

# ABANDONING STANDING: TRADING A RULE OF ACCESS FOR A RULE OF DEFERENCE

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EPA maintains that because greenhouse gas emissions inflict *widespread* harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree.<sup>1</sup>

The very concept of global warming seems inconsistent with [standing’s] *particularization* requirement. Global warming is a phenomenon harmful to *humanity at large* . . . .<sup>2</sup>

## INTRODUCTION

In 2007, the Supreme Court issued significant opinions in three cases that addressed whether a generalized grievance can amount to the type of injury required for constitutional standing—a doctrine that, by lingering consensus, is notoriously indeterminate,<sup>3</sup> incoherent,<sup>4</sup> politicized,<sup>5</sup> and

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1. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (5–4 decision) (emphasis added).

2. *Id.* at 1467 (Roberts, C.J., dissenting) (emphases added) (internal quotations omitted).

3. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (decrying the “apparent lawlessness of many standing cases” and their “wildly vacillating results”).

4. *See, e.g.*, 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.1, at 1107 (4th ed. 2002) (“The Supreme Court has decided over 280 standing disputes, issuing approximately 600 opinions in the process. It is impossible to reconcile all of the majority opinions of the Court that purport to announce tests and decisional criteria that lower courts must follow.”).

5. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999) (characterizing Supreme Court standing decisions as politically driven). *But see* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 614–15 (2004) (suggesting that the claim that standing is purely political is overblown).

lacks firm historical foundations.<sup>6</sup> The most well-known member of this 2007 troika is the source of the opening quotations above, *Massachusetts v. EPA*, in which the Justices split 5–4 over whether the threat of catastrophic global warming caused Massachusetts an injury sufficient for standing.<sup>7</sup> The other two are the obscure *Lance v. Coffman*<sup>8</sup> and the fractured *Hein v. Freedom from Religion Foundation, Inc.*<sup>9</sup> Read together, they confirm that, after many decades of effort, the Court cannot forge a consensus regarding the nature of the injury requirement because the Justices fundamentally disagree over whether the basic purpose of standing doctrine is to block federal courts from usurping the policymaking power of the political branches.<sup>10</sup>

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6. For a few of the leading articles concluding that the Court's constitutional standing doctrine is a recent invention, see, for example, Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961). *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (contending that American courts have a long history of throwing out suits brought by plaintiffs who have not suffered the right kind of injury).

7. *See* 127 S. Ct. at 1453 (concluding that Massachusetts enjoyed constitutional standing to challenge EPA's refusal to initiate rulemaking to regulate greenhouse gas emissions from motor vehicles). *But see id.* at 1463, 1467 (Roberts, C.J., dissenting) (concluding that Massachusetts lacked standing and contending that determination of global-warming policy was the business of the political branches). The standing analysis in *Massachusetts v. EPA* has already been the subject of considerable comment that focuses on whether the majority's application of standing principles marked a significant change in the law. *See, e.g.*, Robin Kundis Craig, *Removing "The Cloak of the Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 CARDOZO L. REV. 149, 194–96 (2007) (discussing the significance of *Massachusetts v. EPA* for whether a risk of harm can count as an injury in fact); Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1 (2007) (similar); Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029, 1030–39 (2008) (discussing the majority's contention that states have a special claim to standing in federal court). Rather than wade into these interesting thickets, this Article focuses on a much simpler aspect of *Massachusetts v. EPA* that, depending on the next Supreme Court appointment or so, has the potential to alter standing doctrine fundamentally: the 5–4 conflict it exposes with regard to whether federal courts can resolve generalized grievances. *See infra* Part I.C (discussing this conflict in the Roberts Court).

8. 127 S. Ct. 1194, 1197 (2007) (per curiam) (explaining that plaintiffs cannot base constitutional standing on generalized grievances).

9. 127 S. Ct. 2553, 2559 (2007) (3–2–4 decision) (holding that an atheist group lacked standing to litigate whether executive-branch spending violated the Establishment Clause).

10. *See infra* Part I.C (analyzing the troika's discussions of standing and its relation to separation of powers). In the interest of completeness, it should be noted that the new Roberts Court has resolved important standing issues in two additional cases beyond the 2007 troika. *See DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1864 (2006) (denying plaintiffs' claim to standing based on their state-taxpayer status); *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2533 (2008) (holding that "an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee

By highlighting the Court's lasting disagreements over the nature of standing, the 2007 troika provides still more evidence that this doctrine's invocation of an injury requirement to limit access to the federal courts has been misguided and should, as many scholars have long insisted, be abandoned.<sup>11</sup> Standing's failure to provide a coherent means for separating judicial from political power does not, however, delegitimize this important project. Rather, it suggests that the courts should explore different means to advance it. In this exploratory spirit, this Article expands upon a suggestion made by a giant of twentieth-century administrative law, Professor Louis Jaffe, nearly fifty years ago: Rather than use standing's rule of *access* to curb judicial usurpation of political power, the federal courts should instead develop a rule of judicial *deference* to serve this end.<sup>12</sup>

The 2007 troika confirms that the four reliably conservative Justices—the Chief Justice as well as Justices Scalia, Thomas, and Alito—believe that standing doctrine protects a fundamental value of both separation of powers and representative democracy: *Courts do not get to decide everything!*<sup>13</sup> The judicial job is to protect “the rights of individuals,” not

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has promised to remit the proceeds of the litigation to the assignor”). For brief commentary on these two cases, see *infra* note 112.

11. See, e.g., Daniel A. Farber, *A Place-Based Theory of Standing 2* (U.C. Berkley Public Law Research, Working Paper No. 1013084, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1013084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013084) (“Much could be said for simply abandoning the ‘injury in fact’ test that is currently so central to standing doctrine.”); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 135 (2007) (contending that standing doctrine “serves no useful function” in cases “where allegedly unlawful action affects widespread groups”); Richard A. Epstein, *Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits*, 6 GREEN BAG 2D 17, 18 (2002) (“[T]he concept of standing, while vital to civil litigation, has no connection to any distinctive constitutional limitation of the use of federal judicial power.”); Sunstein, *supra* note 6, at 167 (referring to the injury-in-fact requirement of constitutional standing as a “large-scale conceptual mistake”); Fletcher, *supra* note 3, at 223 (proposing that “we . . . abandon the idea that Article III requires a showing of ‘injury in fact’”).

12. See Jaffe, *supra* note 6, at 1305–06 (proposing that standing principles should not block “public actions” brought by plaintiffs to enforce the public interest, but that in such cases, to respect room for political judgment, “the court should not intervene unless it can see the law as reasonably clear”). For another recent, critical reassessment of the relationship between standing and separation of powers that also draws inspiration from Professor Jaffe but to different effect, see generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. (forthcoming 2008) (identifying several different separation-of-powers purposes that constitutional standing doctrine purports to serve; explaining why standing doctrine serves these purposes badly; and proposing that the Court replace its standing doctrine with a “prudential abstention” doctrine that would focus on separation-of-powers concerns directly and forthrightly).

13. See, e.g., *Massachusetts v. EPA*, 127 S. Ct. at 1464 (Roberts, C.J., dissenting) (“This Court’s standing jurisprudence simply recognizes that redress of [generalized] grievances of the sort at issue here is the function of Congress and the Chief Executive, not the federal courts.” (citation and internal quotation marks omitted)).

to determine public policy.<sup>14</sup> To prevent judicial usurpation of the policymaking function, courts must avoid resolving public actions brought by plaintiffs who have suffered only generalized grievances.<sup>15</sup> Instead, they should confine themselves to resolving claims of plaintiffs who have suffered particularized injury.<sup>16</sup> The potential power of this form of restrictive standing can be seen in Chief Justice Roberts’s dissent in *Massachusetts v. EPA*, in which he suggested that global warming could not count as an injury because it hurts everybody.<sup>17</sup> It bears strong emphasis that, with the accession of Justices Roberts and Alito, restrictive standing is now, quite suddenly, within one vote of a slim but solid majority.

The four relatively liberal members of the Court—Justices Stevens, Souter, Ginsburg, and Breyer—take a much more permissive approach to standing. They contend that the federal courts may hear actions based on generalized grievances so long as they are sufficiently “concrete” rather than “abstract.”<sup>18</sup> On this view, the basic point of standing is not to protect separation of powers but to ensure that plaintiffs bring the right kind of personal stake to litigation to ensure that it is properly adversarial.<sup>19</sup> The lax nature of this permissive approach finds an excellent recent illustration in Justice Souter’s dissent in *Hein v. Freedom from Religion Foundation, Inc.*<sup>20</sup> This dissent, which all four “liberals” joined, concluded that an ideologically motivated plaintiff had standing to bring an Establishment Clause claim to challenge executive-branch spending to support the President’s Faith-Based and Community Initiatives Program.<sup>21</sup> Presumably, the plaintiffs brought the right kind of stake to their case because they absolutely hate it when the government mixes church and state.

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14. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

15. See, e.g., *Lujan*, 504 U.S. at 576 (explaining that permitting federal courts to resolve generalized grievances would enable them to usurp the legislative and executive functions of “[v]indicating the *public* interest”). It bears noting that, although the Court’s precedents ground the justification for a bar on generalized grievances in separation-of-powers concerns, Professor Kontorovich has recently offered a provocative economic justification for this rule. See Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1684 (2007) (contending that standing doctrine “does valuable work precisely when a plaintiff has a real injury [and] a genuine cause of action, but the social costs of entertaining it exceed the plaintiff’s valuation of his entitlement and transaction costs block an efficient solution”).

16. *Lujan*, 504 U.S. at 576.

17. *Massachusetts v. EPA*, 127 S. Ct. at 1467 (Roberts, C.J., dissenting).

18. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2587–88 (2007) (Souter, J., dissenting).

19. *Id.* at 2584.

20. *Id.* at 2584–88.

21. *Id.*

And Justice Kennedy? He is in the middle.<sup>22</sup>

This 4–1–4 split is the latest expression of a decades-long fight over whether and how to use standing doctrine to limit access to the federal courts to protect separation of powers.<sup>23</sup> One reason this struggle has persisted is that both sides tap into important values that happen to contradict. Restrictive standing purports to expand space for representative government to operate, but it does so at the expense of increasing the risk of illegal government action. Permissive standing enhances the power of the Judiciary to ensure that political officials’ actions are legal, but it may allow the Judiciary to intrude upon the legitimate policymaking authority of the political branches. As both factions in the fight both serve and undermine important values, perhaps neither *should* win an outright victory.

In this spirit, this Article proposes a compromise: Restrictive standing is correct to stress the importance of judicial respect for political-branch policymaking authority, but permissive standing is also correct that this separation-of-powers concern does not justify a constitutional bar on access to the federal courts. Instead, just as Professor Louis Jaffe suggested long ago, the separation-of-powers motivation behind restrictive standing justifies a rule of judicial *deference* rather than a categorical rule of judicial *access*.<sup>24</sup> Two basic ideas inform this alternative framework. The first is the rule-of-law value that independent judicial review of official action is necessary to ensure that law can meaningfully constrain the government’s power.<sup>25</sup> This value counsels against the strategy of separating the political and judicial realms by creating an injury-based constitutional bar to judicial review of an ill-defined category of government action. The second basic idea is that respect for representative democracy suggests that judicial control of the policy choices made by politically accountable officials should be no more intrusive than necessary to ensure the benefits of the

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22. See *id.* at 2572–73 (Kennedy, J., concurring) (joining the plurality in blocking standing for a generalized grievance). But see *Massachusetts v. EPA*, 127 S. Ct. at 1453 (joining the majority opinion that upheld petitioner’s standing based on the “widespread harm” of global warming).

23. See *infra* Part I.B (discussing contradictory Supreme Court precedents on this subject).

24. See *supra* note 12 (quoting Professor Jaffe’s proposal); cf. Elliott, *supra* note 12, at \*6 n.18 (following another thread of Jaffe’s standing analysis to support a proposal to replace standing doctrine with an abstention doctrine).

25. For discussion of the rule-of-law rationale for independent courts, see, for example, Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 304 (1989) (explaining that the concept of the “rule of law” provides the best lens for understanding separation of powers, and identifying its roots in English concepts of natural justice); WILLIAM B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 127–28 (1965) (identifying the “purest” basis for separation of powers as the rule-of-law concept that no man may be judge of his own cause).

rule of law. As will be explored below, combining these ideas suggests (a) that the Constitution does not categorically bar federal courts from resolving actions brought to enforce the public's shared (i.e., "generalized") interest in requiring the government to obey its laws; but (b) that courts should grant relief when resolving such actions only to enforce the government's *clear legal duties*.<sup>26</sup>

Part I of this Article will begin with a brief review of the origins and nature of the standing inquiry. It will then examine a series of leading Supreme Court precedents in which the Justices wrestled over the relation of separation of powers to standing, culminating with a discussion of the 2007 troika of *Lance v. Coffman*,<sup>27</sup> *Massachusetts v. EPA*,<sup>28</sup> and *Hein v. Freedom from Religion Foundation, Inc.*<sup>29</sup> Part II argues that constitutional standing's project of using a vague injury test to determine access to the federal courts should be abandoned. More particularly, the Constitution does not require a plaintiff to demonstrate that her injury is either "particularized" (*à la* restrictive standing) or "concrete" (*à la* permissive standing). Part III makes the case that a rule of judicial deference (*à la* Jaffe) could provide a better means for ensuring proper separation of judicial and political powers than constitutional standing's contentious, injury-based limits on judicial access.

## I. THE SUPREME COURT ON THE RELATION OF STANDING TO SEPARATION OF POWERS

### A. *The Nature of the Standing Inquiry*

It is easy to see the danger of allowing all citizens the right to sue in court to challenge any and all government actions that purportedly violate any law. In a political culture where judicial orders are obeyed, such a system might degenerate quickly into rule by the courts. Where no judicial review is available to review government action, however, government officials become the final judges of the legality of their own actions, and the rule of law must suffer. To steer a path between these two extremes, Congress and the courts have developed a complex set of doctrines governing the availability and timing of judicial review of government action, including, *inter alia*, doctrines on political questions, sovereign immunity, ripeness, primary jurisdiction, finality, and exhaustion.

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26. See Jaffe, *supra* note 6, at 1305–06 (suggesting that courts, when resolving public actions, should enforce the government's clear legal duties and observing that this model can draw historical support from mandamus practice).

27. 127 S. Ct. 1194 (2007) (per curiam).

28. 127 S. Ct. 1438 (2007).

29. 127 S. Ct. 2553 (2007).

Standing, which purports to limit *who* can bring suit, is an important member of this set. Compounding complexity, it comes in three different types—statutory standing, prudential standing, and constitutional standing. (Note: For ease of reference, references to “standing” that do not refer to a particular type refer to “constitutional standing.”)

All three types of standing bear a close relationship to the concept of the “cause of action”—an idea that presents its own interpretive difficulties.<sup>30</sup> For the present purpose, however, stipulate that a plaintiff has a cause of action where (a) the defendant has violated some legal obligation; and (b) the law authorizes the plaintiff to obtain a judicial remedy. In private law, it is a familiar concept that not everyone gets to sue to correct every legal wrong. For instance, if you hit me in the face, then I have a cause of action for battery. If, several thousand miles away from me, you hit someone whom I do not know, then *I* have no cause of action against you—although the person you hit does. The same principle operates in public law: just because the government has violated a law, it does not follow that *everyone* has the right to sue the government for a remedy.

In the nonstatutory world of the common law, the courts themselves determined what grievances were actionable. To get into court, a plaintiff had to fit her grievance into one of the common law’s “forms of action,” such as trespass, debt, etc.<sup>31</sup> As part of the long process of defining and implementing the forms of action, courts quite naturally developed principles for determining who could properly use them. Thus, courts did not need to engage in an independent inquiry into standing to determine whether the “right” plaintiff had brought an action.<sup>32</sup>

Just as courts must determine who can sue to enforce common law obligations, so they must also determine who can sue to enforce obligations created by positive law. Frequently, a legislative body provides controlling guidance by creating an express cause of action that specifies who can sue to enforce a particular law.<sup>33</sup> The most important example of this practice lies in § 10(a) of the Administrative Procedure Act (APA), which grants a cause of action to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the

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30. See generally Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004) (exploring the evolving meaning of “cause of action” and its deployment by courts and scholars to argue about the limits of the judicial power).

31. See *id.* at 784–85 (emphasizing that causes of action existed “by virtue of the availability of a form of action” that offered a remedy).

32. See *id.* at 817 (“At common law, there was no doctrine of standing per se. A case was justiciable if a plaintiff had a cause of action for a remedy under one of the forms of proceeding at law or in equity.”).

33. See, e.g., 33 U.S.C. § 1365(g) (2000) (authorizing a right to review under the Clean Water Act to “[any person] having an interest which is or may be adversely affected”).



meaning of a relevant statute.”<sup>34</sup>

But positive law that creates a legal obligation often fails to specify who has the right to enforce it in court. Many open-ended provisions of the United States Constitution fall into this category. In the absence of guidance in the form of an express, legislatively created cause of action, courts must figure out for themselves who can sue to enforce a given bit of positive law. Put another way, they must determine how and where to infer the existence of an implied cause of action.<sup>35</sup>

As the twentieth century progressed, federal courts began to discuss various aspects of the who-can-sue problem under the rubric of “standing” of various types.<sup>36</sup> “Statutory standing” is just a newish name for the old idea that the source of a plaintiff’s cause of action to enforce a law may be the legislature. Thus, for instance, § 10(a) of the APA grants statutory standing to challenge a wide swathe of government action.<sup>37</sup>

Whereas statutory standing refers to legislative *authorization* to sue, “prudential standing” refers to *limitations* on who can sue based on judicial policy judgments.<sup>38</sup> For example, the prudential doctrine of “third-party standing” often blocks plaintiffs from suing to enforce another person’s rights in light of the judicial judgment that parties generally do a better job of enforcing their own rights than someone else’s.<sup>39</sup> One might think of prudential standing as a newish name for the old idea that, in the absence of clear legislative guidance, courts must figure out for themselves who can

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34. 5 U.S.C. § 702 (2000). The Court has interpreted this statutory cause of action very broadly. Thus, we find that a *rancher* can invoke the Endangered Species Act to contest agency action designed to protect *fish*. *Bennett v. Spear*, 520 U.S. 154, 176–77 (1997).

35. See, e.g., H. Miles Foy III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 524–69 (1986) (discussing the evolution of the Supreme Court’s approach to inferring the existence of implied causes of action).

36. Scholars have suggested several reasons why standing came to the fore as an independent doctrine as the twentieth century progressed. One is that standing provided a means for the courts to modulate judicial control of the administrative state. Professor Sunstein, for instance, contends that Justices Brandeis and Frankfurter developed a restrictive standing doctrine as a means to “insulate progressive and New Deal legislation from frequent judicial attack.” Sunstein, *supra* note 6, at 179. A few decades later, courts relaxed standing to increase the power of private attorneys general to use the courts to police government action. *Id.* at 183–85. Another, quite different reason for the rise of standing may lie in the evolution of procedural law. Most notably, with the abandonment of the old forms of action, they could no longer perform the work of determining who can sue. Courts therefore needed to develop a new framework for solving this problem, which they called “standing doctrine.” Bellia, *supra* note 30, at 827–32.

37. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176–77 (9th Cir. 2004) (describing § 10(a) of the APA as a grant of statutory standing).

38. *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 991 (7th Cir. 2006), *rev’d sub nom. Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

39. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

sue to right a claimed wrong. Of course, as the term “prudential” suggests, Congress can, whenever it wishes, trump prudential-standing limitations by granting any given class of plaintiffs an express cause of action to sue.<sup>40</sup>

The Court insists, however, that Congress cannot use its power to create a cause of action to trump constitutional standing requirements. The Court has often stated that these requirements are located in the Constitution’s limitation of the Article III “judicial power” to resolution of “cases” and “controversies.”<sup>41</sup> Expounding upon these limits, the Court has time and again intoned a standard that is trivially easy to state but notoriously hard to apply. To demonstrate constitutional standing, a “plaintiff must allege personal injury [also known as injury in fact] fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>42</sup> In other words, a plaintiff can use the federal courts only to challenge conduct that caused injury to her, and only if there is some decent chance that a judicial remedy will somehow redress that injury. Where these requirements go unfulfilled, a plaintiff lacks standing to sue—even if the legislature has granted her an express cause of action authorizing her to do so.<sup>43</sup>

#### *B. Four Cases on Injury, Separation of Powers, and Generalized Grievances*

Each of standing’s three canonical requirements—*injury, causation, and redressability*—has caused great confusion among courts, litigants, and scholars. The most intractable problems, however, have revolved around determining what sorts of injury should suffice for standing. In particular, as the 2007 *Lance–Massachusetts–Hein* troika highlights, the Justices have struggled over whether separation-of-powers principles permit generalized grievances to qualify.<sup>44</sup> To set the stage for examination of the troika’s discussions of this dispute, this Article will examine four leading precedents in which the Court’s answer to this question flipped back and forth.

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40. See *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (noting that prudential standing principles apply except where Congress expressly negates them).

41. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1860 (2006).

42. *Id.* at 1861.

43. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–74 (1992) (holding that plaintiffs could not invoke the citizen-standing provision of the Endangered Species Act due to their failure to satisfy constitutional standing requirements).

44. For discussion of the conflicts over standing in the troika, see *infra* Part I.C.

### I. *Frothingham v. Mellon Bars Generalized Grievances*

Although *Frothingham v. Mellon*<sup>45</sup> predates the Court's common use of the term "standing," this case has, as much as any other, come to represent the idea that the federal courts lack power to hear claims brought by persons who have suffered only generalized grievances.<sup>46</sup> Mrs. Frothingham and the Commonwealth of Massachusetts both sued Secretary of the Treasury Mellon to challenge the constitutionality of the Maternity Act, a federal statute designed to reduce infant and maternal mortality that offered funds to participating states.<sup>47</sup> Both claimed that the statute violated the Tenth Amendment by intruding on state prerogatives.<sup>48</sup> In addition, Frothingham alleged that taxing and spending in support of this unconstitutional program took her property without due process of law, damaging her as a federal taxpayer.<sup>49</sup> But of course, if *one* taxpayer can challenge the constitutionality of a federal statute on such grounds, then *all* taxpayers can make the same challenge.<sup>50</sup>

The Court found the prospect of opening the floodgates to such taxpayer actions too horrible to contemplate.<sup>51</sup> To block them, the Court gave a very short but grand exposition on separation of powers.<sup>52</sup> It explained that the "administration of any statute, likely . . . to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of *public* and not of *individual* concern."<sup>53</sup> Such matters of purely public concern were insufficient to invoke the power of judicial review, which requires a party "to show . . . that he has sustained . . . some *direct injury* as the result of its enforcement, and not merely that he suffers in *some indefinite way in common with people generally*."<sup>54</sup> This limitation was necessary to ensure that the Court did not step beyond the judicial role of "interpreting and applying [laws] in cases properly before the courts" and usurp political authority properly

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45. *Massachusetts v. Mellon* (*Frothingham v. Mellon*), 262 U.S. 447 (1923).

46. *Id.* at 487–88. In just the last two terms, *Frothingham* has been cited for its bar on generalized grievances several times. *E.g.*, *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2563–64 (2007) (Alito, J., plurality); *id.* at 2575 (Scalia, J., concurring); *Lance v. Coffman*, 127 S. Ct. 1194, 1197 (2007) (per curiam); *DaimlerChrysler Corp.*, 126 S. Ct. at 1862.

47. *Frothingham*, 262 U.S. at 478–79.

48. *Id.* at 479.

49. *Id.* at 486.

50. *Id.* at 487.

51. *See id.* ("The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.").

52. *Id.* at 488. For pointed criticism of the Court's deployment of separation of powers in *Frothingham*, see Epstein, *supra* note 11, at 23–25.

53. *Frothingham*, 262 U.S. at 487 (emphasis added).

54. *Id.* at 488 (emphasis added).

belonging to the other branches.<sup>55</sup> The Court did not, however, explain precisely how a judicial determination regarding the *legality* of government action could infringe upon the authority of political actors, who presumably have no discretion to violate the law. Notwithstanding this explanatory gap, the Court has periodically relied upon *Frothingham's* bar on generalized grievances to block judicial resolution of what one might call “inconvenient” constitutional claims.<sup>56</sup>

## 2. *Flast v. Cohen Unbars Generalized Grievances*

In *Flast v. Cohen*, the plaintiffs sued to enjoin spending of federal funds for secular instruction at parochial schools pursuant to the Elementary and Secondary Education Act of 1965.<sup>57</sup> The plaintiffs claimed that this spending violated the Establishment Clause and sought standing based on their status as federal taxpayers.<sup>58</sup> One might well think that application of *Frothingham's* bar on federal-taxpayer standing should have doomed this claim.<sup>59</sup> The Warren Court, however, did not agree, declaring it time for a “fresh examination of the limitations upon standing to sue in a federal court.”<sup>60</sup>

To begin this examination, the Court observed that Article III extends the federal courts’ judicial power only to resolution of cases and controversies.<sup>61</sup> The concept of justiciability captures the limitations on the judicial power imposed by this case-or-controversy requirement.<sup>62</sup> Broadly speaking, these limitations flow from three sources. First, there is history—for a court to resolve a matter, it must arrive in “a form historically viewed as capable of resolution through the judicial process.”<sup>63</sup> Second, courts resolve real fights only—questions must be presented in an adversarial context.<sup>64</sup> Third, in a nod to the separation-of-powers concern

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55. *Id.*

56. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 225–27 (1974) (denying standing to plaintiffs who claimed that membership in Congress of persons who held commissions in the Reserves violated the Incompatibility Clause); *United States v. Richardson*, 418 U.S. 166, 179–80 (1974) (denying standing to a plaintiff who claimed that the Government’s failure to disclose CIA expenditures violated the Accounts Clause); *Ex parte Lévit*, 302 U.S. 633, 634 (1937) (per curiam) (dismissing an Incompatibility Clause challenge to Justice Black’s appointment to the Supreme Court).

57. 392 U.S. 83, 85 (1968).

58. *Id.* at 85–86.

59. See *id.* at 85 (conceding that *Frothingham's* “ruling has stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers”).

60. *Id.* at 94.

61. *Id.*

62. *Id.* at 95.

63. *Id.*

64. *Id.*

of *Frothingham*, the Court added that another function of the case-or-controversy requirement is to “define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”<sup>65</sup>

The Court then made the crucial move of explaining that, while it is true that standing is a justiciability doctrine, not every justiciability doctrine has roots in separation of powers. As it relates to justiciability, separation of powers blocks courts from resolving *issues* that are properly the business of the political branches.<sup>66</sup> Standing does not speak to whether a court can determine an issue but rather to the problem of *who can raise it*.<sup>67</sup> Therefore, the *Flast* Court reasoned, standing cannot be rooted in separation of powers.<sup>68</sup> Instead, the true “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.”<sup>69</sup> In other words, standing seems to be about whether the plaintiff will try hard enough.

This functional approach to standing left the problem of determining whether the *Flast* plaintiffs, invoking their status as federal taxpayers, had the right kind of “personal stake.” To make this determination, *Flast* established an opaque two-pronged test that checks (a) whether there is a “logical link between [taxpayer] status and the type of legislative enactment attacked” and (b) whether there is a “nexus” between the plaintiff’s taxpayer status “and the precise nature of the constitutional infringement alleged.”<sup>70</sup> The Court has applied this odd test with extreme narrowness,<sup>71</sup> with the practical result that federal taxpayers can claim standing under *Flast* only to challenge congressional exercises of taxing and spending authority that allegedly violate the Establishment Clause.<sup>72</sup>

The fate of *Flast*’s two-pronged test, however, should not obscure the importance of its more general claim that standing doctrine is not, at its

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65. *Id.*

66. *Id.* at 100–01.

67. *Id.*

68. *Id.*

69. *Id.* at 99 (internal quotations omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

70. *Id.* at 102.

71. *See, e.g.,* *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479–80 (1982) (holding that plaintiffs’ claim failed *Flast*’s first prong because, rather than challenge an exercise of congressional taxing and spending authority, they instead had challenged an exercise of power under the Property Clause).

72. *Cf. DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1863 (2006) (recognizing that the Court has applied *Flast*’s exception for federal-taxpayer standing only to Establishment Clause claims).

core, a doctrine of separation of powers designed to protect political branch authority from overreaching courts. Four Justices of the current Court agree with this claim.<sup>73</sup> Four flatly disagree.<sup>74</sup>

### 3. *Lujan v. Defenders of Wildlife Bars Generalized Grievances (Again)*

Since joining the Court, Justice Scalia—long *Frothingham*'s greatest friend and *Flast*'s greatest foe—has pressed his vision of constitutional standing at every chance, but with mixed success. His greatest victory came in 1992's *Lujan v. Defenders of Wildlife*.<sup>75</sup> The merits of this case revolved around interpretation of a provision of the Endangered Species Act (ESA) that requires agencies to go through a consultation process before undertaking projects that may threaten endangered wildlife. The Secretaries of Interior and Commerce jointly issued a rule declaring that this consultation requirement applied only to projects within the United States or on the high seas.<sup>76</sup> The plaintiffs, Defenders of Wildlife and two of its members, brought suit to contest this rule. Congress had armed such plaintiffs with the ESA's citizen-suit provision, which provides that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States, . . . who is alleged to be in violation of any provision of this chapter."<sup>77</sup> This provision made clear that the plaintiffs enjoyed statutory standing and that prudential standing principles should not block their way.

But according to Justice Scalia's majority opinion, constitutional standing principles did. The most significant portion of this opinion came in response to the Court of Appeals' contention that the rule, by eliminating federal agencies' duty to consult regarding foreign projects, had caused the plaintiffs to suffer a "procedural injury" sufficient for standing.<sup>78</sup> Justice Scalia characterized the Court of Appeals' holding as claiming 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."<sup>79</sup> In other words, the Court of Appeals had allowed standing based upon the

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73. See *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2584–88 (2007) (Souter, J., dissenting; joined by Stevens, Ginsburg, and Breyer, JJ.) (applying *Flast* and notably declining to use substantial separation-of-powers rhetoric in standing analysis).

74. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1464 (2007) (Roberts, C.J., dissenting; joined by Scalia, Thomas, and Alito, JJ.) (insisting that standing funnels certain types of issues to the Executive and Legislative Branches for decision).

75. 504 U.S. 555 (1992).

76. *Id.* at 558–59.

77. 16 U.S.C. § 1540(g)(1) (2000).

78. *Lujan*, 504 U.S. at 571–72.

79. *Id.* at 573.

plaintiffs' generalized grievance that the Executive really should obey the law. This, Justice Scalia insisted, was impermissible because the Court had

consistently held that a plaintiff raising only a *generally available* grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that *no more directly and tangibly benefits him than it does the public at large*—does not state an Article III case or controversy.<sup>80</sup>

Justice Scalia claimed that honoring this limitation on judicial power was vital to preserve “the separate and distinct constitutional role of the Third Branch.”<sup>81</sup> The courts' function, as Chief Justice Marshall explained in *Marbury v. Madison*, “is, solely, to decide on the rights of individuals.”<sup>82</sup> The job of “[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is,” by contrast, “the function of Congress and the Chief Executive.”<sup>83</sup> Just as *Frothingham* had claimed long before, generalized grievances implicate the public interest rather than individual rights, and they are therefore the business of the political branches.<sup>84</sup>

A striking irony of *Lujan* is that it grounds the bar on generalized grievances on a need to protect the policymaking authority of the political branches, yet it interfered with Congress's *political* decision to allow private plaintiffs to bring citizen suits to force the government to obey the ESA. Justice Scalia resolved this tension by explaining that limiting congressional power to create causes of action was necessary to block the Legislature and Judiciary from combining forces to eviscerate the Executive Branch's constitutional authority.<sup>85</sup> More particularly, Congress could not authorize federal courts to resolve generalized grievances because

[t]o 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

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80. *Id.* at 573–74 (emphasis added); *see also id.* (collecting authority).

81. *Id.* at 576.

82. *Id.* (internal quotation marks omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

83. *Id.*

84. *See id.* at 574 (quoting *Massachusetts v. Mellon* (*Frothingham v. Mellon*), 262 U.S. 447, 488 (1923)) (discussing the separation-of-powers significance of the ban on generalized grievances).

85. *See generally* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999) (giving a sympathetic examination of the proposition that the core separation-of-powers concern underlying constitutional standing doctrine must be protection of the Executive's Article II authority).

“take Care that the Laws be faithfully executed,” Art. II, § 3.<sup>86</sup>

Thus, constitutional standing serves separation of powers in two ways: (a) it blocks the federal courts from unilaterally usurping political power and (b) it blocks Congress and the federal courts from teaming up to usurp the Executive’s constitutional authority to enforce the law.<sup>87</sup>

#### 4. *FEC v. Akins Unbars Generalized Grievances (Again)*

The Court quickly backed off from *Lujan*’s aggressive vision of constitutional standing’s limits on judicial power in 1998’s *FEC v. Akins*.<sup>88</sup> In this case, the respondents challenged the FEC’s determination that the American Israel Public Affairs Committee (AIPAC) was not a “political committee” within the meaning of the Federal Election Campaign Act of 1971 (FECA).<sup>89</sup> Such political committees face statutory obligations to disclose information about their members, contributions, and expenditures—information that the respondents said they needed to assess political candidates.<sup>90</sup> The FEC argued for dismissal on the ground that the respondents lacked standing because their claimed injury—lack of access to information concerning AIPAC—was too “generalized.”<sup>91</sup>

Justice Breyer—writing for a six-Justice majority and over Justice Scalia’s vigorous dissent—disagreed.<sup>92</sup> He boldly claimed that, in all the precedents in which the Court had ruled a generalized grievance to be insufficient for standing, the injury had also been “abstract” rather than “concrete.”<sup>93</sup> Abstract injuries cannot suffice for standing because they do not imbue cases with the “concrete specificity that characterized those controversies which were ‘the traditional concern of the courts at Westminster.’”<sup>94</sup> A widely shared injury can, however, support standing provided it is “sufficiently concrete.”<sup>95</sup>

To demonstrate his point, Justice Breyer gave two examples. His first was that a “widespread mass tort” that damages many people inflicts a concrete injury on each one.<sup>96</sup> His second was that widespread interference

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86. *Lujan*, 504 U.S. at 577.

87. For further and critical discussion of Justice Scalia’s theory of standing that he propounded in *Lujan*, see *infra* Part II.B.1–2.

88. 524 U.S. 11 (1998).

89. *Id.* at 18.

90. *Id.* at 14–15, 21.

91. *Id.* at 23.

92. *FEC v. Akins*, 524 U.S. 11, 23 (1998) (Breyer, J.). *But see id.* at 33–37 (Scalia, J., dissenting).

93. *Id.* at 24.

94. *Id.* (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)).

95. *Id.*

96. *Id.* at 24–25.



with voting rights inflicts a concrete injury on each individual voter it affects.<sup>97</sup> With these examples in mind, he concluded that Akins's claim of informational injury, which was "directly related to voting, the most basic of political rights," was "sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."<sup>98</sup>

Of course, notwithstanding Justice Breyer's examples, the meaning of "concrete" in this context is terrifically unclear.<sup>99</sup> To criticize the abstract-concrete dichotomy as vague, however, is to miss the underlying point of its deployment in *Akins*, which was to draw the teeth of the injury inquiry that Justice Scalia had so recently sharpened in *Lujan*. In *Akins*, as in *Flast*, we see that the central idea behind standing is to make sure that plaintiffs have suffered the kind of "injury" that will ensure "concrete specificity" in litigation.<sup>100</sup> As it is unclear what either of these terms means in this context, a court applying this approach could almost always justify the conclusion that a plaintiff has suffered the right kind of injury for constitutional standing.

##### 5. Separation-of-Powers Ping-Pong

*Frothingham v. Mellon* embedded the bar on standing for "generalized grievances" in separation of powers;<sup>101</sup> *Flast v. Cohen* plucked it out;<sup>102</sup> *Lujan v. Defenders of Wildlife* put it back;<sup>103</sup> and *FEC v. Akins* ripped it up.<sup>104</sup> On one level, this sort of doctrinal vibration is hardly surprising. Whether various aspects of standing doctrine are properly embedded in separation of powers is itself a question of separation of powers, which, as Professor Corwin observed, is not so much a body of law as an "invitation to struggle."<sup>105</sup>

In this struggle, standing doctrine has veered toward stricter limits on

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97. *Id.*

98. *Id.*

99. See generally Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 458–62 (2007) (noting the absence of a general definition of "concrete" and analyzing what this term might mean).

100. See *Akins*, 524 U.S. at 24 (indicating that "abstract" injuries do not generate "concrete specificity"); cf. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (explaining 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 . . . concrete adverseness" (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

101. *Massachusetts v. Mellon* (*Frothingham v. Mellon*), 262 U.S. 447, 488 (1923); see also *supra* Part I.B.1 (discussing *Frothingham*).

102. 392 U.S. at 10. See *supra* Part I.B.2 (discussing *Flast*).

103. 504 U.S. 555, 576–77 (1992). See *supra* Part I.B.3 (discussing *Lujan*).

104. 524 U.S. at 23–25; see also *supra* Part I.B.4 (discussing *Akins*).

105. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS: 1787–1957*, at 171 (4th rev. ed. 1957).

judicial power in the hands of jurists keen to protect the political branches' authority from the danger of judicial interference. Thus, in the Progressive and New Deal eras, we see Justices Brandeis and Frankfurter strengthening standing as a means of fending off the ghosts of *Lochner*-style activism.<sup>106</sup> Decades later, we see Justice Scalia using standing to discipline courts that in the 1960s and 1970s had in his view usurped power to determine public policy.<sup>107</sup> Standing doctrine has veered toward less strict limits on judicial power in the hands of jurists keener to use the courts to police the other branches. Thus, we see in Chief Justice Warren's *Flast* opinion an effort to limit standing's constitutional dimension to the vague requirement that litigants have a "personal stake" in their lawsuits.<sup>108</sup> Inevitably, where a given Justice stands on the interminable dispute over the nature of standing must be bound up with that Justice's general ideology regarding the relationship between judicial and political power.

### C. *A Doctrine on the Edge—Generalized Grievances in 2007*

As it happens, an especially ferocious proponent of executive power, President George W. Bush, recently appointed two eminent (and rather young) conservative jurists, Chief Justice Roberts and Justice Alito, to the Supreme Court. Examination of the 2007 troika of *Lance v. Coffman*,<sup>109</sup> *Massachusetts v. EPA*,<sup>110</sup> and *Hein v. Freedom from Religion Foundation, Inc.*<sup>111</sup> reveals that standing doctrine is now balanced on the edge of a knife. With the arrival of the two new Justices at the Court, a potent form of restrictive standing now has four solid votes; permissive standing has another four, and Justice Kennedy is the swing vote.<sup>112</sup>

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106. See Sunstein, *supra* note 6, at 179 (describing Justices Brandeis and Frankfurter as the "principal early architects" of standing doctrine, who wished to "insulate progressive and New Deal legislation from frequent judicial attack"); Winter, *supra* note 6, at 1443–52 (examining the development of standing doctrine in the opinions of Justices Brandeis and Frankfurter).

107. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 893 (1983) (criticizing relaxation of standing requirements as one of the factors that had enabled courts to emerge as "an equal partner" with the Executive and Legislative Branches in the formulation of public policy).

108. *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

109. 127 S. Ct. 1194 (2007) (per curiam).

110. 127 S. Ct. 1438 (2007).

111. 127 S. Ct. 2553 (2007).

112. In addition to the 2007 troika, the Roberts Court has resolved two other cases with notable things to say about standing. The first, *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006), disguised rather than highlighted the Justices' split over the relation of standing to separation of powers. The plaintiffs, Ohio taxpayers, claimed that tax breaks the state had extended to a corporation violated the Commerce Clause. Seven other Justices joined Chief Justice Roberts's opinion in which he explained that the plaintiffs lacked standing based upon their state-taxpayer status because, among other related reasons, the

### 1. *The Misleading Unanimity of Lance v. Coffman*

The Supreme Court issued its first significant opinion on standing in 2007 in *Lance v. Coffman*, in which the plaintiffs claimed that a redistricting plan created by Colorado's state courts violated the Elections Clause.<sup>113</sup> The Court dismissed the claim on the ground that the plaintiffs' injury amounted to a mere generalized grievance with a per curiam opinion issued without argument or dissent.<sup>114</sup> Usually, such brusque procedural treatment is an indication that an opinion does not contain anything interesting. *Lance*, however, is worth a brief look if only because it is so marvelously misleading. The Court's unsigned opinion reads like a brief written to support the proposition that generalized grievances cannot support constitutional standing.<sup>115</sup> To that end, it spends several pages touring a century's worth of precedents to establish that "[o]ur refusal to

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effect of the challenged tax break on their tax bills was too attenuated and speculative to amount to concrete and particularized injury. *Id.* at 1862. *DaimlerChrysler* contains broad language stressing the importance of standing as a means to protect separation of powers, and one might plausibly read it as a sudden and resounding victory for the forces of restrictive standing. *Id.* at 1861. Nonetheless, three Justices who joined the opinion—Justices Stevens, Souter, and Breyer—plainly do not agree that separation-of-powers principles categorically bar federal court resolution of generalized grievances. *See infra* Part I.C.2–3. They presumably would favor a narrow reading of *DaimlerChrysler* that regards it as commentary on when damage to a plaintiff's interest as a *taxpayer* can support standing rather than as a broader commentary on the constitutional status of generalized grievances. *Cf.* *FEC v. Akins*, 524 U.S. 11, 22 (1998) (Breyer, J.) (indicating that a plaintiff who lacks taxpayer standing may nonetheless enjoy standing on the basis of some other broadly shared interest—e.g., the plaintiff's interest as a voter).

The Court's most recent interesting standing case, *Sprint Communications Co. v. APCC Services, Inc.*, analyzed the obscure issue of whether "an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor." 128 S. Ct. 2531, 2533 (2008). A five-Justice majority—the four liberals plus Justice Kennedy—concluded that such assignees have standing "[b]ecause history and precedent make clear that [they have] long been permitted to bring suit." *Id.* The four conservatives joined Chief Justice Roberts's dissent, which claimed that the majority's fundamental error was to fail to recognize that the standing inquiry does not focus on whether a court order would redress *any* injury (e.g., the assignor's claim for damages); rather, the standing inquiry focuses on "whether the *complaining party's* injury is likely to be redressed." *Id.* at 2551. As the assignee (the complaining party) had agreed by contract to remit any recovery it obtained to the assignor, an award could not redress any injury to the assignee. *Id.* at 2550. Therefore, the dissent concluded, the assignee lacked the personal stake needed for standing. *Id.* Chiding the majority for reaching the opposite conclusion, Chief Justice Roberts declared that the majority's approach "could not be more wrong [because the Court has] never approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the court. Never." *Id.* at 2551. Thus, although *Sprint Communications* does not address the problem of generalized grievances in the same manner as the cases of the 2007 troika, on a more general level, it confirms that the Court is sharply and almost evenly divided between restrictive and permissive approaches to constitutional standing.

113. 127 S. Ct. at 1196 (per curiam).

114. *Id.* at 1198.

115. *Id.* at 1196–97.

serve as a forum for generalized grievances has a lengthy pedigree.”<sup>116</sup> At no time does *Lance* advert to the fact that its analysis conflicts with the views of four (perhaps five) sitting Justices—as opinions issued later in the term would confirm.<sup>117</sup> What is one to make of this fact? Did *Lance*’s author expect a rebuttal that never came? Not everyone has let *Lance* slide by. Just a few months later, Justice Scalia cited it for the proposition that the Court had recently and *unanimously* reaffirmed the ban on standing for generalized grievances.<sup>118</sup>

## 2. Massachusetts v. EPA: Does Global Doom Count as Injury?

The most important case of 2007 on its merits was *Massachusetts v. EPA*, in which a 5–4 majority of the Court ruled that EPA had arbitrarily rejected a rulemaking petition requesting that it use its Clean Air Act authority to regulate greenhouse gas emissions of motor vehicles.<sup>119</sup> Before reaching the merits, however, the Court had to forge through the standing issue, on which it also split 5–4.<sup>120</sup> The Justices’ analysis of standing in this case touches on many important issues, but for the present purpose, the critical point to note is that the five-Justice majority declared that the fact that an injury is widely shared is no obstacle to standing, whereas the four-Justice dissent indicated that separation of powers should block standing

116. See *id.* at 1197–98 (discussing authority including, *inter alia*, *DaimlerChrysler*, 126 S. Ct. at 1862 (observing that an injury that one “suffers in some indefinite way in common with people generally” cannot support standing); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974) (“Standing to sue may not be predicated upon an interest of the kind . . . which is held in common by all members of the public.”); *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (dismissing a constitutional challenge to the Government’s failure to disclose CIA expenditures as it was based on a generalized grievance); *Ex parte Lévit*, 302 U.S. 633, 634 (1937) (per curiam) (dismissing an Incompatibility Clause challenge to Justice Black’s appointment to the Supreme Court); *Massachusetts v. Mellon* (*Frothingham v. Mellon*), 262 U.S. 447, 488 (1923) (rejecting taxpayer standing for an injury that a plaintiff “suffers in some indefinite way in common with people generally”); *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (stating that a plaintiff could not institute suit in federal courts based “only [on] the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted”).

117. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453, 1456 (2007) (maintaining that “widely shared” injuries can support standing so long as they are concrete); *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2587 n.3 (2007) (Souter, J., dissenting; joined by Stevens, Ginsburg, and Breyer, JJ.) (declaring that there is no categorical bar on standing to resolve “generalized grievances”).

118. *Freedom from Religion Found.*, 127 S. Ct. at 2574 (Scalia, J., concurring).

119. See 127 S. Ct. at 1460, 1463 (holding that EPA had incorrectly construed its statutory authority and abused its discretion); *cf. id.* at 1471–77 (Scalia, J., dissenting) (rejecting the majority’s merits analysis).

120. See *id.* at 1458 (ruling that petitioners had standing to challenge EPA’s denial of their rulemaking petition); *cf. id.* at 1464 (Roberts, C.J., dissenting) (rejecting standing for petitioners).

based upon the sort of generalized grievance caused by global warming.

Justice Stevens's majority opinion held that Massachusetts had satisfied the injury requirement by demonstrating that global warming threatened to cause rising sea levels, which in turn threatened coastal property owned by the state.<sup>121</sup> Causation and redressability requirements were satisfied because, were EPA to initiate rulemaking, it might promulgate a rule limiting at least some greenhouse gas emissions and because any move in that direction would reduce the risk of catastrophic harm at least a little.<sup>122</sup> Also, the majority buttressed its conclusion in favor of Massachusetts by invoking an obscure, one-hundred-year-old precedent, *Georgia v. Tennessee Copper Co.*,<sup>123</sup> for the principle that *states* have a special claim to standing in the federal courts to protect their quasi-sovereign interests that extend to "all the earth and air within [their] domain[s]."<sup>124</sup>

Responding to the majority opinion on its own terms, Chief Justice Roberts contended that Massachusetts's claim of standing based on the prospective loss of coastal land faced insurmountable causation–redressability problems.<sup>125</sup> He also disputed the majority's reliance on *Tennessee Copper* for the proposition that states are entitled to "special solicitude" when it comes to standing, suggesting that one might best understand invocation of this principle as a tacit admission by the majority that its standing analysis needed all the help it could get.<sup>126</sup>

The dissent's core objection, however, was that the true injury at stake was not the stalking horse of prospective loss of coastal land. The *real* injury was "catastrophic global warming,"<sup>127</sup> which does not harm anyone in the particularized way needed for standing.<sup>128</sup> Correcting government

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121. *Id.* at 1456.

122. *See id.* at 1458 ("The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek."). Note also that the prospect that EPA might, after completing the rulemaking process, decline to adopt a rule limiting greenhouse gas emissions did not present an insufferable redressability problem because Congress had granted the petitioners a "procedural right" to "challenge agency action unlawfully withheld" in 42 U.S.C. § 7607(b)(1), and, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 127 S. Ct. at 1453. Thus, the possibility that EPA would promulgate a rule limiting greenhouse gas emissions—which would help curb Massachusetts's injury at least a little—was sufficient to satisfy redressability.

123. 206 U.S. 230, 237 (1907).

124. *Massachusetts v. EPA*, 127 S. Ct. at 1454 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

125. *Id.* at 1469 (Roberts, C.J., dissenting).

126. *Id.* at 1466 (Roberts, C.J., dissenting). *See generally* Watts & Wildermuth, *supra* note 7 (discussing in detail the significance of the revivification of *Tennessee Copper*).

127. *Massachusetts v. EPA*, 127 S. Ct. at 1470 (Roberts, C.J., dissenting).

128. *See id.* at 1467 (Roberts, C.J., dissenting) ("The very concept of global warming seems inconsistent with this particularization requirement.").

action that causes generalized harm is the proper work of the Legislature and the Executive.<sup>129</sup> Where courts usurp this work, they “intrude on the politically accountable branches,” and thus violate the purpose of standing, which in the dissent’s view is to “maintain[] the tripartite allocation of power set forth in the Constitution” and ensure “that courts function as courts.”<sup>130</sup>

Strictly speaking, the majority did not need to address the reviewability of generalized grievances because it had concluded that Massachusetts had asserted a particularized injury. Nonetheless, it did not let the Chief Justice’s views on generalized grievances go unchallenged. The majority insisted that a plaintiff can possess standing based on “widely shared” harms so long as the harms are “concrete.”<sup>131</sup> Recalling principles familiar from cases such as *Flast v. Cohen*, the logic behind this view is that “the gist of the question of standing is whether petitioners have such a personal stake . . . as to assure . . . concrete adverseness.”<sup>132</sup> A petitioner can bring such a personal stake to court regardless of how many people share her injury.

We thus see that buried in *Massachusetts v. EPA* lies the very same struggle between *Frothingham*- and *Flast*-style approaches to standing (and its relation to separation of powers) that has so long bedeviled the Court. Chief Justice Roberts and Justice Alito plainly have joined Justices Scalia and Thomas in the *Frothingham* camp.

### 3. Freedom from Religion Foundation *Fractures Flast*

The Court’s most revealing discussion of standing in 2007 came in *Hein v. Freedom from Religion Foundation, Inc.*<sup>133</sup> In this case, a five-Justice majority (the four conservatives plus Justice Kennedy) held that the respondents’ claimed injury was too generalized to support constitutional standing to litigate their Establishment Clause claim; the four liberals, by contrast, would have held that the injury was concrete enough for constitutional standing.<sup>134</sup>

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129. See *id.* at 1464 (Roberts, C.J., dissenting) (“This Court’s standing jurisprudence simply recognizes that redress of grievances of the sort at issue here ‘is the function of Congress and the Chief Executive,’ not the federal courts.” (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992))).

130. *Id.* at 1470–71 (Roberts, C.J., dissenting).

131. *Id.* at 1456 (citing *FEC v. Akins*, 524 U.S. 11, 24 (1998)).

132. *Id.* at 1453 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); see also *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (quoting *Baker* to the same effect).

133. 127 S. Ct. 2553 (2007) (3–2–4 decision).

134. See *id.* at 2563 (Alito, J., plurality; joined by Roberts, C.J., and Kennedy, J.) (“We have consistently held this type of interest is too generalized and attenuated to support Article III standing.”); *id.* at 2582 (Scalia, J., concurring; joined by Thomas, J.) (observing that “generalized grievances do not satisfy Article III’s requirement that the injury in fact be

The respondent Foundation and some of its members had sued to block spending on conferences to promote President Bush's Faith-Based and Community Initiatives Program for violating the Establishment Clause.<sup>135</sup> Of course, the real reason that the respondents sued was because they were upset by what they saw as an unconstitutional mixing of church and state. Harm to their mere ideological interests could not support a public action, however.<sup>136</sup> Respondents therefore claimed injury to their interests as federal taxpayers on the basis of the *Flast* exception to the general rule against federal-taxpayer standing.<sup>137</sup>

But, as usual, there was a fly in the *Flast* ointment. By its own terms, the *Flast* exception applies solely to *congressional* action.<sup>138</sup> The money spent to support these conferences came from general executive appropriations—Congress had not directed how this money should be spent.<sup>139</sup> Of course, *Flast*'s understanding of the function of standing—to make sure that plaintiffs have the right personal stake in litigation<sup>140</sup>—suggests that this distinction should make no difference whatsoever—government spending that promotes religion offends those who do not like it regardless of which branch authorizes it. The general rule against ideological plaintiffs, however, creates pressure to limit *Flast* as narrowly as plausible.

The Seventh Circuit panel that heard *Freedom from Religion Foundation* produced two excellent, scholarly opinions that reached opposite results. Writing for the majority, Judge Posner ruled that the legislative–executive distinction made no difference. To hammer this point home, he claimed that *Flast* standing would certainly exist to contest, for example, a decision by the Secretary of Homeland Security to use unearmarked funds to construct a mosque to build goodwill and reduce the likelihood of Islamic terrorism.<sup>141</sup> Judge Ripple, dissenting, argued with equal force that the majority's extension of *Flast* to executive action amounted to a “dramatic expansion of current standing doctrine” that “cuts the concept of taxpayer

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concrete and particularized”). *But see id.* at 2587 (Souter, J., dissenting; joined by Stevens, Ginsburg, and Breyer, JJ.) (indicating that the respondents' claimed injury was concrete enough for standing).

135. *Id.* at 2559.

136. *See, e.g.,* Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (holding that harm to special interest that members of environmental organization had in protecting endangered species could not, by itself, support standing).

137. *Flast*, 392 U.S. at 105–06.

138. *Id.* at 102.

139. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2560 (2007).

140. *Flast*, 392 U.S. at 101.

141. *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 994 (7th Cir. 2006), *rev'd sub nom. Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

standing loose from its moorings.”<sup>142</sup>

When the case reached the Supreme Court, the five most conservative Justices concluded that the Foundation lacked taxpayer standing under *Flast* but disagreed as to why. Justice Alito wrote the controlling plurality opinion, which the Chief Justice and Justice Kennedy joined. At the outset of its analysis, the plurality gave strong support to the general rule against federal-taxpayer standing and to the broader principle that courts are not the place to settle generalized grievances.<sup>143</sup> The plurality did not, however, need to resolve whether this principle justified overruling *Flast* because that was not the question before it. The real question was, not whether to apply *Flast* but whether to *expand* it to cover executive action.<sup>144</sup> Expanding *Flast* to cover executive action would be a terrible idea, however, as it would “effectively subject every federal action—be it a conference, proclamation, or speech—to Establishment Clause challenge by any taxpayer in federal court.”<sup>145</sup> Bloating the judicial power in this way would subvert separation of powers and democracy.<sup>146</sup>

By distinguishing *Flast* rather than confronting it head-on, the Chief Justice and Justice Alito were able to undermine it without technically overruling it. Nonetheless, it is plain enough from a close reading of Justice Alito’s plurality opinion in *Freedom from Religion Foundation* and Chief Justice Roberts’s dissent in *Massachusetts v. EPA* that they share Justice Scalia’s view that generalized, widely available grievances are for the political branches to resolve.<sup>147</sup> Were a case to arise where determining *Flast*’s fate were unavoidable, these two Justices would help speed it to the grave.<sup>148</sup>

Justice Scalia, joined by Justice Thomas, wrote a forceful concurrence that condemned the plurality’s approach for being both dishonest and confusing. Given his way, he would have overruled *Flast* as “wholly irreconcilable with the Article III restrictions on federal-court jurisdiction [overgeneralized grievances] that this Court has repeatedly confirmed are

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142. *Id.* at 997–98 (Ripple, J., dissenting).

143. *Freedom from Religion Found.*, 127 S. Ct. at 2563–64 (plurality).

144. *Id.* at 2566–69.

145. *Id.* at 2569.

146. *Id.* at 2569–70.

147. *Id.* at 2563–64 (2007); *Massachusetts v. EPA*, 127 S. Ct. 1438, 1464 (2007) (Roberts, C.J., dissenting).

148. Although he joined the plurality, Justice Kennedy, unlike the Chief Justice and Justice Alito, made clear that he thought *Flast v. Cohen*, 392 U.S. 83 (1968), had been correctly decided. See *Freedom from Religion Found.*, 127 S. Ct. at 2572 (Kennedy, J., concurring). He nonetheless joined the plurality “in full” because he agreed that extending *Flast* to cover executive action threatened separation of powers by creating a danger of excessive judicial oversight of executive activities. *Id.* at 2572–73.



embodied in the doctrine of standing.”<sup>149</sup>

Dissenting, Justice Souter—joined by Justices Stevens, Ginsburg, and Breyer—agreed with Justice Scalia that *Flast*’s logic justified standing for the Foundation.<sup>150</sup> Rather than overrule *Flast*, however, the dissent would have applied it.<sup>151</sup> Like all of the other opinions issued in *Freedom from Religion Foundation*, the dissent consumed the resources needed to offer a skillful, plausible gloss on the Court’s maze of standing precedents to justify its result.<sup>152</sup> But like the concurrence, the deeper part of the analysis addressed the problem of limiting the concept of injury. As far as the dissent was concerned, Justice Scalia’s familiar claim that judicial resolution of generalized grievances cannot support standing is flat-out wrong.<sup>153</sup> Rather, just as the Court had asserted in *Akins* a scant nine years before, a “widely shared” injury can support standing so long as it is “concrete” rather than “abstract.”<sup>154</sup>

The most critical part of the dissent lies in its brief, vague reflections on what it means to be concrete enough for standing:

In the case of economic or physical harms, of course, the “injury in fact” question is straightforward. But once one strays from these obvious cases, the enquiry can turn subtle. Are esthetic harms sufficient for Article III standing? What about being forced to compete on an uneven playing field based on race (without showing that an economic loss resulted), or living in a racially gerrymandered electoral district? These injuries are no more concrete than seeing one’s tax dollars spent on religion, but we have recognized each one as enough for standing. This is not to say that any sort of alleged injury will satisfy Article III, but only that *intangible harms must be evaluated case by case.*<sup>155</sup>

This case-by-case analysis contemplated by the dissent considers “the nature of the interest protected” and whether, ultimately, “the injury alleged is too abstract, or otherwise not appropriate, to be judicially cognizable.”<sup>156</sup>

#### 4. *Looking Back at the Troika*

After touring the 2007 troika, it is plain to see that the substance of the debate over constitutional standing to pursue generalized grievances has not evolved very far in recent decades. One four-Justice faction of the Court favors a restrictive approach to standing that invokes the bar on

149. *Freedom from Religion Found.*, 127 S. Ct. at 2574 (Scalia, J., concurring).

150. *Id.* at 2584 (Souter, J., dissenting).

151. *Id.*

152. *Id.* at 2585–86.

153. *Id.* at 2587 n.3.

154. *Id.* (quoting *FEC v. Akins*, 524 U.S. 11, 24 (1998)).

155. *Id.* at 2587 (emphasis added) (quotation marks and internal citations omitted).

156. *Id.* (quotation marks and internal citation omitted).

generalized grievances in the name of separation of powers. By limiting the judicial role to resolution of claims based on particularized injury, this faction seeks to protect the political branches (and the people) from an overreaching, inept, illegitimate juristocracy.

The other four-Justice faction favors a permissive approach to standing that allows the federal courts to resolve generalized grievances so long as they are concrete rather than abstract. This concreteness requirement seems to boil down to the idea that a plaintiff can have constitutional standing to contest an “intangible harm” so long as the courts think, on the basis of case-by-case judgment, that it makes good sense.<sup>157</sup>

Excluding Justice Kennedy’s swing vote from the picture, neither faction is likely to enlist the support of anyone from the other side. With the arrival of Chief Justice Roberts and Justice Alito, however, restrictive standing has become much stronger very quickly as a matter of the Court’s internal electorate. Restrictive standing is suddenly just one vote away from becoming the controlling view of the Court for some indefinite period of time. *Massachusetts v. EPA* provides a potent example of what such control might mean.<sup>158</sup> Had restrictive standing attracted just one more vote in that case, the Court would have ruled that Massachusetts lacked constitutional standing because catastrophic global warming hurts everyone.<sup>159</sup>

## II. ABANDONING STANDING: WHY THE CONSTITUTION REQUIRES NEITHER CONCRETE NOR PARTICULARIZED INJURY

As we have seen, although standing’s injury requirement sounds simple enough on its face, the Justices of the Supreme Court have been unable to reach consensus on what it means. For this and many other reasons, the law of constitutional standing is extremely confusing. Why, then, put up with it? The Constitution’s text does not expressly mention an injury requirement. Nor do historical understandings of the judicial power clearly compel its adoption—a strong scholarly consensus holds that standing’s injury requirement is a twentieth-century invention.<sup>160</sup>

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157. *Id.* at 2587.

158. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1467 (2007) (Roberts, C.J., dissenting).

159. *Id.* (“The very concept of global warming seems inconsistent with this particularization requirement.”).

160. *See, e.g.*, Sunstein, *supra* note 6, at 170–75 (discussing prerogative-writ and qui tam practice as evidence that, prior to 1920, “[n]o one believed that the Constitution limited Congress’s power to confer a cause of action”); Winter, *supra* note 6, at 1375–76 (discussing the “surprisingly short history” of standing doctrine); Berger, *supra* note 6, at 824–25 (concluding that “a colonial lawyer might well have concluded that [based on English precedents] mandamus was capable of issuance at the suit of a stranger who sought to assert the public interest”); Jaffe, *supra* note 6, at 1275–81 (documenting American courts’ common allowance of public actions brought by persons seeking to vindicate general

Absent clear textual or compelling historical support, the justification for constitutional standing must be functional in the sense that it provides a means for implementing a constitutional value so important that it justifies empowering the federal courts to overturn legislative judgments regarding who can sue. Neither permissive nor restrictive standing, however, rests on a persuasive justification for its particular limits on judicial power. Permissive standing's justifications—e.g., that the injury requirement ensures that litigants bring the right personal stake to litigation—are, frankly, difficult to take seriously. The proponents of restrictive standing, led by Justice Scalia, at least provide a colorable theory for their doctrine. They claim that restrictive standing's insistence on particularized injury is necessary to protect the power of the political branches to determine and act upon the public interest.<sup>161</sup> But, as discussed below, this separation-of-powers theory fails to justify restrictive standing's limits on access to the courts because (a) it is antimajoritarian, (b) it undermines the rule of law, and (c) the generalized–particularized dichotomy upon which it rests is indeterminate and easy to manipulate.<sup>162</sup>

In short, constitutional standing's insistence that a plaintiff must suffer the right kind of injury to gain access to the federal courts lacks sufficient textual, historical, or functional support to justify the confusion and other ills it causes. It should be abandoned.<sup>163</sup>

#### *A. Why Permissive Standing's Concrete Injury Test Is Difficult to Take Seriously*

Again, the most significant recent discussion of permissive standing from the Supreme Court appears in Justice Souter's dissent in *Hein v. Freedom from Religion Foundation, Inc.*<sup>164</sup> Two prominent, related themes appear in this opinion, which all four liberals joined: (a) constitutional standing requires that a plaintiff bring the right kind of personal stake to court; and (b) constitutional standing requires a concrete rather than abstract injury.<sup>165</sup>

The obvious problem with personal-stake analysis is that it cannot

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rights enjoyed by all). *But see* Woolhandler & Nelson, *supra* note 6, at 691 (declining to claim that “history *compels* acceptance of the modern Supreme Court’s vision of standing” but insisting also that “history does not *defeat* standing doctrine”).

161. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–76 (1992) (discussing the separation-of-powers justification for restrictive standing's bar on generalized grievances).

162. *Infra* Part II.B.1–2.

163. *See supra* note 11 (citing to leading scholars contending that constitutional standing and its injury test should be abandoned).

164. 127 S. Ct. 2553, 2584 (2007) (Souter, J., dissenting).

165. *See generally id.* at 2584–88.

measure anything in a sensible and useful manner. As Justice Harlan observed with devastating common sense in his dissent in *Flast v. Cohen*, in cases where plaintiffs are motivated by their values rather than economic concerns “it is very nearly impossible to measure sensibly any differences in the intensity of their personal interests in their suits.”<sup>166</sup> Moreover, even if one could measure the strength of such impulses, one might think it needless to do so given the fair supposition that anyone motivated enough to sue is very likely to have a sufficient personal stake in the litigation.<sup>167</sup>

With regard to the more general problem of determining whether an injury is adequately concrete, Justice Souter explained that “[t]he question, ultimately, has to be whether the injury alleged is too abstract, or otherwise not appropriate, to be considered judicially cognizable.”<sup>168</sup> This language, rather than providing a meaningful legal standard, instead gives the courts a license to exercise policymaking discretion to determine which suits may proceed in federal court and which may not. This is not a novel role for the courts to play. At common law, courts determined who-could-sue-whom-over-what as part of the process of developing the forms of action.<sup>169</sup> In modern law, the concept of prudential standing captures the idea that courts can continue to exercise discretion to block certain plaintiffs from suing.<sup>170</sup> The problem is that, if this power has constitutional status, then courts can and should use it to trump congressional policy judgments concerning who can sue. If, however, the injury inquiry simply boils down to whether it is a *good idea* as a matter of policy to let someone sue, it is far from obvious why a judicial determination on this point should trump a congressional one.

Of course, there is a simple way for the four Justices who signed on to the *Freedom from Religion Foundation* dissent to avoid this problem: Whenever confronted by a plaintiff whom Congress has expressly authorized to sue, they could find that this particular plaintiff has, indeed, suffered an injury concrete enough for standing. Given the hazy nature of permissive standing’s injury inquiry, as well as a proper impulse to defer to congressional policy judgments, such outcomes should be easy enough to

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166. *Flast v. Cohen*, 392 U.S. 83, 124 (1968) (Harlan, J., dissenting).

167. See Scalia, *supra* note 107, at 891 (observing that “[o]ften the very best adversaries are national organizations such as the NAACP or [ACLU] that have a keen interest in the abstract question at issue in the case, but no ‘concrete injury in fact’ whatever”); cf. Siegel, *supra* note 11, at 87 (“Of all the arguments concerning the purposes of the justiciability requirements, this [personal stake rationale] is perhaps the most obviously wrong. Indeed, we could hardly take the argument seriously if repetition had not benumbed us to its flaws.”).

168. *Freedom from Religion Found.*, 127 S. Ct. at 2587 (Souter, J., dissenting) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)) (internal quotation marks omitted).

169. See *supra* notes 31–32 and accompanying text.

170. See *supra* notes 38–40 and accompanying text.

justify. If, however, the Court never disagrees with Congress over standing, then standing—considered as a constitutional rather than prudential doctrine—becomes totally toothless. It is tempting to suppose that the four dissenting Justices, in keeping with the weight of scholarly criticism of constitutional standing, would not mind this result.<sup>171</sup> In short, maybe they do not take permissive standing very seriously either.

### *B. Why Restrictive Standing Fails to Justify Barring Access to the Courts*

Restrictive standing's core appeal lies in the fact that it reflects a serious response to the deep separation-of-powers problem of enabling courts to protect individuals without enabling the courts to usurp political power. The importance of drawing the right line between the political and judicial realms is undeniable in a system committed to both representative democracy and the rule of law. Restrictive standing, however, draws this line in a way that undermines both democracy and law, and is alarmingly indeterminate. To back up this claim, this Article will take a closer look at the jurisprudential underpinnings for restrictive standing developed by its intellectual godfather, Justice Scalia.

#### *1. A Closer Look at Justice Scalia's Restrictive Standing*

One rock upon which Justice Scalia built his theory of restrictive standing is the second-most famous quotation from *Marbury v. Madison*: “The province of the court is, solely, to decide on the *rights of individuals* . . . .”<sup>172</sup> By contrast, the political task of “[v]indicating the *public interest* . . . is the function of Congress and the Chief Executive.”<sup>173</sup> Restrictive standing's limits on who can sue are supposed to be a means to enforce this individual-rights–public-interest dichotomy.

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171. Cf. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 642–43 (1999) (concluding that the majority opinion in *FEC v. Akins*, 524 U.S. 11 (1998), which all four of the *Freedom from Religion Foundation* dissenters joined, suggests that the injury-in-fact requirement should be regarded as satisfied so long as “Congress or any other source of law gives the litigant a right to bring suit”); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 336 (2002) (suggesting that *Akins* signified that the Court (as then composed) would not use the injury requirement to trump an express congressional grant of a cause of action). For further discussion of *Akins*'s effort to weaken standing requirements, see *supra* Part I.B.4. For a hint that at least one of the *Freedom from Religion Foundation* dissenters seems ready to junk constitutional standing doctrine in its current form, see *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1869 (2006) (Ginsburg, J., concurring) (declining, pointedly, to endorse the Court's major standing decisions of the last thirty years).

172. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)) (emphasis added).

173. *Id.* (emphasis added).

Perhaps the most obvious problem with the preceding approach is that it rests on an assumption that there can be no overlap between public and individual rights. Might not every citizen enjoy an individual right to enforce the public interest? Congress, all concede, has vast power to create new causes of action—indeed, it does so all the time. Might Congress use this power to grant all citizens an individual right to sue to enforce some public-interest statute? If Congress can make this move, then so much for the individual-rights–public-interest dichotomy—and so much for restrictive standing.

Justice Scalia’s answer to this problem rests on an intuitively appealing vision of the role of the courts in a representative democracy. In such a government, the judicial function should be confined to protecting the rights of *minorities* from democratically empowered *majorities*.<sup>174</sup> Expanding judicial intervention to protect majority interests is both unnecessary and costly. It is unnecessary because our form of government is based on the axiom that the majority can look after itself through the political process.<sup>175</sup> It is costly because, where a court intervenes to impose its own conception of the public interest on the public at large, it displaces the judgments of institutions that, by design, reflect majority will.<sup>176</sup> Such displacement is illegitimate as it undermines majority rule without benefiting minority rights.

Thus, the true point of constitutional standing doctrine for Justice Scalia is that it “roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interests of the majority itself.”<sup>177</sup> This view that the legitimate function of courts is to protect minorities makes the notion of an “individual right” to protect the “public interest” a contradiction in terms that Congress cannot overcome.<sup>178</sup>

This vision of standing requires a means for distinguishing between minority and majority interests, which leads to restrictive standing’s approach to the problem of injury. According to Justice Scalia, to assert a minority interest (or individual right) suitable for judicial protection, a plaintiff must allege that she has in some way been “harmed *more* than the rest of us.”<sup>179</sup> A plaintiff who has not alleged any such particularized harm

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174. Scalia, *supra* note 107, at 894.

175. *Id.* at 896.

176. *Id.*

177. *Id.* at 894.

178. See *Lujan*, 504 U.S. at 576–77 (holding that the “public interest in proper administration of the laws” cannot be “converted into an individual right by a statute that denominates it as such”).

179. Scalia, *supra* note 107, at 894–95.

“has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention.”<sup>180</sup> It is the business of the political branches to address such generalized grievances relating to the propriety and legality of government actions that *affect everyone exactly the same way*. Of course, a minority of citizens may object to a particular government action that has such uniform effects. Restrictive standing takes the view, however, that such a minority has no right to use the courts to trump the majority’s choice so long as the majority is not picking on the minority in a particularized way.

Certainly, the idea that majorities should use the political process to look after themselves is attractive. Restrictive standing’s majoritarian bona fides are, nonetheless, dubious at best for two obvious reasons. First, it is a basic tenet of political science and common sense that motivated special interests often hijack the legislative process at the expense of diffuse majorities.<sup>181</sup> Second, standing doctrine—regarded as an expression of *constitutional law*—limits the power of *Congress* to authorize plaintiffs to sue. Where a court fashions constitutional law to trump a congressional statute, an unelected body trumps the political decision of a representative body. Justice Scalia’s majoritarian story thus carries, ironically, a strong antimajoritarian strain.

His parry to this objection indicates that restrictive standing may be more about protecting *executive* rather than majoritarian power. Recall that in *Lujan*, Justice Scalia stressed that it is the President whom the Constitution charges with the specific duty and power to “take Care that the Laws be faithfully executed.”<sup>182</sup> Allowing courts to resolve generalized grievances would enable them to usurp this Article II enforcement authority, and “with the permission of Congress, to assume a position of authority over the governmental acts of another and coequal department, and to become virtually continuing monitors of the wisdom and soundness of Executive action. We have always rejected that vision of our

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180. *Id.* at 895.

181. See Siegel, *supra* note 11, at 101–02 (observing that free-rider problems plague political efforts to correct illegal action that harms a large group of people, but, by contrast, “the concentrated minority that benefits from the illegal action would have strong incentives to act politically to retain its advantage”); Sunstein, *supra* note 6, at 219 (noting that well-organized minorities are often better positioned to manipulate the political process than ill-organized majorities and observing that Congress authorizes citizen suits precisely to address this problem); Elliott, *supra* note 12, at \*31–32 (observing that “dismissing a case because an injury is widely shared, on the assumption that the group will mobilize to obtain redress through the political branches, does not take into the account the political reality that some groups have more access than others”).

182. *Lujan*, 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3).

role . . . .”<sup>183</sup>

The logic of this argument seems to be that (a) the Constitution created three coequal branches of government; (b) without a bar on standing to resolve generalized grievances, Congress could make the Executive subordinate to the courts; and (c) therefore, to preserve the coequal status of the Executive, the Constitution demands a bar on standing for plaintiffs with generalized grievances.

Underlying this structural argument is a functional concern that the Executive can run the government much better than can a bunch of unelected judges. Remarkably, Justice Scalia has followed the logic of this competency argument so far as to argue that restrictive standing improves government performance by protecting the Executive’s power to *ignore* the law from officious judicial efforts to enforce it.<sup>184</sup> Advocates of the rule of law might be excused for thinking that, in keeping with Article II’s Take Care Clause, the Executive’s job is to *enforce* the laws until they are changed by competent authority. This contention misses, however, that the Executive’s practical power “to lose or misdirect laws” is a “prime engine[] of social change.”<sup>185</sup> If any plaintiff can use the courts to force the Executive to enforce the law, then this useful nonenforcement power may disappear.<sup>186</sup>

We thus see that Justice Scalia’s attempt to strike a separation-of-powers balance between majority rule and the rule of law might be said to betray both. Although his theory purports to protect majoritarian political power from overreaching courts, it does not permit the (majoritarian) legislature to create a cause of action that grants an individual right to plaintiffs to seek judicial enforcement of laws designed to protect the public interest. The rationale for this limitation is that, without it, Congress could authorize the courts to issue orders to the Executive requiring it to *obey* the law, thus depriving the Executive of its power to *ignore* it.

## 2. *The Indeterminacy of the Generalized-Grievance–Particularized-Injury Dichotomy*

For the moment, ignore doubts about the majoritarian bona fides of

183. *Id.* (citations and internal quotation marks omitted).

184. Scalia, *supra* note 107, at 897.

185. *See id.* (“Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways [of the bureaucracy.]”).

186. For recent, pointed criticism of Justice Scalia’s view that the Executive should be able to exercise a “dispensing” power to ignore law, see Farber, *supra* note 11, at \*23–25 (“At the very least, we can say that Justice Scalia’s core notion—that the Executive should have leeway to exercise benign neglect in enforcement, thereby leaving statutory mandates to wither from neglect—would have been repugnant to the Framers.”).



restrictive standing or its consistency with the rule of law. Even with these problems set to one side, restrictive standing is seriously flawed because the generalized-grievance-particularized-injury dichotomy upon which it rests is alarmingly indeterminate and easy to manipulate.

The core problem is that *any* set of injuries suffered by *any* group of individuals can be described as either generalized or particularized by varying the level of abstraction of the description. Recall, for example, Chief Justice Roberts's dissent in *Massachusetts v. EPA*, in which he declared that "[t]he very concept of global warming seems inconsistent with [standing's] particularization requirement. Global warming is a phenomenon harmful to humanity at large."<sup>187</sup> Well, one can certainly say that global warming will cause the generalized harm of threatening everyone in the world with catastrophic climate change. Because we walk through this life in our own bodies, however, global warming will do different things to different people. For instance, it may cause *X*'s crops to fail; it might cause *Y*'s air conditioning bill to rise; it might threaten *Z*'s coastal home with inundation. When we focus on the fact that global warming threatens all three by one mechanism, their injuries look generalized. When we focus on the differences among their particular factual circumstances, the injuries look particularized.

Justice Scalia's attempt to wrestle with this problem in his dissenting opinion in *FEC v. Akins* is especially damning.<sup>188</sup> Recall that the plaintiffs claimed that they had suffered "informational injury" due to the FEC's allegedly incorrect determination that AIPAC was not a "political committee" subject to various statutory disclosure requirements.<sup>189</sup> Dissenting, Justice Scalia rejected standing for the plaintiffs on the ground that they only claimed a "generalized grievance."<sup>190</sup> Writing for the majority, Justice Breyer had preempted this move by holding that the generalized-grievance bar lacked constitutional force.<sup>191</sup> In support of this claim, he noted that it was obvious that the victims of a "widespread mass tort" would each enjoy standing even though their injuries were in some sense "widely shared."<sup>192</sup> If five hundred people are injured in a plane crash, all five hundred have standing to sue. It follows that there can be no constitutional bar on standing for generalized grievances.

Justice Breyer thus put Justice Scalia in the ticklish position of having to explain why victims of a mass tort can sue even if their injuries are widely

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187. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1467 (2007) (Roberts, C.J., dissenting) (internal quotation marks and citation omitted).

188. 524 U.S. 11, 29 (1998) (Scalia, J., dissenting).

189. *Id.* at 21 (majority opinion).

190. *Id.* at 35–36 (Scalia, J., dissenting).

191. *Id.* at 24 (majority opinion).

192. *Id.*

shared. To steer clear of this trap, Justice Scalia explained that, even where a mass tort such as a plane crash causes widespread harm to many people, it causes particularized injury to each one—each person suffers her own *particular* broken limb, not somebody else’s.<sup>193</sup> Where this particularization requirement is satisfied, a grievance does not become generalized no matter how many people have suffered it.<sup>194</sup> By contrast, according to Justice Scalia, the *Akins* plaintiffs failed the generalized-grievance bar because the FEC’s decision deprived everybody of the same information, thus causing “undifferentiated” rather than “particularized” harm.<sup>195</sup>

But the obvious rejoinder to this characterization is that, just as each person hurt in a plane crash suffers injury to *her own* body, so the FEC’s treatment of AIPAC had deprived *particular individuals* of information. Moreover, the FEC’s decision affected these *different people differently*. Just as one plane crash victim might suffer a broken arm and another a broken leg, so the effects of the FEC’s determination varied across people, depending, among other factors, on how interested they were in obtaining information concerning AIPAC’s political connections. The bottom line is that, because each individual’s factual situation is different, it is always possible to frame injuries suffered by a group of people in a differentiated way.

A proponent of restrictive standing might try to deflect the preceding argument by claiming that mental differences among people regarding the intensity of their desire for information cannot particularize their injuries in light of the rule that “ideological” harms do not count for standing.<sup>196</sup> Justice Scalia stressed a similar move in his concurrence in *Hein v. Freedom from Religion Foundation, Inc.*, where, writing with his customary force, he drew a sharp distinction between “Wallet Injury” and “Psychic Injury.”<sup>197</sup> The former, which includes but is not limited to economic injury, is “concrete and particularized” and thus can constitute an

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193. See *id.* at 35 (Scalia, J., dissenting) (noting that, in the mass tort situation, “[o]ne tort victim suffers a burnt leg, another a burnt arm—or even if both suffer burnt arms they are *different* arms”).

194. *Id.*

195. See *id.* at 35–36 (observing that the “undifferentiated” harm “caused to Mr. Akins by the allegedly unlawful failure to enforce FECA is precisely the same as the harms caused to everyone else: unavailability of a description of AIPAC’s activities”).

196. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (stating that plaintiffs needed to assert harm to more than their mere “special interest” in species preservation to satisfy the injury requirement); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding that injury to Sierra Club’s long-standing “special interest” in environmental protection did not suffice for standing under the APA). *But cf.* *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2587 (2007) (Souter, J., dissenting) (allowing that “intangible harms” can provide a basis for constitutional standing).

197. *Freedom from Religion Found.*, 127 S. Ct. at 2574 (Scalia, J., concurring).

injury in fact for constitutional standing.<sup>198</sup> The latter, which is really nothing more than “mental displeasure,” cannot suffice for standing thanks to “the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the *generalized grievance* that the law is being violated.”<sup>199</sup> This move expands the potential scope of the category of generalized grievances by the simple expedient of declaring that many obvious ways to particularize injury across individuals do not count. On this view, a plaintiff could not, for example, claim particularized injury from an alleged Establishment Clause violation merely because it upsets her far more, and thus differently, than her neighbors.

It is certainly convenient for proponents of restrictive standing to invoke the bar on psychic or ideological injuries supporting standing to help make their theory work, but the legitimacy of doing so is far from clear. The primary reason that the Court has sometimes announced this bar is that, without it, its injury-based framework for constitutional standing cannot work. Virtually any plaintiff motivated enough to sue could plausibly claim that they were doing so to challenge some act or omission that upset them.<sup>200</sup> If everyone who wants to claim injury can plausibly do so, then an injury screen on access to the courts becomes worthless.

But no matter how useful a bar on psychic injuries may be to the current standing framework, it still does not make much sense. As a threshold matter, given that mental displeasure *hurts*, it is not obvious why it should not count as an injury. Nor, given that people’s emotional reactions to events in the world vary wildly, is it obvious why the injury of mental displeasure should always be regarded as generalized. Moreover, implementing a bar on psychic injury leads the law towards bizarre hair-splitting. For instance, suppose the government decided to kill the last tiger, which is living a quiet life in the San Diego Zoo. Members of the Natural Sierra Defenders of Tigers Council (NSDTC) are appalled by the prospect, but the rule against “ideological” plaintiffs blocks such persons from bringing suit absent some additional, extrapsychic injury. Fortunately for them, Supreme Court precedents allow this injury to take the form of the “aesthetic” harm of being unable to look at a live tiger.<sup>201</sup> Therefore,

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198. *Id.*

199. *Id.* (emphasis added).

200. *Cf. Fletcher, supra* note 3, at 231 (“If we put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint. If this is so, there can be no practical significance to the Court’s ‘injury in fact’ test because all people sincerely claiming injury automatically satisfy it.”).

201. *See Lujan*, 504 U.S. at 562–63 (“Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”).

for NSDTC to gain standing, it need only find a member willing to sign an affidavit swearing that she likes to go see the tiger from time to time at the zoo.<sup>202</sup> Current standing doctrine thus encourages persons who have suffered real emotional injuries to manufacture fake but legally cognizable injuries to get into federal court.

Suppose nonetheless that it makes sense to exclude all psychic injuries as generalized. Even so, restrictive standing would still face the problem that it is often child's play for a judge, with the right will, to characterize various "nonpsychic" injuries as either generalized or particularized. Restrictive standing's generalized-grievance-particularized-injury dichotomy is therefore better viewed as a tool for stopping analysis rather than advancing it. In this vein, it seems fair to suspect that the dissenting Justices in *Massachusetts v. EPA* did not conclude that global warming causes generalized injury and that therefore, alas, the Court lacked the power to fix EPA's climate change policy. The causal arrow ran the other way: They concluded that climate change was not the Court's business, which suggested that global warming does not cause particularized injury.<sup>203</sup>

### C. Surveying the Wreckage

The broad lesson of Part III is that neither the supporters of permissive standing nor those of restrictive standing have offered a satisfying rationale for establishing a constitutional rule that a plaintiff must suffer a certain kind of injury to gain access to the federal courts. In the hands of the *Hein v. Freedom from Religion Foundation, Inc.* dissenters, permissive standing, which demands concrete injury, seems so weak that it arguably does not meaningfully limit congressional power at all.<sup>204</sup> It might best be viewed as a vehicle for depriving constitutional standing doctrine of any serious substance without taking the controversial step of overruling a long line of problematic precedents. Restrictive standing, by contrast, insists that plaintiffs must suffer particularized injury to protect the power of political officials to make the rules that govern the public at large from judicial

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202. *Cf. id.* at 579 (Kennedy, J., concurring) (suggesting that American plaintiffs could have established injury in fact related to inability to look at leopards and elephants by purchasing plane tickets to visit Sri Lanka and Egypt).

203. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1463–64 (2007) (Roberts, C.J., dissenting) (opening opinion with the observation that "[g]lobal warming may be a 'crisis'" but that "[i]t is not a problem . . . that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government").

204. *See supra* Part II.A (discussing the weakness and indeterminacy of permissive standing's concrete injury requirement as deployed by Justices Souter, Stevens, Ginsburg, and Breyer).

usurpation.<sup>205</sup> Restrictive standing does not, however, provide a satisfactory framework for achieving this end given that it is antimajoritarian, it undermines the rule of law, and it is fundamentally indeterminate.<sup>206</sup>

The failure of either restrictive or permissive standing to make a persuasive case for its preferred limitation on the concept of injury is a manifestation of a deeper problem. Anyone who sues can plausibly claim to be doing so to obtain relief from some kind of injury because *no one sues for no reason at all*. It follows that, for constitutional standing to have any teeth, it must require not a mere showing of injury but rather a showing of the *right kind* of injury. The Constitution itself, however, provides no textual guidance with regard to which sorts of injuries can support a cause of action in federal court, and which cannot, and the historical record is contestable at best.<sup>207</sup> Therefore, it is hardly surprising that the Court's efforts to build a coherent, determinate doctrine of standing around the concept of injury have failed. This failure suggests that we should—as Judge Fletcher suggested many years ago—simply accept that anyone who claims to have been injured has been injured enough for standing if he can prove his allegations.<sup>208</sup> Accepting this suggestion would, of course, spell the end of standing as a constitutional bar on access to the federal courts.

### III. FROM A RULE OF ACCESS TO A RULE OF DEFERENCE

#### A. *A Rule That Demands Deference Rather Than Denies Access*

Notwithstanding constitutional standing's many problems, most observers would presumably agree that restrictive standing, in particular, purports to serve a worthy value: Given our society's commitment to representative democracy, as a general matter, within the range permitted by law, political branch officials who answer to the electorate, not unelected judges, should make the rules that govern the public at large. The failure of this value to justify standing's ill-defined limits on access to the federal courts does not make this value illegitimate or unappealing. This failure does, however, suggest that it may be worthwhile to explore other means to enforce separation of judicial and political power. And now may be an especially propitious time for such investigation given how close

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205. See generally *supra* Part II.B.1 (discussing the jurisprudential underpinnings of restrictive standing).

206. See generally *supra* Part II.B.1–2 (criticizing restrictive standing doctrine as indeterminate, inconsistent with majority rule, and in tension with the rule of law).

207. See *supra* note 160 (discussing lack of historical authority for the Supreme Court's modern standing doctrine).

208. Fletcher, *supra* note 3, at 231.

the Court seems to be adopting an aggressive form of restrictive standing.<sup>209</sup>

In this spirit of inquiry, this Article proposes revisiting a suggestion that the great Professor Jaffe made nearly fifty years ago that a rule of *deference* could provide a better tool for separating judicial and political power than constitutional standing's categorical rule of *access*.<sup>210</sup> Professor Jaffe framed his proposal in terms of the federal courts' power to resolve "public actions," which he defined as actions brought by private persons "primarily to vindicate the public interest in the enforcement of public obligations."<sup>211</sup> These are precisely the types of actions that restrictive standing wishes to block at the courthouse door for presenting generalized grievances.<sup>212</sup> Professor Jaffe documented, however, that such actions—often requesting relief in the form of mandamus or an injunction—had long flourished in many state court systems in America.<sup>213</sup> In part due to this history, he opposed efforts to impose a constitutional bar on public actions. He was nonetheless quite sensitive to their potential to intrude improperly on political decisionmaking.<sup>214</sup> To respond to this concern, he suggested that a court should not grant relief in a public action "*unless it can see the law as reasonably clear*."<sup>215</sup> Equivalently, courts should apply mandamus-style levels of judicial deference when resolving public actions and only grant relief to enforce the government's "clear legal duty."<sup>216</sup>

This Article submits that Professor Jaffe's half-century-old solution to the standing conundrum is basically correct: Federal courts can, consistent with Article III limitations, resolve public actions, but in doing so, they should uphold the legality of actions taken by political branch officials so long as these actions fall within the space where reasonable jurists could conclude they are legal. More specifically, in the public-action context, a court should uphold an agency's action so long as it comports with a reasonable construction of relevant law (constitutional, statutory, or regulatory) and is based on reasonable factual and policy determinations.

For the present purpose, let the concept of public action embrace those

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209. See generally *supra* Part I.C (discussing the Court's 2007 opinions on standing).

210. Jaffe, *supra* note 6, at 1305–06.

211. Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961).

212. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) (contending that Article III bars access to the federal courts where a plaintiff "claim[s] only harm to his and every citizen's interest in proper application of the Constitution and laws, and seek[s] relief that no more directly and tangibly benefits him than it does the public at large").

213. Jaffe, *supra* note 6, at 1275–82.

214. *Id.* at 1306.

215. *Id.* at 1305.

216. *Cf. id.* ("[I]t is part of the traditional conceptualism of mandamus that the writ issues only to command 'a clear legal duty.'").

suits in which (a) the only legally protected interest the plaintiff asserts is that the government should enforce rather than violate (or ignore) a particular law; (b) the plaintiff shares this interest equally with the public at large—i.e., she is not a member of any special class that this law singles out for protection; (c) the plaintiff’s right to relief does not depend on any particular factual circumstances that are true of her but not of every other member of the public at large; and (d) the plaintiff seeks only relief that would run to the benefit of the public at large.

The point of the preceding definition is to capture actions that raise generalized grievances in a *legal* sense rather than in restrictive standing’s unworkable *factual* sense. As a matter of “fact,” government action that affects many people affects them all differently because, not to put too fine a point on the matter, we are all different.<sup>217</sup> Most factual differences among individuals’ particular circumstances lack legal significance, however. For instance, recall that in *FEC v. Akins* various people wanted to get information about the American Israel Political Affairs Committee—supposedly to guide their voting.<sup>218</sup> The intensity of their respective desires for this information must have varied, but this factual variance had no significance for whether they had a legal right to the information they sought. In a public action, *no* factual differences among individuals’ particular circumstances have any bearing on whether they may assert the legal interest at issue. From the point of view of *law* rather than of *fact*, every member of the public at large is in the same boat.

Defined this way, public action captures the cases in which the Court has wrestled over whether a constitutional bar on generalized grievances requires dismissal. For instance, in *Massachusetts v. EPA*, petitioner Massachusetts sought to force EPA to initiate rulemaking to regulate greenhouse gas emissions pursuant to its Clean Air Act authority to regulate “air pollutants.”<sup>219</sup> Playing the game of constitutional standing required Massachusetts to insist that EPA’s refusal to regulate had increased the risk that rising sea levels would swallow some indeterminate bit of its coastal property.<sup>220</sup> The legal protection that Massachusetts asserted against this type of injury, however, flowed from the Clean Air Act’s requirement that EPA curb “air pollutant[s].”<sup>221</sup> Every member of the public—regardless of his particular circumstances—enjoys the right to clean air that this statute expresses. Also, the threat to Massachusetts’s

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217. See *supra* Part II.B.2 (explaining that restrictive standing’s deployment of the generalized-grievance–particularized-injury distinction is indeterminate for this reason).

218. 524 U.S. 11, 21 (1998). See *generally supra* Part I.B.4 (discussing the Court’s standing analysis in this opinion).

219. 127 S. Ct. 1438, 1447 (2007).

220. *Id.* at 1456.

221. *Id.* at 1454 (quoting 42 U.S.C. § 7521(a)(1)).

property had no necessary connection to the merits of its claim, which turned on (a) whether Congress meant the statutory phrase “air pollutant” to include carbon dioxide and (b) whether EPA had given a reasoned explanation for its refusal to regulate.<sup>222</sup> The answers to these questions would not change even if Massachusetts did not exist. Moreover, the particulars of the state’s circumstances had no bearing on the nature of the relief it sought, which was to force EPA to initiate rulemaking, and the benefits of this relief ran to the public at large.

A similar exercise can be done for *Hein v. Freedom from Religion Foundation, Inc.*<sup>223</sup> Recall that the Foundation and some of its members had brought an Establishment Clause claim to challenge a presidential policy pursuant to which executive agencies funded conferences in support of the President’s Faith-Based and Community Initiatives Program.<sup>224</sup> From the point of view of the law, there was nothing special about the plaintiffs’ circumstances or their legal interest. The government had not, for instance, strapped them down and forced them to listen to the conference proceedings. Although it seems safe to presume that the plaintiffs harbored a special distaste for government support for religion that was not shared by most members of the public, this factual distinction has no legal significance. In keeping with the strange *Flast* doctrine, the plaintiffs claimed standing based upon injury they suffered in their capacity as federal taxpayers.<sup>225</sup> Putting this fiction to one side, the real legal interest in play was the shared public interest in blocking government support for religion expressed by the Establishment Clause. Neither the merits of the plaintiffs’ claim nor the relief they sought turned in any way on the specifics of their factual circumstances. The merits turned on a question of law regarding whether executive allocation of unearmarked funds to support the conferences violated the Establishment Clause. The relief the plaintiffs sought—making the government stop—ran to the public at large (by the plaintiffs’ lights, anyhow).

The proposed definition of public action excludes challenges to government conduct that may have been targeted at some vulnerable individual or group in a legally significant way. For instance, suppose that FBI officers, acting without a warrant, break down your door in the middle of the night and search your house. You bring a *Bivens* claim against the officers, claiming that they violated your Fourth Amendment rights, and

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222. *Id.* at 1460–63.

223. 127 S. Ct. 2553 (2007).

224. *Id.* at 2559.

225. See *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (allowing federal-taxpayer standing for the plaintiffs’ Establishment Clause claim). See generally *supra* Part I.B.2 (discussing *Flast*).



also sue for trespass. From the point of view of the law, you are in a situation distinct from that of the public at large. You lay claim to legal interests—constitutional and common-law protections against trespass into *your* house—that the public does not fully share. Also, you seek relief—damages—that run to you rather than the public at large and that depend upon your particular factual circumstances (e.g., just how much will it cost to replace that door?).

With these reflections on the concept of public action in mind, it is time to return to Professor Jaffe's suggestion that courts should apply a deferential standard of review when resolving them. Again, just like restrictive standing, the underlying justification for this proposal is that it provides a means to keep the courts from improperly usurping the political branches' discretion to govern.<sup>226</sup> Backing up this claim requires consideration of a very basic and big question: Why have independent courts at all? Or, to put the same question another way, why not trust legislative and executive officers to behave legally and honorably and uphold rather than violate the law?

The need for independent judicial control over governmental power traces back to the ancient rule-of-law maxim that no one can be the judge of his own cause.<sup>227</sup> The rationale for this maxim is, given a moment's reflection on human nature, obvious: Where a person judges her own cause, she is far too likely to see the facts and the law in whatever way is necessary to support her own victory, thus making the rule of law meaningless.<sup>228</sup> This principle applies to government officials as well as private actors, which is why, no matter how much we respect them, we do not want prosecutors making final determinations of guilt and innocence. A similar logic motivated Hamilton's observation that, were the Legislature (rather than the courts) in charge of determining the constitutional limits on legislative authority, "all [the Constitution's] reservations of particular rights or privileges would amount to nothing."<sup>229</sup> The fundamental point of

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226. Jaffe, *supra* note 6, at 1305–06.

227. See, e.g., THE FEDERALIST NO. 80, at 511 (Alexander Hamilton) (Robert Scigliano ed., Random House 2000) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."); *Dr Bonham's Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.) (applying the maxim to block a financially interested body from determining whether to grant a license to a doctor). See generally Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 403–04, 413 (1996) (discussing the relation of the "no man can be the judge of his own case" maxim to separation of powers in the thought of luminaries including Locke, Montesquieu, Harrington, Madison, and Wilson).

228. Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES 260 (noting that the infamous Court of Star Chamber, which combined "the provinces of a judge and a minister of state," had the unfortunate habit of "pronounc[ing] that for law, which was most agreeable to the prince or his officers").

229. THE FEDERALIST NO. 78, *supra* note 227, at 497.

independent courts is thus, from a separation-of-powers point of view, to give practical effect to the rule of law.<sup>230</sup>

On one overly simple view of the matter, it is difficult to see how courts could, in the course of enforcing the law, usurp the policymaking discretion of political officials. If we assume that federal courts do not regularly misinterpret law or find facts incorrectly, then, generally speaking, a judicial order that resolves a case should simply instruct litigants to do what the law requires in light of the facts. Stipulate that, in a system devoted to the rule of law, no one has discretion to violate the law.<sup>231</sup> Even the inconvenient bits of the Constitution are *part of the Constitution* until they are properly removed by amendment, which, by design, is extremely hard to do. Or, returning to the global warming example, the Clean Air Act is the law, and EPA does not get to change that law by ignoring or distorting it. It follows that, except when they make their occasional mistakes, courts cannot, by ordering an official to obey the law, infringe on that official's legitimate policymaking discretion.

But the preceding paragraph does not take into account an almost omnipresent problem: Reasonable minds can (and do) disagree over how to construe vague or ambiguous laws, exercise official discretion, or determine uncertain facts. Any governmental system must allocate power to resolve such doubtful questions to someone. In the context of judicial review of governmental action, one broad possibility is that the courts should control all of this power—in essence exercising *de novo* review of the propriety of government decisions. Another broad possibility is that this power over doubtful questions should belong to political officials—in which case, courts should uphold these officials' decisions so long as they fall within the space where reasonable minds might disagree. Where a court in the course of resolving a case exercises the first, tight type of control over a government decision, but instead should exercise the second, the court may usurp the decisionmaking authority of other officials.

Two fundamental values—the rule of law and representative democracy—pull in different directions with regard to whether courts or political officials should enjoy the power to resolve doubtful questions. The rule of law often favors assigning this power to the courts to ensure that officials do not unfairly twist law or fact to justify their preferred outcomes. For instance, suppose that it is criminal to “pollute” a stream.

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230. See 1 M. DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 161 (J.V. Prichard ed., Thomas Nugent trans., Fred B.G. Bell & Sons Ltd. 1914) (1748) (explaining that the justification for separation of powers is to protect “political liberty,” which is the “right of doing *whatever the laws permit*” (emphasis added)).

231. But see Scalia, *supra* note 107, at 894 (lauding the Executive's power to ignore the law).

This proscription naturally raises the question: What is “pollution”? Suppose that, on one reasonable view, a certain kind of “sludge” is “pollution,” but on another reasonable view, it is not. Were it left up to executive officials to exercise final, unreviewable authority on a case-by-case basis over which view should prevail, we might find that “sludge” is “pollution” when Alberto dumps it in a lake but not when Bella does. Moreover, where economic and political power are on the line, we might find that application of the law proscribing “pollution” varies for less than innocent reasons—maybe Alberto gave to the wrong political party. In short, allowing political branch officials to exercise final authority to resolve legal ambiguity and factual uncertainty increases the risk of uneven, arbitrary government action, strengthening the case for strict judicial review in such contexts.<sup>232</sup> This point helps explain why a prosecutor must do more than prove that her case is minimally reasonable; she must prove it beyond reasonable doubt.

Respect for representative democracy, by contrast, pulls in favor of assigning the power to resolve doubtful questions to political officialdom. This point is particularly clear as it relates to the problem of assigning operative meaning to ambiguous laws. By hypothesis, an action that is consistent with a reasonable construction of ambiguous law *X* cannot violate the force of *X itself*—for the simple reason that *X itself* does not specify which of its reasonable meanings is binding. In this vein, the Supreme Court has recognized that the task of choosing among reasonable legal constructions partakes of policymaking.<sup>233</sup> Its leading expression of this point is the “counter-*Marbury*” of the modern administrative state, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>234</sup> The outcome of this case turned on the meaning of “stationary source,” a phrase that appears in the Clean Air Act Amendments of 1977.<sup>235</sup> The D.C. Circuit rejected EPA’s construction of this phrase because, in the court’s view, it conflicted with the best available construction.<sup>236</sup> Reversing, the

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232. Admittedly, this proposition is in tension with the practice of agency adjudication in the modern administrative state. For instance, under modern administrative law, an agency charged with enforcing a law against “pollution” might prosecute and judge the liability of an alleged polluter in an internal agency proceeding. On judicial review, the court would likely extend substantial deference to the agency on issues of fact, law, and policy; the cards are stacked in favor of the agency. The fact that some practices of the modern administrative state are in tension with the rule of law, however, does not alter the point that rule-of-law principles counsel close judicial control of application of law to fact where the government targets coercive force against vulnerable individuals or groups.

233. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 865–66 (1984) (describing resolution of statutory ambiguity as policymaking).

234. *Id.* at 837.

235. *Id.* at 839–40.

236. *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 725–28 (D.C. Cir. 1982), *rev’d sub nom.* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Supreme Court chided the D.C. Circuit for usurping EPA's policymaking power to resolve ambiguities in statutes it administers.<sup>237</sup> Rather than throw out EPA's reading because it was not the *best* (by judicial lights), the D.C. Circuit should have instead affirmed it as *reasonable*.<sup>238</sup>

The essence of the Jaffe proposal as it relates to deference is that the power to resolve doubtful questions raised by public actions should be assigned to politically accountable officials. This allocation makes sense in light of the fact that a public action does not raise concerns that the government is treating people differently in a way that implicates any interests *that the law recognizes*. Thus, public actions do not raise the sort of equal treatment concerns that cause the rule of law to pull in favor of tight judicial control over doubtful questions. They do, however, implicate representative democracy's pull in favor of allocation of such control to the political branches. For instance, suppose EPA declines to regulate the emission of carbon dioxide from motor vehicles on the ground that this gas is not an "air pollutant."<sup>239</sup> Stipulate that one might reasonably conclude that carbon dioxide is an "air pollutant" or that it is not.<sup>240</sup> EPA's refusal to regulate will surely have particularized effects (as a matter of "fact") on everyone in the world. Massachusetts's coastline will be threatened, but so will California's different coastline. As far as the law is concerned, however, EPA has treated everyone in the *same* way—the different effects its policy will have on different persons are legally meaningless and do not signify that it has treated some persons unfairly or arbitrarily. There is, in particular, absolutely no danger that EPA will declare that carbon dioxide emitted by your car is an "air pollutant" (and that therefore you should pay a civil penalty) but that the carbon dioxide emitted by my car is not. Absent such fears of arbitrarily unequal treatment, respect for representative democracy suggests that politically accountable officials should be free to choose among reasonable, uniform interpretations of "air pollutant."

Applying this approach in public actions that raise statutory challenges to administrative action would not, in point of fact, require especially dramatic changes to the approach that courts purport to apply under the

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237. *Chevron*, 467 U.S. at 842.

238. *Id.* at 842–43, 865–66.

239. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1450 (2007) (citing EPA's determination, 68 Fed. Reg. 52,926–28, that it lacks authority to regulate greenhouse gases as "air pollutants" under the Clean Air Act).

240. *See id.* at 1476 (Scalia, J., dissenting) (concluding that EPA had reasonably construed its statutory authority to regulate "air pollutants" as excluding power to regulate greenhouse gas emissions from motor vehicles). *But see id.* at 1460 (holding that the "statutory text forecloses" EPA's conclusion that it lacks authority to regulate carbon dioxide as an air pollutant).

current judicial-review regime. Indeed, as noted above, the *Chevron* doctrine already requires that, where certain conditions hold, a court should apply a lax form of rationality review to an agency's construction of a statute it administers.<sup>241</sup> Similarly, courts are supposed to apply deferential standards of review when reviewing agency findings of fact and policy determinations.<sup>242</sup> One might therefore say that, at least in the statutory context, this Article merely seeks to establish that *Chevron*-style rationality review provides a better tool for protecting separation of powers than constitutional standing's mysterious injury requirement.

This Article's proposal and current judicial practice notably part company, however, when it comes to the problem of constitutional construction. In essence, when the Court construes the Constitution it tends to exercise independent judgment rather than defer the views of other officials.<sup>243</sup> This Article's proposal threatens this claim to interpretive supremacy by contending that the courts should, at least in the context of public actions, defer to the political branches' reasonable constitutional constructions.

Applying a "clear error" approach to judicial review of constitutional questions in public actions may sound jarring to those used to regarding the Court as the repository of all power to determine the Constitution's meaning. It bears noting, however, that this approach can draw support from the views of many leading statesmen and judges of the early Republic.<sup>244</sup> It is also broadly consistent with a burgeoning modern

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241. See *Chevron*, 467 U.S. at 842–43 (instructing courts to defer to an agency's permissible (i.e., reasonable) resolution of ambiguity in a statute that the agency administers).

242. See 5 U.S.C. § 706(2)(A), (E) (2006) (establishing arbitrariness and substantial-evidence standards for review of issues of fact and policy). An earlier draft of this Article asserted somewhat carelessly that judicial review under the "arbitrariness" standard *is* deferential. Professor Kathryn Watts pointed out to me that one of the criticisms commonly leveled against the current judicial review regime is that, in practice, arbitrariness review—especially in its "hard look" form—is often quite strict. It is therefore more accurate to say that arbitrariness review is *supposed to be* a relatively lax form of review for rationality. It is certainly fair to say that one of the costs of any regime that allows judicial review for rationality is that sometimes the courts will improperly apply tougher standards, thus displacing the judgment of other officials.

243. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 9 (1983) ("[H]ere, as elsewhere, Holmes's page of history is worth a volume of logic. The Court and the profession have treated the judicial duty as requiring independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text, and that specific conception of the judicial duty is now deeply engrained in our constitutional order.").

244. See, e.g., THE FEDERALIST NO. 78, *supra* note 229, at 497 (indicating that the courts should overturn legislation only where it is "contrary to the *manifest tenor* of the Constitution") (emphasis added); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 625 (1819) (Marshall, C.J.) (declaring that "in no doubtful case, would [the Court] pronounce a legislative act to be contrary to the constitution"); *Cooper v. Telfair*, 4 U.S. (4

literature that insists that political actors should play a greater role in determining operative constitutional meaning than the modern Supreme Court seems ready to concede.<sup>245</sup> Most importantly, those disturbed by the prospect of deferential judicial review in this context should bear in mind that, where the Court chooses to apply a restrictive form of standing, the alternative to deferential review of a constitutional issue may be *no review at all*.<sup>246</sup>

Stepping back, this Article seeks to change the terms of the debate over how to limit operation of the judicial power to block the courts from usurping political power. Constitutional standing doctrine has framed this debate around a very bad question: What sort of injury in fact does the Constitution—which on its face is silent on this point—require a plaintiff to assert to gain access to the federal courts? Attempting to answer this question has spawned decades of confusion over the metaphysics of injury. Moreover, in the hands of aggressive proponents of restrictive standing, this doctrine limits judicial review in a way that undermines the rule of law. This Article suggests a better question: How much judicial control is necessary to ensure that the actions of the political branches comport with the rule of law? The need to block arbitrary, uneven application of law

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Dall.) 14, 19 (1800) (Paterson, J.) (declaring that a “clear and unequivocal breach of the constitution” is necessary to justify invalidating legislation); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798) (Chase, J.) (“I will not decide *any law to be void, but in a very clear case.*”). See generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140–46 (1893) (identifying nearly a score of judicial opinions from the early Republic declaring a “clear error” rule for judicial review of legislation for constitutionality); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 59–65 (1990) (contending that during the earliest years of the Republic, a consensus existed that the power of judicial review “was confined to the concededly unconstitutional act”).

245. See, e.g., NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 238–39 (2004) (contending that constitutional questions should be resolved by “coordinate construction” among the branches, which bring differing institutional capabilities to this process); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 248 (2004) (arguing for greater popular and less judicial control over constitutional construction); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 187 (1999) (similar); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 846 (2002) (suggesting that, when resolving constitutional ambiguity, the courts should “enforc[e] the principled decisions reached elsewhere rather than . . . autonomously and authoritatively defin[e] constitutional meaning”).

246. See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2555 (2007) (rejecting standing for Establishment Clause claim); *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1862 (2006) (rejecting standing for Commerce Clause claim); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) (rejecting standing for Incompatibility Clause claim); *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (rejecting standing for Account Clause claim); cf. Scalia, *supra* note 107, at 894 (explaining that a bar on standing for generalized grievances should bar certain types of claims from ever being litigated by any claimant).

suggests a need for tight judicial control where government action targets legally distinct interests of groups smaller than the public at large. Public actions do not implicate this danger of unequal treatment as, in essence, they challenge the legality of government policies that, from the law's point of view, treat us all in the same way. In the absence of concerns over unequal treatment, courts can apply a deferential standard of review that leaves space for political branch policymaking but still upholds the rule of law.

*B. A Quick Reminder That There Are Other Forms of Judicial Docket Control*

Before attempting to make the virtues of this Article's proposal more concrete by applying it to some cases, it bears pausing to stress what this Article does *not* propose. It condemns constitutional standing's invocation of a vague concept of injury to limit federal jurisdiction, but it does not insist that courts must resolve the merits of any and all questions a plaintiff might try to raise. For instance, as a threshold matter, to obtain relief for a claimed violation of law, a plaintiff must have a cause of action to enforce it.<sup>247</sup> Also, the instant proposal does not call into question the use of *prudential* standing principles to determine whether, given the range of potential plaintiffs, a given person is the *right* plaintiff to bring suit.<sup>248</sup> Nor does it call into doubt the political question doctrine that courts invoke where they determine that a claim depends on constitutional provisions that are best left entirely to the political branches.<sup>249</sup>

One might therefore fairly ask the following question: Given that this Article's proposal leaves such doctrines in place, is it worth the bother? Why eliminate the power of constitutional standing to bar access to the courts given that a court might manipulate related doctrines to reach similar ends anyway? One answer to this question lies in the value of reasoned, transparent justification. The doctrine of constitutional standing is so rife

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247. Cf. Sunstein, *supra* note 6, at 166 (contending that access to the courts should depend not on an injury-in-fact requirement but instead on whether “the law—governing statutes, the Constitution, or federal common law—has conferred on the plaintiffs a cause of action”); Fletcher, *supra* note 3, at 229 (similar).

248. See *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 991 (7th Cir. 2006) (describing prudential standing principles as denying standing where the plaintiff “is not the ‘right’ person to bring suit, maybe because someone has been injured more seriously and should be allowed to control the litigation”), *rev'd on other grounds*, *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007); see also *supra* notes 38–40 and accompanying text (discussing prudential standing doctrine).

249. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (identifying six factors bearing on whether an issue presents a political question, including, *inter alia*, “a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”).

with indeterminacy that its application must often turn on whether a judge thinks it is a good idea for the courts to intervene to determine a given claim. The language of constitutional standing—with its many vague labels—distracts from direct discussion of such concerns, causing confusion.<sup>250</sup> As a result, judicial opinions applying the doctrine veer into strained, lengthy, wasteful discussions over whether, for instance, global warming causes the right kind of injury to *everyone* or the wrong kind of injury to *everyone*.<sup>251</sup> By contrast, where a court decides to block a plaintiff's claim on the prudential ground that there are *better* plaintiffs available, the court should give a reasoned explanation justifying this conclusion. Similarly, to justify invoking the political question doctrine, a court must explain why it makes sense to conclude that the Constitution has committed construction and application of one of its provisions exclusively to the political branches.<sup>252</sup>

### C. Two Applications

With the preceding qualifications in mind, consider now how this Article's proposal might have simplified and improved the two most important and contentious members of the 2007 troika.

#### I. Massachusetts v. EPA<sup>253</sup>

Various petitioners, Massachusetts among them, had petitioned EPA to begin a rulemaking to regulate greenhouse gas emissions from motor vehicles pursuant to its Clean Air Act authority to regulate "air pollutants."<sup>254</sup> The D.C. Circuit panel that heard the case had three judges, so they split three ways on constitutional standing.<sup>255</sup> The Supreme Court

250. See *PIERCE*, *supra* note 4, at 1108 (contending that the "obvious solution [to the standing mess] is greater candor [and that if] the Court considers it inappropriate for the federal Judiciary to become enmeshed in a new class of disputes because the Court cannot identify a justiciable standard to govern such disputes, for instance, it should say so"); see also Elliott, *supra* note 12, at \*6 (proposing that the Court develop a "vibrant abstention doctrine" that would "directly face the separation-of-powers issues now clouded by the vagaries of standing doctrine").

251. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1456 (2007) (concluding that the risk of global warming caused particularized injury to Massachusetts). *But see id.* at 1467 (Roberts, C.J., dissenting) (observing that "[t]he very concept of global warming seems inconsistent with [standing's] particularization requirement").

252. *Cf.* Epstein, *supra* note 11, at 25 (condemning the distorting effect of using standing doctrine to justify refusal to resolve political questions).

253. *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

254. *Id.* at 1449–50.

255. See *Massachusetts v. EPA*, 415 F.3d 50, 54–56 (D.C. Cir. 2005) (Randolph, J.) (avoiding the issue of standing), *rev'd*, 127 S. Ct. 1438 (2007); *id.* at 60 (Sentelle, J., concurring) (contending that the bar on generalized grievances blocked standing); *id.* at 64–67 (Tatel, J., dissenting) (contending that Massachusetts had satisfied constitutional standing



reversed. It split 5–4 on standing; a slim majority ruled that Massachusetts had shown particularized injury; the four dissenters insisted that Massachusetts had raised a generalized grievance that the Constitution, properly understood, commits to the political branches to resolve.<sup>256</sup> Together, the various opinions issued by both courts added up to about seventy pages in the Westlaw reporters, of which about twenty-one, or thirty percent, were devoted to standing.<sup>257</sup> More to the point, given the vast number of parties and amici, it is fair to hazard that attorneys and others must have devoted thousands of hours to standing analysis. No one—it may bear mentioning—is going to get that time back.

Had this Article’s proposal been applied, all of the effort wasted on discussion of constitutional standing would have been saved. Prudential standing would not have posed a serious concern given the absence of any reason to think Massachusetts an unqualified or underqualified litigant. All the litigants, and both courts, could have proceeded simply and directly to the merits. Given that standard administrative law principles required the courts to apply deferential review in any event,<sup>258</sup> adopting this Article’s proposed framework should not have altered the form or outcome of the Court’s merits analysis.

## 2. *Hein v. Freedom from Religion Foundation, Inc.*<sup>259</sup>

The plaintiffs claimed that executive expenditures in support of conferences organized to promote President Bush’s Faith-Based and Community Initiatives violated the Establishment Clause.<sup>260</sup> Just as in *Massachusetts v. EPA*, the courts poured a vast amount of energy into the side-show of standing. To get into federal court, the plaintiffs had invoked the narrow exception to the rule against federal taxpayer standing established by *Flast v. Cohen*.<sup>261</sup> The District Court dismissed on the ground that *Flast* permits challenges only to congressional action.<sup>262</sup> A

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requirements).

256. *Massachusetts v. EPA*, 127 S. Ct. at 1456 (Stevens, J.). *But see id.* at 1467 (Roberts, C.J., dissenting).

257. *Id.* at 1452–58 (Stevens, J.); *id.* at 1464–71 (Roberts, C.J., dissenting); *Massachusetts v. EPA*, 415 F.3d at 54–56, *rev’d*, 127 S. Ct. 1438 (2007); *id.* at 59–60 (Sentelle, J., dissenting in part and concurring in part); *id.* at 64–66 (Tatel, J., dissenting).

258. *See Massachusetts v. EPA*, 127 S. Ct. at 1459–61 (applying *Chevron* framework to EPA’s statutory construction but rejecting it as unreasonable); *id.* at 1462–63 (applying arbitrariness review to EPA’s policy rationale for refusing to initiate rulemaking). *Cf. id.* at 1471–77 (Scalia, J., dissenting) (applying *Chevron* to uphold EPA’s statutory construction).

259. 127 S. Ct. 2553 (2007).

260. *Id.* at 2559.

261. 392 U.S. 83, 105–06 (1968).

262. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2561 (2007) (plurality) (discussing *Freedom from Religion Found., Inc. v. Towey*, No. 04-C-381-S, 2005

Seventh Circuit panel produced two splendid opinions that reached opposite results on this point.<sup>263</sup> Denying rehearing en banc, two judges wrote opinions explaining that the law made so little sense that no one other than the Supreme Court could fix it.<sup>264</sup> At the Supreme Court, (a) Justice Alito, writing for a three-Justice plurality, ruled that the plaintiffs lacked standing because *Flast* did not apply; (b) Justice Scalia, writing for himself and Justice Thomas, demanded that *Flast* be overruled because it violates the bar on generalized grievances; and (c) Justice Souter, writing for a four-Justice dissent, contended that standing existed under *Flast*; there is no constitutional bar on generalized grievances; and standing for intangible harms requires nuanced, case-by-case analysis.<sup>265</sup> The upshot of this fractured decision was to immunize executive spending that mixed church and state in a potentially suspect way from Establishment Clause scrutiny.

Had this Article's approach been taken, none of the preceding debates over the strange metaphysics of injury would have been necessary. No one had been more directly harmed than the plaintiffs by the government's support for the conferences; therefore, prudential standing would not have demanded dismissal in favor of a better plaintiff. The plaintiffs did not challenge government action that targeted their interests in some way the law regards as distinct. Rather, the plaintiffs had asserted a shared public interest in blocking executive officials from violating the Establishment Clause. In the absence of concerns that the government was arbitrarily targeting distinct legal interests of the plaintiffs, the judicial function could be safely limited to determining whether the policy decision to support the conferences was consistent with some reasonable understanding of the Establishment Clause. Had the Court adopted this approach, it would have elucidated that constitutional provision instead of immunizing the government from its force.

## CONCLUSION

By far the most important conflict regarding constitutional standing revolves around its relation to separation of powers. This conflict has been percolating at the Court for many decades but has taken on new

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U.S. Dist. LEXIS 39444 (W.D. Wis., Nov. 15, 2004)).

263. *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 994 (7th Cir. 2006) (Posner, J.), *rev'd sub nom.* *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007); *id.* at 998 (Ripple, J., dissenting).

264. *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 990 (7th Cir. 2006) (Easterbrook, J., concurring); *id.* (Flaum, C.J., concurring).

265. *See supra* Part I.C.3 (discussing the Justices' opinions in *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007)).

significance with the accession of Chief Justice Roberts and Justice Alito. As the 2007 *Lance–Massachusetts–Hein* troika demonstrates, four Justices are now firmly committed to restrictive standing’s view that separation of powers bars plaintiffs with generalized grievances.<sup>266</sup> Demonstrating the potential power of this approach, these four were willing to apply restrictive standing to block judicial review of the legality of EPA’s failure to regulate greenhouse gas emissions in part because global warming hurts *everyone*.<sup>267</sup> Four other Justices, adherents to what one might call “permissive standing,” seem committed to the view that the fundamental point of constitutional standing is to preserve the adversarial process by insisting on concrete injuries—a standard that does not block plaintiffs who come to court with widely shared, generalized grievances.<sup>268</sup>

Examination of this clash reveals that neither faction’s approach is justified. This Article therefore concludes—like many before it—that the courts should abandon constitutional standing’s project of barring judicial access based on an injury screen that is indeterminate and contentious, lacks compelling historical foundations, and has no obvious grounding in constitutional text. The separation-of-powers concerns that motivate restrictive standing do, however, justify a framework for judicial deference that is sensitive to the degree of judicial intervention needed to ensure the lawfulness of government conduct while maximizing respect for the political branches’ policymaking authority. The need for close judicial scrutiny of official action is especially acute where such action targets the legally distinct interests of vulnerable individuals or groups. In a public action, where a plaintiff seeks to enforce a shared legal interest belonging equally to all members of the public at large, concerns over unequal treatment recede. In the absence of such concerns, courts resolving public actions should—just as Professor Jaffe suggested almost fifty years ago—grant relief against the government only to enforce a clear legal duty.<sup>269</sup>

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266. See *supra* Part I.C (discussing standing analysis in *Lance v. Coffman*, 127 S. Ct. 1194 (2007) (per curiam); *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007); *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007)).

267. *Massachusetts v. EPA*, 127 S. Ct. at 1463, 1467 (Roberts, C.J., dissenting; joined by Scalia, Thomas, and Alito, JJ.).

268. *Freedom from Religion Found.*, 127 S. Ct. at 2584–88 (Souter, J., dissenting; joined by Stevens, Ginsburg, and Breyer, JJ.).

269. Jaffe, *supra* note 6, at 1305–06.