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Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine

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Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine

HEATHER ELLIOTT*

The Supreme Court's Article III standing doctrine has plagued liberal groups for nearly forty years. Recently, however, the doctrine has blocked a number of conservative lawsuits opposing gay marriage, the 2010 health care law, and the expansion of federal funding for stem cell research.

What can we learn from these cases? Because contemporary criticisms of standing doctrine have usually come from the left and defenses from the right, it is commonplace to associate arguments for broad standing with left-wing political agendas. But, as some scholars have shown, a version of narrow standing helped liberals protect New Deal legislation in the 1930s and 1940s. Perhaps, if the doctrine keeps both liberals and conservatives out of court, liberals will find less to criticize in the doctrine.

But if one truly believes that the federal courts should be open to more plaintiffs, one should see that these cases present a strange-bedfellows moment that might persuade a majority of the Court to alter existing standing doctrine. Liberal members of the Court generally advocate for a more expansive doctrine of standing; conservative members of the Court usually support restrictive standing doctrine, but their interest in reaching the merits of certain cases may lead them to agree to certain reforms. In this Article I address that prospect as well as the possibility that Congress might enact legislation to force the standing question.

If the Court seizes the opportunity to reform standing doctrine, what are its options? Will changes to the doctrine affect all plaintiffs? Or are these recent examples of conservative impact litigation different in kind from the cases that generated current standing doctrine? In answering these questions, I review recent suggestions for amending the doctrine. I conclude that these new conservative cases are lamentably unlikely to lead to much change in the law of standing.

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INTRODUCTION

Article III standing doctrine is the bane of environmental and civil rights attorneys.[1] Plaintiffs in federal court must satisfy Article III by showing an injury in fact, fairly traceable to the defendant, and redressable by the remedy sought.[2] The standing of those directly regulated by government action—most often businesses—is usually obvious,[3] but those who benefit from regulation—by breathing less pollution or competing for integrated housing, for example—have a harder time showing standing to sue.[4] Thus, standing is often seen as favoring conservative interests over liberal[5] ones.[6]

In a number of recent cases, however, standing doctrine has barred court access for conservative plaintiffs in lawsuits challenging gay marriage, the 2010 health care law, and the recent expansions in federal funding for stem cell research.[7] Litigators for these conservative causes[8] now feel the frustration often felt by liberal

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1. *See infra* Part I.B.
2. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
3. *See id.* at 561–62.
4. *See id.* at 562.
5. I use the term "liberal" despite its current anathematic status, *see* Roger Cohen, *The New L-Word: Neocon*, N.Y. TIMES, Oct. 4, 2007, at A29 ("A few years back, at the height of the jingoistic post-9/11 wave, the dirtiest word in the American political lexicon was 'liberal.'"), and despite the term's older links to libertarian political thought. *See, e.g.*, ISAIAH BERLIN, LIBERTY (2002); *see also* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1454 (1988) ("A basic tenet of liberalism is the primacy of the individual as the focus of the political and moral world." (citation omitted) (citing ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975))). I also acknowledge that neat lines cannot be drawn between "conservatives" and "liberals" on many issues. *See, e.g.*, *infra* note 56.
6. *See, e.g.*, Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 324–30 (2002) (recounting abuse of standing doctrine to, for example, help white plaintiffs and wealthy plaintiffs and to harm black plaintiffs, indigent plaintiffs, and imprisoned plaintiffs).
7. *See infra* Part II.
8. Conservatives continue to use the full panoply of political and legal tools. *See, e.g.*,

litigators: standing doctrine has barred the federal courthouse door to right-wing impact litigation,[9] just as it has so often for the left.[10]

What can we learn from these cases? Arguments to broaden standing are generally made by those on the left; such critics wish to ensure that the courts can enforce laws against, for example, environmental degradation and racial and gender discrimination.[11] But would these critics want a broader standing doctrine if that doctrine enlisted the courts in enforcing laws against gay marriage[12] or in preventing stem cell research on pro-life grounds?[13] Perhaps instead these cases support a liberal argument for the current restrictive standing doctrine. As some scholars have shown, standing doctrine served liberal purposes in the New Deal and its immediate aftermath.[14] These new cases may suggest that the doctrine can play a liberal role again by closing the door of the courts to conservative plaintiffs (and thus preventing judgments for those plaintiffs on the merits).

But given the ample and convincing criticisms of current standing doctrine,[15] perhaps the better view is that these new cases present an opportunity for reform. Members of the Court might form unusual coalitions, with conservatives motivated by the merits of these new cases to recognize the need for broadened standing doctrine and liberals seizing the moment to implement long-desired changes.[16] Will the Court take this opportunity? And what will it do?

Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599 (2005).

9. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1311 (1976).

10. Impact litigation for conservative causes is not new; the Pacific Legal Foundation (PLF), for example, has been filing such lawsuits since 1973. *See* PACIFIC LEGAL FOUNDATION, http://www.pacificlegal.org/page.aspx?pid=262. Nor is the standing issue a wholly new one for conservative litigants. *See* Diamond v. Charles, 476 U.S. 54, 66 (1986) (holding that a physician with strong personal feelings but no particular and concrete interest in anti-abortion law had no standing to defend the constitutionality of the law, because "Article III requires more than a desire to vindicate value interests" (citation omitted)). But the emergence of standing as a significant barrier to conservative litigation is new, in part because many conservative causes (for PLF, private property rights and free enterprise) fit traditional common-law notions of private rights, thus satisfying the standing doctrine more easily than do liberal causes such as environmental and consumer protection. *See infra* Part II.

11. *See infra* notes 55–81 and accompanying text.

12. *See infra* Part II.A.2.

13. *See infra* Part II.C.

14. *See infra* Part I.A.

15. *See infra* Part I.B.

16. Some are watching closely. *See* Linda Greenhouse, *Who Stands for Standing?*, N.Y. TIMES (Sept. 23, 2010, 9:44 PM), http://opinionator.blogs.nytimes.com/2010/09/23/who-stands-for-standing/ ("Personally, I can hardly wait to watch Chief Justice John G. Roberts, Jr., and his allies, for whom raising the barriers to standing is a core part of their agenda, figure out how to respond when one of the new issues reaches the Supreme Court."); Erwin Chemerinsky, *Who Has Standing to Appeal Prop. 8 Ruling?*, L.A. TIMES (Aug. 15, 2010), http://articles.latimes.com/2010/aug/15/opinion/la-oe-chemerinsky-gay-marriage-20100815 ("Ironically, it is a legal doctrine fashioned by conservatives that may provide a decisive victory to the supporters of marriage equality for gays and lesbians and end the litigation

A decision to grant certiorari in the gay marriage, stem cell, or health care cases would give the Court not only the responsibility of addressing standing doctrine but also (if standing is found) of resolving the merits of the underlying case.[17] Justice Kennedy is the swing vote on both the standing and merits issues of all these cases, and his position is difficult to predict.[18] Although it takes only four Justices to grant certiorari,[19] serious doubt about the fifth vote on the merits[20] may well convince both the liberal and the conservative justices to leave the merits—and hence necessarily a grant of broader standing—for later.

Congress may try to force the issue by enacting statutes that purport to confer standing on particular plaintiffs or groups.[21] Under current Supreme Court doctrine, Congress cannot grant standing exceeding the bounds of Article III,[22] but it can, within those bounds, open the courthouse doors more widely.[23] It can also, of course, pass statutes that it knows do not comport with the Court's current interpretation of Article III, hoping to nudge the Court along.[24] Such political support might make the Court more willing to confront long-noted problems with the standing doctrine.

If the Court decides to revisit the doctrine, what might it do? I take the opportunity these recent cases offer to review new suggestions for altering standing

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over California's Proposition 8.").

As I discuss below, *see infra* Part III.A., my argument need not rely on the members of the Court engaging in naked political calculation rather than thoughtful doctrinal modification. It is quite consistent with good judicial practice to change one's mind when faced with the far-reaching consequences of earlier decisions.

17. As I discuss below, the Supreme Court granted certiorari on November 14, 2011 in the only pending health-care case in which standing has been *conceded* by all parties. *See infra* Part II.B.

18. *See, e.g.*, Erwin Chemerinsky, *When It Matters Most, It Is Still the Kennedy Court*, 11 GREEN BAG 2D 427 (2008); Kenneth M. Murchison, *Four Terms of the Kennedy Court: Projecting the Future of Constitutional Doctrine*, 39 U. BALT. L. REV. 1 (2009).

19. The "Rule of Four" is nowhere codified, but it is the current and longstanding practice of the Court that only four justices need vote to grant certiorari. EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 327 (9th ed. 2007).

20. A simple majority of justices sitting on a case is required for a Supreme Court opinion to have precedential value; recusals may affect both the denominator and the numerator of the simple majority. *Id.* at 5–6. An equally divided Court never creates precedent. *Id.* at 6.

21. *See, e.g.*, Discussion Draft, American Clean Energy & Security Act of 2009, H.R. 2454, 111th Cong. § 336(a) (2009), *available at* http://democrats.energycommerce.house.gov/Press_111/20090331/acesa_ discussiondraft.pdf (draft bill, never adopted in this form, providing broadened standing for climate-change issues).

22. *See* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 182–94 (2011).

23. Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (emphasis in original).

24. Congress already enacts statutes that are unconstitutional, with the comfortable knowledge that the courts provide a backstop. *See* Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 504 (2009).

doctrine. For example, Robert Pushaw, a noted scholar of the federal courts,[25] has recently published an intriguing article on standing doctrine. He suggests limiting standing in certain contexts to those who can show they were accidentally exposed to the action they challenge (thus barring plaintiffs who intentionally create an "injury in fact" in order to establish the right to sue).[26] Jonathan Remy Nash has suggested importing the precautionary principle—an oft-cited principle of international law—into standing decisions on certain issues.[27] The emergence of standing as an issue for conservative litigants offers a new perspective from which to evaluate such suggestions.

I then turn more generally to the tripartite standing test of injury in fact, causation, and redressability and ask how the Court might use these conservative standing cases to effect specific changes. I conclude that the problems faced by conservative litigants are sufficiently similar to those faced by liberals that the solution for both is the same: the Court should abandon its strict constitutional standing doctrine in favor of a prudential doctrine of abstention.[28] I also conclude, regretfully, that the Court is unlikely to take this step.

***

This Article is structured as follows. In Part I, I give a brief overview of standing doctrine and of its standard criticisms, many of which view the doctrine as a tool used by conservative judges to stifle liberal plaintiffs. In Part II, I outline the ways in which standing has recently hindered conservative litigation in a variety of contexts. I then, in Part III, assess the likelihood that the Court will seize on these conservative cases (or on congressional enactments prompted by these cases) to reform standing doctrine. I ask in Part IV what that reform might look like.

I. STANDING AND ITS CRITICS

In this Part, I review Article III standing doctrine and give a brief overview of standing scholarship, much of which has viewed the doctrine as a tool of conservative jurists seeking to suppress liberal litigants.

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25. *See, e.g.*, Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1516–20, 1542–71 (2007); Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165 (2002); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) [hereinafter Pushaw, *Justiciability*]; Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) [hereinafter Pushaw, *Case/Controversy Distinction*].

26. Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 82–105 (2010).

27. Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 511–26 (2008).

28. *See infra* Part III.C; *see also* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 510–16 (2008).

A. The Doctrine

Standing doctrine is rooted in the "case or controversy" provision of Article III.[29] Current doctrine requires a plaintiff to show that she has "suffered an injury in fact—an invasion of a legally protected interest which is . . . concrete and particularized . . . and . . . actual or imminent, not conjectural or hypothetical."[30] That injury must also be "fairly traceable" to the defendant, at least in part, and the remedy sought must redress the injury to some extent.[31] This tripartite test of injury in fact, causation, and redressability is the "bedrock requirement" of constitutional standing.[32] The Court has issued opinions dealing with a variety of special circumstances under the constitutional standing doctrine,[33] including generalized grievances,[34] procedural injury,[35] informational injury,[36] and risk of harm.[37]

The standing test arrived at its current tripartite form in 1978,[38] the result of tightening criteria for Article III standing throughout the 1970s.[39] As recently as

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29. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . ;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

30. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

31. *Id.* at 560–61.

32. Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 471 (1982); *see also* Massachusetts v. EPA, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting) (same).

33. Federal courts must also apply a variety of prudential standing doctrines, which ensure, for example, that the plaintiff is within the zone of interests of the statute he invokes, *e.g.*, Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153–57 (1970), and that the plaintiff does not raise issues better raised by a third party, *see, e.g.*, Tileston v. Ullman, 318 U.S. 44, 46 (1943).

34. *Valley Forge*, 454 U.S. at 475; Warth v. Seldin, 422 U.S. 490, 499–500 (1975); *see* Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 265–66 (2008).

35. *EPA*, 549 U.S. at 516–21.

36. FEC v. Akins, 524 U.S. 11, 24 (1998). For an in-depth discussion of the import of *Akins*, see Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 616 (1999).

37. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009).

38. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 74 (1978).

39. *See* Pushaw, *supra* note 26, at 34–43; *see also generally* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 640–47 (2010) (suggesting rise of public interest litigation in the 1960s as a reason for tightening of standing doctrine in the 1970s); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1139–69 (2009) (recounting history of broad standing in the 1940s through the 1960s and showing the demise of that broad standing by 1976); Cass R. Sunstein, *What's Standing*

1962, the Court framed standing using much freer language: "the gist of the question of standing" is whether "the appellants [have] 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 . . . depends."[40] But the explosion of public-interest litigation in the 1960s, along with changes in the Court's composition, led to increasingly strict standing requirements.[41] The Court over the same period has made it clear that it sees the tripartite standing test not only as assuring "concrete adverseness"[42] (necessary for a court to do its job qua court), but also as maintaining the separation of powers provided by our Constitution's structure (keeping political issues with the political branches and keeping the courts out of legislative versus executive battles).[43]

This recent history—of standing as a barrier to (usually liberal) public-interest litigation which threatens the constitutional separation of powers—overshadows an earlier history, in which standing protected liberal New Deal legislation from the pro-business federal courts.[44] Professors Ho and Ross have stated that, "[r]ather than supporting the conservative goal of keeping broad-based public interest litigation out of court, restrictive standing requirements may originally have achieved precisely the opposite result: preserving and enshrining the liberal New Deal administrative state."[45] As Professor Winter puts it, standing allowed liberal justices to "preclude any dissatisfied private citizen from invoking the Constitution in the courts to challenge the progressive programs enacted by the polity" during the New Deal.[46]

After Lujan*? of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193–97 (1992) (choosing 1975 as date that current restrictive standing doctrine started to emerge). For an analysis linking standing to much earlier efforts at docket control, see Pushaw, *supra* note 26, at 17 n.61.

40. Baker v. Carr, 369 U.S. 186, 204 (1962).

41. Pushaw, *supra* note 26, at 34 ("The [Court's] emerging conservative majority reduced the impact of cases recognizing novel constitutional rights, refrained from creating any new such rights, and construed liberal statutes narrowly. Most importantly, the Court blunted the force of federal laws by making it harder to sue to enforce them. Specifically, the Court began to apply the injury-in-fact requirement more stringently and erected two new Article III hurdles, causation and redressability." (footnotes omitted)).

42. *Baker*, 369 U.S. at 204.

43. Allen v. Wright, 468 U.S. 737, 752 (1984) ("[S]tanding is built on a single basic idea—the idea of separation of powers."); *see* Elliott, *supra* note 28, at 469–74, 475–83, 493–96. Standing is, however, a poor tool for these separation-of-powers functions. *See id.* at 474–75, 483–92, 497–500.

44. *See* Ho & Ross, *supra* note 39, at 639–44; Sunstein, *supra* note 39, at 179–81; Winter, *supra* note 5, at 1456–57.

45. Ho & Ross, *supra* note 39, at 595. Note, however, that Ho and Ross disagree with Sunstein and Winter about the reasons standing doctrine emerged in this period: while Sunstein and Winter contend that the doctrine was invented by liberal justices in order to protect the administrative state during the New Deal, Ho and Ross suggest instead that the standing doctrine emerged originally as a means of docket control and was then seized on as a convenient existing tool during the New Deal. *Compare* Ho & Ross, *supra* note 39, at 634–38, *with* Sunstein, *supra* note 39, at 179–80, *and* Winter, *supra* note 5, at 1374.

46. Winter, *supra* note 5, at 1457; *see also* Pushaw, *Justiciability*, *supra* note 25, at 458–59 ("[Justice] Brandeis's disciple Felix Frankfurter, who became a Justice in 1939, led

B. Standing's Effects on Liberal Impact Litigation

Article III standing doctrine has been criticized extensively. It has been called "incoherent,"[47] "manipulable,"[48] "doctrinal[ly] confus[ed],"[49] a "word game played by secret rules,"[50] and "one of 'the most amorphous [concepts] in the entire domain of public law.'"[51] Critics say that it "reduc[es] the permissible role of Congress in government policymaking,"[52] permits courts to decide the merits by pretending instead to decide a threshold jurisdictional question,[53] and amounts to *Lochner*-style substantive due process.[54]

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a rapidly emerging majority of FDR appointees in fostering the New Deal by minimizing judicial interference with the political departments through the justiciability doctrines. For example, the Court embraced the Brandeisian strategy of invoking justiciability to shield progressive legislation from conservative substantive due process challenges."). *But see* Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995).

47. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221–23 (1988) (describing the doctrine as "incoherent"); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 75 (2007) (describing standing and other justiciability doctrines as "pointless constraint[s] on courts"); *see* Winter, *supra* note 5, at 1418–25 (describing doctrine as lacking a historical foundation).

48. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988).

49. *Id.*

50. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

51. *Id.* at 99 (majority opinion) (quoting *Hearings on S. 2097 Before the Subcomm. on Const. Rts. of the S. Jud. Comm.*, 89th Cong. 498 (1966) (statement of Professor Paul A. Freund)) (internal quotation marks omitted); *see also id.* at 94 (noting that the Case or Controversy provision of Article III has "an iceberg quality, containing beneath [its] surface simplicity submerged complexities").

52. Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170 (1993) (emphasis omitted); *see also id.* at 1201 (calling *Lujan* part of "the evisceration of the principle of legislative supremacy"); David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301, 304 (2007) (Standing doctrine "poses a general constraint on Congress's power to craft enforcement schemes for its regulatory programs."); Nichol, *supra* note 6, at 305 (contending that the injury-in-fact standard "should neither be used to restrict the powers of Congress to authorize jurisdiction, nor to [give scope to] the Justices' own unexamined and unexplained preferences"); Sunstein*, supra* note 39, at 211 ("[T]here is a huge difference between cases reflecting judicial reluctance to invoke the Constitution to challenge legislative outcomes and cases in which Congress, the national lawmaker, has explicitly created standing so as to ensure bureaucratic conformity with democratic will."). *But see* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).

53. *See, e.g.*, Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977).

54. *See, e.g.*, Sunstein, *supra* note 39, at 167 ("[T]he injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process."); *see also* Sunstein, *supra* note 48, at 1480 (arguing that a strict view of standing produces results much like that of the *Lochner* era, "when constitutional provisions were similarly interpreted so as to frustrate regulatory initiatives in deference to private-law

Standing has particularly been criticized by those who see it as a tool used by conservative judges to keep left-wing litigants out of court.[55] This view has evolved in part because many of the cases that produced today's narrow standing doctrine rejected environmental and civil rights plaintiffs on the ground that they lacked standing.[56]

In *Sierra Club v. Morton*,[57] the Court enunciated the now dominant view of standing to protect natural resources such as forests, rivers, and mountains: a plaintiff may legitimately claim injury to his aesthetic and environmental interests, but that plaintiff must personally use the resource; a group's general interest in environmental protection is insufficient for standing.[58] *Lujan v. Defenders of Wildlife* similarly required plaintiffs to show concrete plans to visit and study endangered species, rather than more diffuse interests in the species, to justify standing to sue and thus enforce the Endangered Species Act.[59] Yet, in *Bennett v. Spear*,[60] the Court allowed ranchers to sue under the Endangered Species Act because economic injury they faced due to potential water rationing clearly satisfied Article III.[61] Recent cases raise issues about the level of environmental risk that suffices for standing.[62]

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understandings of the legal system"); Fletcher, *supra* note 47, at 233 ("[O]ne may even say that the 'injury in fact' test is a form of substantive due process."). *But see* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 467–69 (1995) (arguing that Sunstein's view of the *Lochner* era ignores important changes that were taking place in standing for state governments as litigators).

55. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 62 (2008) ("The door to the Supreme Court is held open by the Constitution; Congress, in turn, is to a large extent keeper of the keys to the lower federal courts. In the past half century, however, the courts have increasingly taken it upon themselves to close their doors to parties and complaints that they consider unsuitable for judicial resolution. One of the chief ways of petitioning for redress is through cases brought in our courts. Principal among the tools we use in violation of the constitutional promise of the right to petition is the doctrine of standing." (footnotes omitted)). Standing doctrine has also been criticized from the right. *See, e.g.*, Pushaw, *Justiciability*, *supra* note 25, at 467–72.

56. Some do not see the doctrine as so lopsided. *See* Pushaw, *supra* note 26, at 4 ("Liberal Justices have adopted a relaxed approach to maximize access for plaintiffs seeking to vindicate progressive laws, whereas conservatives have strictly enforced standing rules to keep out ACLU types but have loosened the reins for businesses and other favored plaintiffs."). Moreover, left-wing groups do not have a monopoly on such issues. *See, e.g.*, John Copeland Nagle, *The Evangelical Debate over Climate Change*, 5 U. ST. THOMAS L.J. 53 (2008); Lucia A. Silecchia, *Environmental Ethics from the Perspectives of NEPA and Catholic Social Teaching: Ecological Guidance for the 21st Century*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 659 (2004).

57. 405 U.S. 727 (1972).

58. Silecchia, *supra* note 56, at 734–40.

59. 504 U.S. 555, 562–67 (1992).

60. 520 U.S. 154 (1997).

61. *See id.* at 161–79. Economic injury from water rationing clearly satisfies Article III injury; I highlight *Bennett* as a case that caused consternation among environmental public-interest groups, especially in contrast with *Lujan*. *See, e.g.*, William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 788–89 (1997); Sam Kalen, *Standing on Its*

Standing has also been problematic in civil rights cases. *Allen v. Wright*[63] involved a suit over the IRS's failure to enforce nondiscrimination regulations against segregated private schools.[64] The plaintiffs contended that the IRS's inaction caused a direct injury to the plaintiffs' dignity: the IRS was not taking racial discrimination seriously, and the plaintiffs were injured thereby.[65] But the Court held that the claimed dignitary injury was insufficient to satisfy standing's injury-in-fact requirement: the claimed injury was either a generalized grievance—"an asserted right to have the Government act in accordance with law"[66]—or an "abstract stigmatic injury."[67] The Court also stopped left-wing impact litigation by invoking causation and redressability problems in *Warth v. Seldin*,[68] *Simon v. Eastern Kentucky Welfare Rights Organization*,[69] and *Linda R. S. v. Richard D.*[70] Professor Nichol has argued that, in general, standing doctrine "systematically

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Last Legs: Bennett v. Spear *and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1, 2 (1997).

62. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000). For useful discussions of the debate over probabilistic injury, see generally Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391 (2009); Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009); Cassandra Sturkie & Suzanne Logan, *Further Developments in the D.C. Circuit's Article III Standing Analysis: Are Environmental Cases Safe from the Court's Deepening Skepticism of Increased-Risk-of-Harm Claims?*, 38 ENVTL. L. REP. 10,460 (2008); Cassandra Sturkie & Nathan H. Selzer, *Developments in the D.C. Circuit's Article III Standing Analysis: When Is an Increased Risk of Future Harm Sufficient to Constitute Injury-in-Fact in Environmental Cases?*, 37 ENVTL. L. REP. 10,287 (2007).

63. 468 U.S. 737 (1984).

64. *See id.* at 739–40.

65. *See id.* at 753–54.

66. *Id.* at 754.

67. *Id.* at 755.

68. 422 U.S. 490, 506–07 (1975) (holding that, in a case challenging allegedly discriminatory land use practices in the town of Penfield, "the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and [the] asserted injury" of individual plaintiffs; their situations suggest that their "inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondent's assertedly illegal acts"; also denying standing to a variety of housing organizations who sought to be plaintiffs).

69. 426 U.S. 26, 42–43 (1976) (holding, in a case challenging a charitable tax exemption for a hospital that did not serve the poor, that even if the IRS enforced requirements for the tax exemption, it was merely speculative that the hospital would then provide the plaintiffs with the health care they sought; the hospital might choose instead to forgo charity status).

70. 410 U.S. 614, 618 (1973) (noting that in a case involving a challenge by the mother of an illegitimate child to the prosecutor's policy of prosecuting men for nonpayment of child support only when parents of the child had been married, holding that the mother had a cognizable injury due to nonpayment of child support, but further holding that her injury would not be redressed even if she won her case seeking even-handed prosecution: "if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative.").

favors the powerful over the powerless."[71] In other words, "the power to trigger judicial review is afforded most readily to those who have traditionally enjoyed the greatest access to the processes of democratic government."[72] On Nichol's analysis, whites have easier access to federal courts than do blacks in the race discrimination context (particularly in voting cases); men have easier access than do women in the sex discrimination context; and the privileged generally have easier access than do the underprivileged.[73]

Standing doctrine also builds in an asymmetry in access much lamented by liberal commentators. In *Lujan*, the Supreme Court stated that its Article III standing doctrine gives certain categories of plaintiffs easier access to the federal courts than other categories. When "the plaintiff is himself an object of the action (or forgone action) at issue. . . . there is ordinarily little question that" he has standing.[74] When, however, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."[75] The doctrine thus permits suits by regulated entities (companies or individuals whose activities will be limited by government regulation) more easily than it permits suits by regulatory beneficiaries (those who will benefit from the restrictions imposed by government regulation).

This asymmetry in standing has received some attention.[76] Professor Pierce, for example, focuses on the effects that this asymmetry has inside regulatory agencies.[77] If an agency knows it can be sued, he points out, it has an incentive to avoid the activity that will prompt a lawsuit.[78] Given that standing doctrine makes it harder

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71. Nichol, *supra* note 6, at 304; *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1168 (1993) ("Justice Scalia's view of separation of powers threatens to constitutionalize an unbalanced scheme of regulatory review. . . . The courts can protect the interests of regulated entities, but the interests of 'regulatory beneficiaries' are left to the political process." (footnotes omitted)).

72. Nichol, *supra* note 6, at 333.

73. *See id.* at 322–29. Justice Douglas raised a similar concern when he dissented in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 229 (1974) (Douglas, J., dissenting). In preventing citizens from challenging certain actions under the Incompatibility Clause, Justice Douglas argued that the standing doctrine

> protects the status quo by reducing the challenges that may be made to it and to its institutions. It greatly restricts the classes of persons who may challenge administrative action. Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens.

Id.

74. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992).

75. *Id.* at 562 (citation omitted).

76. *See* Elliott, *supra* note 22, at 172–74; Elliott, *supra* note 28, at 466–67; Fletcher, *supra* note 47, at 222; Nichol, *supra* note 6, at 305; Pierce, *supra* note 52, at 1177–82; Sunstein, *supra* note 36, at 167–68; Tushnet, *supra* note 53, at 663.

77. *See* Pierce, *supra* note 52, at 1194–95.

78. *See, e.g.*, Pierce, *supra* note 52, at 1194–95; Sunstein, *supra* note 36, at 219–20; *see also* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 327 (2008) (noting value of lawsuits in deterring undesirable private conduct).

for regulatory beneficiaries to get into court, the agencies will try to please those who *can* sue: the regulated industry.[79] This, in turn, will facilitate the "capture" of agencies by regulated industry;[80] such "'capture' is a version of the phenomenon the Framers called 'factionalism.' [Standing doctrine thus may] maximiz[e] the potential growth of the political pathology the Framers most feared and strived to minimize."[81]

In general, then, the critics of standing tend to be liberals who lament the high hurdles imposed on plaintiffs who seek to protect the environment, vindicate civil rights, and the like. But recent cases demonstrate that liberal plaintiffs are not the only ones restricted by standing doctrine. Those cases are the subject of the next Part.

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79. Pierce, *supra* note 52, at 1194–95; *see also* Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27, 45 (2003) (comparing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), which rejected the plaintiffs' standing and which "rests on a narrow, grudging, indeed hostile, reading of Congress's citizen-suit provisions," with *Bennett v. Spear*, 520 U.S. 154 (1997), which found standing for ranchers under the Endangered Species Act even though their victory would harm protected species and which may be "a manifestation of greater concern for business interests alleging economic harm from government"). The asymmetry extends to decisions, not just about standing, but also about the availability of judicial review. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 553, 661 (1985) ("The Court's decisions reflect skepticism about the appropriateness of judicial supervision of the regulatory process at the behest of statutory beneficiaries."). *But see* A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen-Suit Provisions of Environmental Legislation*, 12 DUKE ENVTL. L. & POL'Y F. 1 (2001) (contending that it is environmental groups that have the advantage, given generous citizen suit provisions and broad availability of standing).

80. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010) (explaining that capture is the process by which "well-financed and politically influential special interests" overwhelm "the diffuse interest of the general public" and obtain special treatment by agencies); *id.* at 21 n.23 (collecting citations on the literature of capture). For the classic description of such capture, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 127 (2d ed. 1971) ("Since relatively small groups will frequently be able voluntarily to organize and act in support of their common interests, and since large groups normally will not be able to do so, the outcome of the political struggle among the various groups in society will not be symmetrical. . . . [S]mall 'special interest' groups, the 'vested interests,' have disproportionate power."); *id.* at 144 ("Often a relatively small group or industry will win a tariff, or a tax loophole, at the expense of millions of consumers or taxpayers in spite of the ostensible rule of the majority.").

81. Pierce, *supra* note 52, at 1195 (footnote omitted); *see also* Sierra Club v. Morton, 405 U.S. 727, 745–46 (1972) (Douglas, J., dissenting) ("The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.").

II. STANDING AS A BAR TO CONSERVATIVE PLAINTIFFS

In this Part, I outline the ways in which standing has hindered conservative litigation in cases challenging California's ban on gay marriage, challenging the constitutionality of the recently enacted health care law, and challenging changes to the federal stem-cell research program.[82]

A. Gay Rights

A number of state courts have used standing doctrine akin to that under Article III to dismiss conservative lawsuits brought to limit gay rights.[83] The standing issue

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82. Cases have arisen in a variety of other areas, in which standing has been denied to conservative plaintiffs. *See, e.g.*, Glenn v. Holder, 738 F. Supp. 2d 718, 731 (E.D. Mich. 2010) (holding that pastors lacked standing to challenge the criminal provisions of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, which added sexuality as a protected category); Morrison v. Bd. of Educ., 521 F. 3d 602, 610–11 (6th Cir. 2008) (finding that a student opposed to homosexuality on religious grounds lacked standing to challenge school board's ban on making stigmatizing comments about other students' sexual orientation); Daubenmire v. City of Columbus, 452 F. Supp. 2d 794, 812 (S.D. Ohio 2006) (holding that plaintiffs who burned gay-pride flags to protest homosexuality lacked standing to seek injunctive relief against city); Gilles v. Davis, 427 F. 3d 197, 208 (3d Cir. 2005) (holding that plaintiffs who preached against homosexuality on university campus lacked standing to challenge permit requirement imposed by university, when they had never even applied for the permit).

83. Helgeland v. Wisconsin Municipalities, 745 N.W.2d 1 (Wis. 2008) (denying municipalities intervention in suit brought by lesbians seeking same-sex benefits for their partners); Brinkman v. Miami Univ., No. CA2006-12-313, 2007 WL 2410390 (Ohio Ct. App. Aug. 27, 2007) (finding standing lacking for conservatives who sought to prevent public employer from providing benefits to same-sex partners of public employees); William B. Turner, *Chasing Queers: The Radicalism of Conservative Attacks on Lesbians and Gay Men* (May 2008) (unpublished manuscript) (http://works.bepress.com/william_turner/10/) (discussing Alons v. Iowa Dist. Ct. for Woodbury Cnty, 698 N.W.2d 858 (Iowa 2005), which found standing lacking for conservatives who sought to prevent a lesbian couple, who had entered into a civil union in Vermont, from divorcing in Iowa); *see also* John Schwartz, *When Same-Sex Marriages End*, N.Y. TIMES, July 3, 2011, at SR3 (describing efforts of the Texas Attorney General to intervene in two divorces involving gay couples married in states where gay marriage is legal, on the ground that Texas recognizes neither gay marriage nor gay divorce).

A fascinating example is *Rohde v. Ann Arbor Public Schools*, 737 N.W.2d 158 (Mich. 2007), in which the Michigan Supreme Court initially found standing lacking for conservatives who sought to prevent a public employer from providing benefits to same-sex partners of public employees. *Rohde*, 737 N.W.2d at 167. *Rohde* was overruled by *Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686 (2010), when the Michigan Supreme Court recognized that federal standing doctrine had led it astray: cases like *Rohde*

> dramatically distorted Michigan jurisprudence to invent out of whole cloth a constitutional basis for the standing doctrine and then, perplexingly, determined that Michigan's standing doctrine should be essentially coterminous with the federal doctrine, despite the significant differences

has emerged most forcefully, however, in federal lawsuits challenging federal and state bans on gay marriage.[84]

1. California's Gay-Marriage Ban

On November 4, 2008, slightly more than 52% of voters voted yes[85] on Proposition 8 ("Prop 8"), thus amending the California Constitution with the following language: "Only marriage between a man and a woman is valid or recognized in California."[86] That provision became effective the next day.[87] State-court challenges to this gay-marriage ban, alleging conflicts with the California Constitution, failed.[88]

On May 22, 2009, two gay couples (Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey J. Zarrillo) sued then-Governor Arnold Schwarzenegger, then-Attorney General Jerry Brown,[89] and several other California officials in

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> between the two constitutions and the powers held by the respective court systems.

Id. at 692. Under the historical Michigan approach, good law again after *Lansing Schools*, courts apply a prudential (and not constitutional) analysis to determine whether plaintiffs should be able to proceed. *Id.* at 699.

84. *See California Supreme Court to Decide Issue in Same-Sex Marriage Ban Case*, CNN (Feb. 17, 2011, 8:24 AM), http://www.cnn.com/2011/US/02/16/california.proposition.8/ index.html?iref=allsearch; Peter Henderson & Dan Levine, *Gay Marriage Case Back in California Court, Adds Delay*, REUTERS (Feb. 16, 2011, 6:50 PM), http://www.reuters.com/article/2011/02/16/us-usa-gaymarriage-california-idUSTRE71F7UY20110216; Ashby Jones, *With Latest Ruling, Prop. 8 Case Now Officially on Slow Track*, WALL ST. J. L. BLOG (Feb. 16, 2011, 6:12 PM), http://blogs.wsj.com/law/2011/02/16/with-latest-ruling-prop-8-case-now-officially-on-slow-track/; *see also* Pamela S. Karlan, *The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage*, 2010 SUP. CT. REV. 159 (2011).

85. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: 2008 GENERAL ELECTION 7 (2008) [hereinafter STATEMENT OF VOTE], *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

86. CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDE: TEXT OF PROPOSED LAWS 128 (2008), *available at* http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8. Voters had previously enacted Proposition 22, which amended the California Family Code to ban gay marriage. CAL. SEC'Y OF STATE, OFFICIAL DECLARATION OF THE RESULT OF THE PRIMARY ELECTION HELD ON TUESDAY, MARCH 7, 2000, THROUGHOUT THE STATE OF CALIFORNIA ON STATEWIDE MEASURES SUBMITTED TO A VOTE OF ELECTORS x (2000), *available at* http://www.sos.ca.gov/elections/sov/2000_primary/dec_measures.pdf. The California Supreme Court held that the statute created by Proposition 22 violated the California Constitution. *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008), *invalidated by* 207 P.3d 48 (Cal. 2009).

87. STATEMENT OF VOTE, *supra* note 85, at 6–7 ("An initiative . . . approved by a majority of votes thereon takes effect the day after the election." (citing CAL. CONST. art. II, § 10)).

88. Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

89. Brown has now replaced Schwarzenegger as the Governor of California, and Kamala Harris is now the Attorney General of California. Jack Chang, *Kamala Harris Asks Court to Let Gay Marriages Resume*, SACRAMENTO BEE, Mar. 2, 2011, at 4, *available at* 2011 WLNR 4036602.

federal court.[90] The couples contended that the gay-marriage ban instituted by Prop 8 violated the Due Process and Equal Protection Clauses of the Federal Constitution;[91] superstar Supreme Court litigators Theodore Olson and David Boies appeared for the plaintiffs in the district court.[92]

Schwarzenegger, Brown, and the other government defendants refused to defend the ban—indeed, Brown conceded that the ban was unconstitutional[93]—but remained in the case as parties; the district court then allowed those who had promoted the Prop 8 initiative itself ("Proponents") to intervene to defend it.[94] After a lengthy trial, the district court ruled that California's ban on gay marriage denied the gay couples due process and equal protection under the Federal Constitution and enjoined the ban's enforcement.[95]

The plaintiffs had no Article III standing problems. They were injured in fact by California's initiative-imposed barrier to their marriages; their injury would be redressed by a judgment declaring the gay-marriage ban unconstitutional and enjoining its enforcement. Because the government defendants remained parties in the proceedings before the district court,[96] no question arose (at least under Ninth Circuit law) of the intervenors' standing to participate at that level.[97]

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90. Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010), *stay granted*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

91. *Id.* at 927.

92. Olson and Boies famously opposed each other in the Supreme Court case involving the disputed 2000 election between George W. Bush and Al Gore. Bush v. Gore, 531 U.S. 98, 99 (2000). President Bush subsequently appointed Olson as Solicitor General of the United States. Tony Mauro, *Olson Trying on His Morning Coat: After Senate Fight, New Solicitor General Narrowly Confirmed After Surprise Vote*, LEGAL TIMES, May 28, 2001, at 18.

93. *Perry I*, 704 F. Supp. 2d at 928.

94. *Id.*

95. *Id.* at 927.

96. Perry v. Schwarzenegger (*Perry II*), 628 F.3d 1191, 1194 (9th Cir. 2011) (order certifying a question to the Supreme Court of California), *certified question answered*, Perry v. Brown, __ P.3d __, 52 Cal. 4th 1116, No. S189476, 2011 WL 5578873 (Cal. Nov. 17, 2011).

97. Indeed, once the plaintiffs had sued, other plaintiffs without standing could have joined them; if one party satisfies Article III's standing requirement, courts need not inquire into the standing of other parties who seek the same relief. *E.g.*, McConnell v. FEC, 540 U.S. 93, 233 (2003) ("It is clear . . . that the Federal Election Commission . . . has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's." (citing Clinton v. City of New York, 524 U.S. 417, 431–32, n.19 (1998); Bowsher v. Synar, 478 U.S. 714, 721 (1986))), *overruled on other grounds by* Citizens United v. FEC, 130 S. Ct. 876 (2010); *see also* Massachusetts v. EPA, 549 U.S. 497, 518 (2007); Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 52 n.2 (2006).

The circuits are split, however, on whether Rule 24 limits intervention solely to those parties with Article III standing. *See* Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 GA. L. REV. 411, 426–39 (2005) (summarizing circuit split regarding Rule 24 intervention and Article III standing, and arguing that the Supreme Court's position in cases like *Bowsher* suggests there is no strong requirement that Rule 24 intervenors have Article III standing).

But after the district court entered judgment, the government defendants refused to appeal the district court's decision.[98] The Proponents sought to appeal, but with the government parties now gone, the Proponents' standing was problematic under the logic of the Supreme Court's *Arizonans for Official English v. Arizona*.[99] As both the district court and the Ninth Circuit noted,[100] the case suggests (but does not actually hold) that proponents of a ballot initiative do not, by virtue of being proponents, satisfy Article III standards for defending that initiative.[101] What grievance do the Prop 8 Proponents suffer? They are not themselves bound by the district court's injunction—it prevents California state and local officials from denying marriage to gay couples but binds no private actors—and California law does not clearly make them appropriate parties to represent the State of California in federal court.[102] The outrage they feel about gay marriage is the kind of emotion the Court has long said is not sufficient to support standing in the federal courts—a "generalized grievance" that the law is not as it should be or is not being enforced as it should be,[103] without a more concrete injury. Thus they may not have the stake required by Article III.[104]

The Ninth Circuit heard oral argument on both the standing issue and the merits and subsequently certified to the California Supreme Court the following question:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the

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98. *Perry II*, 628 F.3d at 1195.

99. 520 U.S. 43, 66 (1997).

100. Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786 at *1 (9th Cir. Aug. 16, 2010) (order granting motion to stay) (citing *Arizonans*, 520 U.S. at 66); Perry v. Schwarzenegger, 702 F. Supp. 2d 1132, 1135–39 (N.D. Cal. 2010) (order denying motion to stay) (citing *Arizonans*, 520 U.S. at 66).

101. *Arizonans*, 520 U.S. at 66.

102. *Id*. The standing issue here overlaps with more prudential and procedural issues that arise on appellate review. *See, e.g.*, 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3902, at 73 (2d ed. 1991 & Supp. 2011) (noting, for example, that parties may settle a lawsuit, thus making it impossible for an appeal to be had by non-parties).

103. The Court generally "has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." Valley Forge Christian Coll. v. Am. United for Separation of Church & State, 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499–500 (1975)); *see also* Brown, *supra* note 34, at 265–66.

104. *See* Steinman, *supra* note 97, at 419–21; Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 880 (2004).

> initiative, when the public officials charged with that duty refuse to do so.[105]

The California Supreme Court accepted the certified question on February 16, 2011,[106] and heard oral arguments on September 6, 2011.[107] The Court issued its response to the certified question remarkably quickly, finding that the Proponents were proper parties to defend Prop 8: "[W]hen the public officials who ordinarily defend a challenged measure decline to do so, [the California constitution and statutes] authorize the official proponents . . . to participate . . . in a judicial proceeding to assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure."[108] The case has now returned to the Ninth Circuit for decision.

The Proponents also recently challenged the neutrality of now-retired District Judge Vaughn Walker.[109] Judge Walker retired shortly after issuing the opinion ruling California's gay-marriage ban unconstitutional[110] and, soon after his retirement, confirmed what had been an "open secret,"[111] that he is gay.[112] The Proponents argued that Judge Walker should have recused himself from the gay-marriage case on the grounds that his long-term relationship with another man gave him a stake in the outcome for gay marriage—he, like the plaintiffs, wants to get married.[113] They further argued that, because Judge Walker did not recuse himself, his opinion finding California's gay-marriage ban unconstitutional must be vacated. Their argument was rejected by the district court.[114]

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105. *Perry II*, 628 F.3d 1191, 1193 (9th Cir. 2011) (order certifying a question to the Supreme Court of California), *certified question answered*, Perry v. Brown, __ P.3d __, 52 Cal. 4th 1116, No. S189476, 2011 WL 5578873 (Cal. Nov. 17, 2011).

106. Perry v. Schwarzenegger, No. S189476 (Cal. Feb. 16, 2011) (order granting request for certification), *available at* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist= 0&doc_id=1966489&doc_no=S189476.

107. *Supreme Court of California, Oral Argument Calendar, San Francisco and Hastings College of Law Special Session, September 6 and 7, 2011*, CAL. CTS., http://www.courtinfo.ca.gov/courts/calendars/documents/SSEPA11.PDF. A vacancy on the California Supreme Court might have delayed the hearing, but a justice *pro tempore* was appointed. *Id.*

108. Perry v. Brown, __ P.3d __, 52 Cal. 4th 1116, No. S189476, 2011 WL 5578873, at *20 (Cal. Nov. 17, 2011).

109. *Judicial Bias Is Alleged in a Ruling on Marriage*, N.Y. TIMES, June 14, 2011, at A12.

110. Bob Egelko, *Prop 8 Judge on Ruling, Retirement*, S.F. CHRON., Apr. 7, 2011, at A1.

111. *Id.*; *see also* John Schwartz, *Conservative Jurist, with Independent Streak*, N.Y. TIMES, Aug. 6, 2010, at A10.

112. Egelko, *supra* note 110.

113. *Judicial Bias Is Alleged in a Ruling on Marriage*, *supra* note 109.

114. Perry v. Schwarzenegger, 790 F. Supp. 2d 1119 (N.D. Cal. 2011), *certified question answered*, Perry v. Brown, __ P.3d __, 52 Cal. 4th 1116, No. S189476, 2011 WL 5578873 (Cal. Nov. 17, 2011). The district court judge deciding the motion noted that

> [r]equiring recusal because a court issued an injunction that could provide some speculative future benefit to the presiding judge solely on the basis of the fact that the judge belongs to the class against whom the unconstitutional law

Ironically, the recusal argument has given further heft to the arguments against the Proponents' standing. In arguing that Judge Walker should have recused himself, the Proponents contended that a straight judge would have been "unaffected" by the ruling and thus more neutral. But, as observers were quick to point out, the basis for the Proponents' standing is that straight people *must be* affected by gay marriage—and in fact are injured by it.[115] Whether the recusal motion ultimately hurts the Proponents' standing arguments before the Ninth Circuit remains to be seen.

2. The Federal Defense of Marriage Act

Congress enacted the Defense of Marriage Act (DOMA) on September 21, 1996, providing that

> [i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[116]

The General Accounting Office estimated in 2004 that DOMA affects the implementation of 1138 federal laws.[117]

> was directed would lead to a . . . standard that required recusal of minority judges in most, if not all, civil rights cases. Congress could not have intended such an unworkable recusal statute.

Id. at *5. Moreover, "the presumption that 'all people in same-sex relationships think alike' is an unreasonable presumption, and one which has no place in legal reasoning." *Id.* at *11.

115. Ty Bardi, Letter to the Editor, *Prop 8 Backers Hurt Cause*, S.F. CHRON., Apr. 28, 2011, at A11 ("But in saying that a gay judge cannot rule impartially because he has a personal stake in the outcome, whereas a straight judge does not, they are admitting that Prop. 8 does not have any effect whatsoever on heterosexual marriage."); Editorial, *Who's Fit to Judge?; Prop. 8 Backers Say Judge Walker Should Have Recused Himself Because He's Gay. That's Absurd*., L.A. TIMES, Apr. 27, 2011, at A16 ("This claim is absurd on many levels, especially when you remember that ProtectMarriage's case against same-sex marriage is that it threatens the institution of heterosexual marriage. In fact, the group says, that damage gives it the legal status to challenge the initiative, because any married heterosexual is allegedly harmed by same-sex unions. But if that's the case, then by the group's own logic, married heterosexual judges would also be forced to recuse themselves; the integrity of their own marriages could be damaged by the matter before them."); Howard Wasserman, *Picking Your Spots and Arguments*, PRAWFSBLAWG (Apr. 26, 2011, 3:30 PM), http://prawfsblawg.blogs.com/prawfsblawg/2011/04/index.html.

116. Defense of Marriage Act, Pub. L. No. 104-199 § 3(a), 110 Stat. 2419 (2006) (codified at 1 U.S.C. § 7 (2006)).

117. Letter from Dayna K. Shah, Assoc. Gen. Counsel, GAO, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), *available at* http://www.gao.gov/new.items/d04353r.pdf. Note that shortly after this letter, the General Accounting Office became the Government Accountability Office. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811 (2004).

Several challenges to DOMA have been made,[118] and several recent cases have found that the statute violates the rights of gay plaintiffs.[119] The Obama Administration announced on February 23, 2011 that it would no longer defend DOMA in the courts.[120] Attorney General Eric Holder announced that classifications based on sexual preference should be subjected to heightened scrutiny and that, under such scrutiny, DOMA could not survive; the United States, as a consequence, would no longer defend the law in court.[121]

The standing issue arises, again, not because of who challenges the law: the gay plaintiffs argue that DOMA denies them spousal benefits including retirement income, health benefits, and tax benefits—economic harms directly traceable to DOMA that are more than sufficient to support standing. Instead, the standing question arises because of who wishes to defend the law, now that the Justice Department has refused.

House Republicans had ordered the General Counsel of the House to defend the law,[122] but Speaker of the House John Boehner then hired former Solicitor General Paul Clement to defend DOMA.[123] It is unclear whether the House has standing,[124] though it appears that the United States will remain a party to the cases so that standing problems do not prevent the federal courts from reaching the merits of DOMA's constitutionality.[125]

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118. *See, e.g.*, Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004); Mueller v. Comm'r, T.C.M. (RIA) 2001-274 (2001), *aff'd*, 39 F. App'x 437 (7th Cir. 2002).

119. *In re* Golinski, 587 F.3d 901 (9th Cir. 2009); *In re* Levenson, 587 F.3d 925 (9th Cir. 2009); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010); *In re* Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011); *see also* Dragovich v. U.S. Dep't of Treas., 764 F. Supp. 2d 1178 (N.D. Cal. 2011) (rejecting motion to dismiss gay plaintiff's complaint on grounds of failure to state a claim).

120. Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1.

121. *Id.*

122. Carolyn Lochhead, *House GOP Leaders Vote to Defend '96 Marriage Act*, S.F. CHRON., Mar. 10, 2011, at A6.

123. In a widely publicized scandal, Clement left his law firm, King & Spalding, after the firm backed out of the DOMA case under a barrage of criticism; Clement took the case to the firm Bancroft P.L.L.C. Michael D. Shear & John Schwartz, *Law Firm Won't Defend Marriage Act*, N.Y. TIMES, Apr. 26, 2011, at A1.

124. Chris Geidner, *The Right Man: Conservative Attorney Ted Olson Has Become One of the Nation's Most Powerful Voices for Marriage Equality*, METRO WKLY., Mar. 10, 2011, at 6 ("It'll be interesting to see whether [the House has] legal standing to do it. That's a[] tough question." (quoting former Solicitor General Theodore Olson)). In general, individual legislators have great difficulty showing standing to sue, *see* Raines v. Byrd, 521 U.S. 811, 829–30 (1997), but the two houses of Congress may not face the same obstacles, *see* R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This, Anyway?*, 62 NOTRE DAME L. REV. 1 (1986).

125. Geidner, *supra* note 124, at 6; *see also supra* note 97 and accompanying text.

3. What Do These Cases Tell Us About Standing?

The standing issue in the gay-marriage case has received a great deal of media attention.[126] Pro-gay-marriage commentators have urged the Ninth Circuit to hear the merits of the appeal, rather than have it dismissed for lack of standing.[127]

What can we learn from the Proponents' standing problems? It must be emphasized that this case raises the standing issue in an unusual posture. Standing doctrine usually focuses on the plaintiff. The standing of defendants is typically not analyzed, presumably because, assuming that the plaintiff has standing, the defendant risks an adverse judgment and thus has the requisite stake in the litigation that justifies the court's jurisdiction.[128] And a defendant who wishes to appeal an adverse judgment usually has standing to do so: in general, only losing parties may appeal, and therefore the adverse judgment satisfies any requirement of concreteness.[129] But here, the plaintiff won, and the defendants who are bound by the judgment have chosen not to appeal. The Proponents, who do wish to appeal, are *not* bound by the judgment, and their interest in defending the gay-marriage ban is more akin to a generalized grievance than a concrete interest.[130]

Yet if the Proponents cannot appeal, California's initiative process, through which the people can directly amend the California Constitution when the government refuses to act,[131] is arguably stymied by that same government's refusal

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126. One would expect a great deal of coverage in California, and articles have appeared in all major California newspapers. *See* Westlaw Search of USNP Database, Mar. 15, 2011, search of ("Prop 8" & standing) (retrieving *Los Angeles Times*, *San Francisco Chronicle*, *Oakland Tribune*, *Sacramento Bee*, *San Jose Mercury News*, *Orange County Register*, *Stockton Record*, and *Fresno Bee* articles). But the case has also received national attention. *See id.* (retrieving pieces in, for example, the *New York Times*, *Boston Globe*, *Washington Post*, *Chicago Tribune*, *Christian Science Monitor*, *Orlando Sentinel*, and *Charlotte Observer*).

127. Editorial, *Let Appeal of Proposition 8 Proceed*, ALAMEDA TIMES-STAR, Aug. 16, 2010, *available at* 2010 WLNR 16672278 ("While we strongly support same-sex marriage and editorialized against Prop. 8, we believe that such a significant step [as finding the gay-marriage ban unconstitutional] would best be solidified by winning support in the 9th U.S. Circuit Court of Appeals and eventually in the U.S. Supreme Court.").

128. *See* 15A WRIGHT ET AL., *supra* note 102, at 61. The ban on collusive lawsuits takes the defendant's standing (or lack thereof) into account to some extent. *See* Muskrat v. United States, 219 U.S. 346 (1911).

129. ASARCO Inc. v. Kadish, 490 U.S. 605, 618 (1989). The general rule prohibiting appeal by winning parties may be rooted to some extent in a standing concept—"what's it to you?" is a resonant question when a party who has already won the judgment nevertheless seeks to appeal because she is irked by *how* she won. The rule is, however, merely prudential, and may be set aside if the circumstances demand it. *See* Camreta v. Greene, 131 S. Ct. 2020 (2011) (holding that a state employee could appeal ruling involving the definition of constitutional violations, even though the employee had obtained qualified immunity from the lawsuit, because he nevertheless would have to change his behavior to reflect the ruling and thus had Article III standing to appeal).

130. *See supra* notes 34 and 66 and accompanying text.

131. *See generally* Stephen M. Griffin, *California Constitutionalism: Trust in Government and Direct Democracy*, 11 U. PA. J. CONST. L. 551 (2009).

to defend the initiative.[132] To permit ballot initiatives to change the law by direct democratic vote, but to have no mechanism by which those initiatives can be defended in court, makes hollow the promise of direct democracy.

To be sure, the government might refuse to appeal a decision striking down such a democratically imposed law because government actors believe in good faith that no colorable defense can be made of the law,[133] and that is almost certainly what happened here. But the government could equally well decline to defend such a law simply because it is unpopular, or expensive, or irritating. Without judicial review, there is no way to determine whether the democratic will is being improperly thwarted or properly reined in. The California Supreme Court said as much in answering the certified question, holding that the Proponents were proper parties to appeal the district court's decision:

> [I]n instances in which the challenged law has been adopted through the initiative process there is a realistic risk that the public officials may not defend the approved initiative measure "with vigor." This enhanced risk is attributable to the unique nature and purpose of the initiative power, which gives the people the right to adopt into law measures that their elected officials have not adopted and may often oppose.[134]

But how can California *state* law confer *federal* standing on the Proponents? The Court has placed clear limits on the power of Congress to legislate standing. In 1975, the Court stated that "[t]he actual or threatened injury required by Art. III may exist *solely* by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[135] But by 1992 it had made clear that "'[i]ndividual rights' . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. . . . [Our prior cases] involved Congress' elevating to the status of legally cognizable injuries *concrete, de facto injuries that were previously inadequate in law*."[136] Or, put more plainly,

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132. The Ninth Circuit seems likely to affirm the district court's opinion: the proponents put on almost no factual case, *see Perry I*, 704 F. Supp. 2d 921, 930–32 (N.D. Cal. 2010), and Judge Walker's decision invalidating the gay-marriage ban is exhaustive, well-reasoned, and sound.

133. The federal Department of Justice has reached a similar conclusion about the federal Defense of Marriage Act. *See supra* notes 120–21and accompanying text.

134. Perry v. Brown, __ P.3d __, 52 Cal. 4th 1116, No. S189476, 2011 WL 5578873, at *17 (Cal. Nov. 17, 2011) (citation omitted).

135. Warth v. Seldin, 422 U.S. 490, 500 (1975) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)) (emphasis added).

136. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (emphasis added) (citation omitted). To be sure, Justice Kennedy, in his *Lujan* concurrence, stated that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* at 579–80 (Kennedy, J., concurring); *see also* Summers v. Earth Island Inst., 129 S. Ct. 1142, 1153 (2009) (Kennedy, J., concurring); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 126 n.22 (1997) (Stevens, J., dissenting). But the *Lujan* majority states:

> Whether the courts were to act on their own, *or at the invitation of Congress*, in ignoring the concrete injury requirement described in our cases, they would be

"[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[137] How, then, could a California state law confer standing where Congress could not?[138]

One might respond that all this highlights how needlessly complicated our standing doctrine has become. After all, the older *Baker v. Carr* requirement for standing is more than satisfied here: "the appellants allege[] 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[.]"[139] And it seems odd to say that one federal district judge has the final say because California officials have declined to appeal, when what is at stake is a proposition (however misguided) chosen by the majority of California voters at the ballot box. Admittedly, many lawsuits end at the district court level for one reason or another;[140] as I discuss below, however,[141] having a case involving such controversial issues end at the district court because of

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> discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

Lujan, 504 U.S. at 576 (emphasis added).

137. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) (citation omitted); *see also* Summers, 129 S. Ct. at 1151 ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

138. The question has been little addressed. *See* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.14, at 280 (3d ed. 2008).

139. 369 U.S. 186, 204 (1962); *see also* Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (quoting same language from *Baker*); *Lujan*, 504 U.S. at 583 (Stevens, J., concurring) (same); Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 72 (1978) (same). Indeed, in holding that the Proponents were proper parties under California law to appeal the adverse judgment, the California Supreme Court highlighted the benefits to judicial decision making of the Proponents' participation:

> The experience of California courts in reviewing challenges to voter-approved initiative measures over many years thus teaches that permitting the official proponents of an initiative to participate as parties in postelection cases, even when public officials are also defending the initiative measure, often is essential to ensure that the interests and perspective of the voters who approved the measure are not consciously or unconsciously subordinated to other public interests that may be championed by elected officials, and that all viable legal arguments in favor of the initiative's validity are brought to the court's attention.

Perry v. Brown, __ P.3d __, 52 Cal. 4th 1116, No. S189476, 2011 WL 5578873, at *19 (Cal. Nov. 17, 2011).

140. Cases may settle; a losing defendant may decide that appeal is not worth the money; a "losing" defendant may like the reasoning behind the plaintiff's "win" and decide not to appeal, while the "winning" plaintiff is forbidden to appeal, however unhappy she is with the result.

141. *See infra* Part IV.C.

the confusing ins-and-outs of standing doctrine is undesirable and highlights the case for a prudential, rather than an Article III approach to standing.

More abstractly, the Proponents may simply be victims of the usual asymmetry in standing doctrine: those burdened by a law have standing to challenge it; those who benefit from the law's enforcement must meet more specific standing criteria.[142] So one might analogize the Proponents' efforts to defend the California gay-marriage ban against the gay plaintiffs' Equal Protection and Due Process challenges to the efforts of, for example, the San Francisco Baykeeper to defend section 404 of the Clean Water Act against a business's Commerce Clause challenges.[143] Those regulated by the law—gay couples burdened by the ban on gay marriage or businesses burdened by wetlands regulation—clearly have standing to sue.[144] Those benefitting from the law—the Proponents from the prevention of gay marriage and Baykeeper members from the regulation of wetlands—have a more difficult time showing standing.[145]

But surely the *kinds* of benefit at stake in the two cases are different. Assume the federal court determines that section 404 is unconstitutional as applied to that wetland, thus precluding its application to prevent the dredging and filling of the wetland. If I am a person who uses the wetland for recreation (say, bird-watching), and the wetland will disappear because section 404 does not protect it, I will no longer be able to bird-watch there. The Court has long recognized such consequences as injury in fact for standing.[146]

But it is hard to identify any kind of similar harm for the Proponents. Indeed, the Proponents here look much like the plaintiff physician in *Diamond v. Charles*, who sought to defend the constitutionality of an anti-abortion law.[147] The physician lacked standing for a variety of reasons, which boiled down to his objections to

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142. *See supra* notes 74–81 and accompanying text.

143. Section 404 of the Clean Water Act delegates to the Army Corps of Engineers and the Environmental Protection Agency the authority to protect America's wetlands from filling (as when a developer wishes to fill a marshy area in order to build houses across an expanse of land). Clean Water Act, 33 U.S.C. § 1344 (2006). The Corps has interpreted the statute to require permits for even isolated and transitory wetlands, and that interpretation has been challenged repeatedly as inconsistent with Congress's intent in the statute or (if consistent with Congress's intent) unconstitutional as beyond the scope of the Commerce Clause. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 738 (2006) (deciding scope of section 404 on statutory grounds but noting constitutional question); Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) (same).

144. *See Solid Waste Agency*, 531 U.S. at 159 (not even hinting that standing was any question in suit by regulated entities against Corps); *Lujan* 504 U.S. at 561 ("[When] the plaintiff is himself an object of the action (or forgone action) at issue. . . . there is ordinarily little question that [he has standing].").

145. *See Lujan*, 504 U.S. at 562; *see also, e.g.*, Save Ourselves, Inc. v. U.S. Army Corps of Eng'rs, 958 F.2d 659, 662 (5th Cir. 1992) (finding standing lacking for environmental group opposing Corps's actions regarding wetlands).

146. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000); Sierra Club v. Morton, 405 U.S. 727, 744–46 (1972).

147. 476 U.S. 54 (1986).

abortion and his strong feelings that abortion should be illegal.[148] The Court said, "Article III requires more than a desire to vindicate value interests."[149]

As Professor Karlan has recently written, however, the conservative members of the Court may well think that the Proponents have standing. In analyzing an earlier case arising from the Prop 8 litigation, which involved whether the district court proceedings could be televised, the Court "articulate[d] the view that supporters of traditional marriage are at substantial risk of unfair treatment and therefore deserving of special judicial solicitude."[150] Karlan notes that other recent cases reflect similar fears that traditional beliefs are being marginalized.[151]

B. Health Care

1. Challenges to Recent Health Care Legislation

President Obama signed the Patient Protection and Affordable Care Act (PPACA)[152] into law on March 23, 2010.[153] Pejoratively called "ObamaCare,"[154] PPACA (*inter alia*) protects those with pre-existing conditions,[155] creates state-level

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148. *See id.* at 62–67.

149. *Id.* at 66; *see also* Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 465 (7th Cir. 1998) (citation omitted) ("A purely ideological interest is not an adequate basis for standing to sue in a federal court.").

150. Karlan, *supra* note 84, at 181.

151. *Id.* (citing Citizens United v. FEC, 130 S. Ct. 876 (2010)) (applying First Amendment to protect corporate political campaign expenditures); *Citizens United*, 130 S. Ct. at 980–81 (Thomas, J., dissenting) (describing harassment of conservative initiative proponents as the reason Court's decision should have gone further); Doe v. Reed, 130 S. Ct. 2811 (2011) (rejecting a challenge to public records act by conservatives seeking to keep private their signatures on an anti-domestic-partnership referendum petition); *Reed*, 130 S. Ct. at 2823 (Alito, J., concurring in the judgment) ("The widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case."); Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (upholding a public law school's ban on funds for a student group that required members to affirm that only marriage between a man and a woman provided a permissible context for sex); *id.* at 3000, 3010, 3019–20 (Alito, J., dissenting) ("The proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.' Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning." (citation omitted)).

152. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

153. *See* Sheryl Gay Stolberg & Robert Pear, *A Stroke of a Pen, Make That 20, and It's Official*, N.Y. TIMES, Mar. 24, 2010, at A19.

154. Andrew Gelman, Nate Silver & Daniel Lee, *The Senate's Health Care Calculations*, N.Y. TIMES, Nov. 19, 2009, at A35 ("Critics of the health care reform plan often refer to it derisively as 'Obamacare.'").

155. § 1201, 124 Stat. at 154 (amending Public Health Service Act § 2704, 42 U.S.C. § 300gg (2006)).

health insurance exchanges,[156] and (starting in 2014) imposes fines on individuals who have not purchased health insurance policies (the "individual mandate").[157]

Within minutes after the President signed the bill into law, opponents began filing lawsuits arguing that PPACA—in particular, its individual mandate—should be declared unconstitutional.[158] Dozens of lawsuits have been filed challenging the law,[159] and Article III standing has been an issue in almost all of them. Several federal circuits have heard appeals from these cases; some found standing and addressed the constitutionality of PPACA,[160] some found that the state plaintiff

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156. *Id.* §§ 1311–13, 1321–24.

157. *Id.* § 1501.

158. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 (N.D. Fla. 2011) (order granting summary judgment) ("This case, challenging the Constitutionality of [PPACA], was filed minutes after the President signed."), *aff'd in part & rev'd in part*, Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011).

159. *See id.*; Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039 (6th Cir. June 29, 2011); Kinder v. Geithner, No. 1:10-cv-101 RWS, 2011 WL 1576721 (E.D. Mo. Apr. 26, 2011); Peterson v. United States, 774 F. Supp. 2d 418 (D.N.H. 2011); Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011); Bryant v. Holder, No. 10-CV-76-KS-MTP, 2011 WL 710693 (S.D. Miss. Feb. 3, 2011); U.S. Citizens Ass'n v. Obama, 754 F. Supp. 2d 903 (N.D. Ohio 2010); Goudy-Bachman v. U.S. Dep't of Health & Human Servs., 764 F. Supp. 2d 684 (M.D. Penn. 2011), *subsequent opinion at* No. 1:10-CV-763, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (2011); N.J. Physicians, Inc. v. Obama, 757 F. Supp. 2d 502 (D.N.J. 2010), *aff'd*, 653 F.3d 234 (3d Cir. 2011); Liberty Univ. v. Geithner, 753 F. Supp. 2d 611, (W.D. Va. 2010), *vacated*, No. 10–2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011); Shreeve v. Obama, No. 1:10-CV-71, 2010 WL 4628177 (E.D. Tenn. Nov. 4, 2010); Anderson v. Obama, No. Civ. PJM 10-17, 2010 WL 3000765 (D. Md. July 28, 2010); Baldwin v. Sebelius, No. 10CV01033 DMS (WMC), 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010), *aff'd*, 654 F.3d 877 (9th Cir. 2011), *cert. denied*, 131 S. Ct. 573 (2010); *see also* Independent Am. Party of Nev. v. Obama, No. 2:10-cv-1477 JCM (GWF) (D. Nev. Mar. 7, 2011); Complaint for Declaratory and Injunctive Relief, Pruitt v. Sebelius, No. 6:11-cv-00030-RAW (E.D. Okla. Jan. 1, 2011); Complaint, Purpura v. Sebelius, No. 3:10-cv-04814-FLW-DEA (D.N.J. Sept. 20, 2010); Complaint, Calvey v. Obama, No. 5:10-cv-00353-R (W.D. Okla. Aug. 6, 2010); Complaint for Declaratory Judgment and Injunctive Relief, Sissel v. U.S. Dep't of Health & Human Servs., No. 1:10-cv-01263-RJL (D.D.C. July 26, 2010); Complaint, Fountain Hills Tea Party Patriots, L.L.C. v. Sebelius, No. 2:10-cv-00893-DKD (D. Ariz. Apr. 22, 2010); Petition for Declaratory Judgment and Preliminary Injunctive Relief, Peterson v. Obama, No. 1:10-cv-00170-JL (D.N.H. May 4, 2010); Complaint, Van Tassel v. United States, No. 1:10-cv-00310-TDS-PTS (M.D.N.C. Apr. 22, 2010); Class Action Petition for Injunctive and Declaratory Relief, Burlsworth v. Holder, No. 4:10-cv-00258-SWW (E.D. Ark. Apr. 27, 2010); Complaint for Declaratory and Injunctive Relief, Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius, No. 1:10-cv-00499-RJL (D.D.C. Mar. 26, 2010); Complaint, Bellow v. Sebelius, No. 1:10-cv-00165-RC-KFG (E.D. Tex. Mar. 24, 2010); NATIONAL HEALTH LAW PROGRAM, HEALTH REFORM LITIGATION CASE SCHEDULING (Feb. 22, 2011) (citing Complaint, Coons v. Geithner, No. 2:10-cv-01714-GMS (D. Ariz. Aug. 12, 2010)).

160. Thomas More Law Ctr. v. Obama, 651 F.3d 529, 536 (6th Cir. 2011), *petition for cert. filed*, No. 11-117 (U.S. July 26, 2011) (holding that plaintiffs had standing because "the

lacked standing to sue,[161] and one found the challenge violative of the Anti-Injunction Act.[162]

The cases involve several categories of plaintiffs, and hence a number of different arguments about standing:

- Individuals who contend that the individual-insurance mandate injures them (1) by exposing them to threat of penalty in 2014 if they do not have health insurance then, and/or (2) by forcing them to make financial adjustments now in preparation for the imposition of the mandate in 2014. In cases where the plaintiff alleged only the former injury, the courts have typically held that it was an insufficient injury for Article III purposes.[163] In cases

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impending requirement to buy medical insurance on the private market has changed their present spending and saving habits"; going on to hold, on the merits, that the individual mandate was constitutional); Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1243 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011) (noting that the government defendants had conceded the standing of one plaintiff and thus had made it unnecessary for the court to decide whether other plaintiffs had standing, given that "the law is abundantly clear that so long as at least one plaintiff has standing to raise each claim . . . we need not address whether the remaining plantiffs have standing"; holding, on the merits, that parts of PPACA are unconstitutional (citations omitted)). *Cf.* Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011), *petition for cert. filed*, No. 11-679 (U.S. Nov. 30, 2011) (holding—in an opinion written by Judge Silberman, a Republican appointee—that PPACA's individual mandate is constitutional but providing no Article III standing discussion).

161. Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 269 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420) (holding that Virginia statute purporting to immunize Virginia citizens from PPACA did not create an injury in fact for Virginia to sue regarding the enforceability of its own laws: "[T]he Constitution itself withholds from Virginia the power to enforce the VHCFA against the federal government. . . . This non-binding declaration does not create any genuine conflict with the individual mandate, and thus creates no sovereign interest capable of producing injury-in-fact." (citation omitted)); New Jersey Physicians, Inc. v. President of the United States, 653 F.3d 234, 239–41 (3d Cir. 2011) (finding plaintiffs' complaint barren of allegations that would support standing).

162. Liberty Univ., Inc. v. Geithner, No. 10–2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), *petition for cert. filed*, 80 U.S.L.W. 3240 (Oct. 7, 2011) (No. 11-438) (holding that the plaintiffs' challenge to the individual mandate amounted to a pre-enforcement challenge to a tax, something prohibited by the Anti-Injunction Act, IRC § 7421(a)).

163. *See Kinder*, 2011 WL 1576721, at *5 (noting that plaintiff's term in office expires in 2013, and so his asserted injury—that he would face worse health care choices both as a Missouri employee and as one who hires—was speculative); *Bryant*, 2011 WL 710693, at *10–11 (rejecting uncertainty regarding "what might conceivably occur" as a reason to deny standing, but nevertheless finding standing lacking because the plaintiffs had not alleged enough to show an injury); *Peterson*, 774 F. Supp. 2d at 423–25 (finding plaintiff lacked standing because he qualified for Medicare and thus could not be subjected to penalties under PPACA's insurance mandate); *Baldwin*, 2010 WL 3418436, at *3 (noting that plaintiff Baldwin had failed to allege whether or not he had health insurance and that, regardless, he might take any number of actions that will provide him with insurance before the individual mandate becomes effective in 2014); *New Jersey Physicians, Inc.*, 757 F. Supp. 2d at 506–07 (also denying standing to a doctor because he alleged no concrete harm flowing from PPACA).

where plaintiffs alleged the latter or both forms of injury, courts have ruled that the latter or both were sufficient.[164]

- Employers (including governmental entities such as states) who do not want to be subject to the employer provisions. Again, some courts have held this injury sufficient,[165] others insufficient.[166]
- States qua states. A lower court held that the Commonwealth of Virginia had standing solely as a sovereign entity,[167] an argument that the Fourth Circuit rejected on appeal,[168] and arguments to the same effect have been made in the appeal of the Florida case,[169] though those arguments were found irrelevant on appeal.[170]

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164. *See Thomas More Ctr.*, 2011 WL 2556039, at *3–5 (in the first appellate decision to issue on the merits of PPACA, finding not only that certain plaintiffs had already altered their behavior because of the statute but also that the challenge was ripe regardless: "In view of the probability, indeed virtual certainty, that the minimum coverage provision will apply to the plaintiffs on January 1, 2014, no function of standing law is advanced by requiring plaintiffs to wait until six months or one year before the effective date to file this lawsuit."); *Mead*, 766 F. Supp. 2d at 23–27 (finding standing because the present financial injury to plaintiff was sufficient; also finding the prospective injury sufficient, even though the plaintiff might not be harmed by the mandate, because uncertainty is inevitable in pre-enforcement review of a statute); *Goudy-Bachman*, 764 F. Supp. 2d at 690–92 (same); *Liberty Univ.*, 753 F. Supp. 2d at 624–26 (same); *U.S. Citizens Ass'n*, 754 F. Supp. 2d at 907–08 (same);Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 888 (E.D. Mich. 2010) (same); Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1144–48 (N.D. Fla. Oct. 14, 2010) (order and memorandum opinion on motion to dismiss) (same).

165. *See Florida ex rel. Bondi*, 780 F. Supp. 2d 1256, 1271–73 (N.D. Fla. 2011) (State of Florida had standing as an employer because it would have to either expend funds to satisfy PPACA's mandate or expend funds on penalties under PPACA); *Liberty Univ.*, 753 F. Supp. 2d at 622–26 (holding that plaintiff Liberty University had standing because its health care plan would be deemed insufficient and it would have to spend more on providing health insurance under PPACA).

166. *See Baldwin*, 2010 WL 3418436, at *3 (holding that plaintiff Pacific Justice Institute lacked standing because it made no allegations that it was a large enough organization to be subject to PPACA's employer provisions and that, in any event, it already provided health insurance to its employees that may satisfy PPACA's requirements).

167. *See Virginia ex rel. Cuccinelli*, 702 F. Supp. 2d at 603, 607 ("In the immediate case, the Commonwealth is exercising a core sovereign power because the effect of the federal enactment is to require Virginia to yield under the Supremacy Clause. . . . Federal regulatory action that preempts state law creates a sufficient injury-in-fact." (citation omitted)).

168. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 269 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420).

169. *See* Brief for Appellants, Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (11th Cir. 2011) (No. 11-11021); Opening / Response Brief of Appellee / Cross-Appellant States, Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (11th Cir. 2011) (No. 11-11021); Reply Brief of Appellee Cross-Appellant States, Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (11th Cir. 2011) (Nos. 11-11021, 11-11067). The 11th Circuit heard oral arguments on June 8, 2011.

170. *See* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1243 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011).

- People who are angry about PPACA because they think it is unconstitutional. Courts have consistently ruled that these plaintiffs lack standing.[171]

2. What Do These Cases Tell Us About Standing?

Most of these cases should not surprise those who follow debates about standing; the courts in most of the cases applied fairly ordinary analyses to find that plaintiffs did or did not have standing. Indeed, the Court has very recently granted certiorari in the one case where standing was *conceded*.[172]

Like many famous standing cases, the problems faced by many of the plaintiffs here derive from their failure to plead the right facts.[173] Just as Amy Skilbred was found to lack standing in *Lujan* because she failed to allege concrete plans to travel to see the endangered tigers she sued to protect,[174] here many individual plaintiffs lacked standing because they failed to allege sufficient present-day harm; the plaintiffs who alleged "I have to change my behavior now to prepare for this law's effects" were found to have standing, for the most part, while those plaintiffs who alleged "I don't want to have to pay a penalty in 2014" with nothing more were found to lack standing.[175]

Similarly, those who sued because they were angry about PPACA, with nothing more, lacked standing under straightforward application of standing doctrine. As discussed above,[176] generalized grievances about the content of the law, or about failure to enforce the law, have long been found insufficient to meet the requirements of Article III. Indeed, decades before the current edifice of standing had been erected, the Court was rejecting generalized grievances.[177]

Most interesting is the state qua state standing issue. States are seizing on *Massachusetts v. EPA*, in which the Supreme Court recognized Massachusetts's

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171. *Baldwin*, 2010 WL 3418436, at *3 (to the extent they say they are injured simply by the fact of PPACA's alleged unconstitutionality, "Plaintiffs are simply airing generalized grievances that the Court is precluded from adjudicating" (citation omitted)); *Shreeve*, 2010 WL 4628177, at *4 (same).

172. Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1243 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011) (noting that the government defendants had conceded the standing of one plaintiff and thus had made it unnecessary for the court to decide whether other plaintiffs had standing, given that "the law is abundantly clear that so long as at least one plaintiff has standing to raise each claim . . . we need not address whether the remaining plaintiffs have standing").

173. *See, e.g.*, Pushaw, *supra* note 26, at 5–6 ("Put bluntly, the 'individualized injury' determination often depends on using certain magic words. Such arbitrariness also characterizes the other two Article III standards. First, 'causation' is a discretionary policy judgment about how far back in a related chain of events a court is willing to go. Second, ascertaining whether the requested relief will 'likely' redress the injury involves guesswork about probabilities." (footnotes omitted)).

174. Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64 (1992).

175. *See supra* notes 163–164 and accompanying text.

176. *See supra* note 156 and accompanying text.

177. *E.g.*, Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922).

standing to sue to force the EPA to regulate greenhouse gases.[178] The standing analysis in that case emphasized the quasi-sovereign status of Massachusetts as key to the standing inquiry.[179] The Court, as Justice Stevens wrote for the majority, had long "recognized that States are not normal litigants for the purposes of invoking federal jurisdiction."[180] Oddly, the Commonwealth's sovereign status played no clear role in the subsequent standing analysis.[181] But states are using the *Massachusetts v. EPA* language regarding state sovereignty to support Article III standing in these health care cases[182] and in other efforts.[183] Indeed, one state has filed the anti-*Massachusetts* case: Texas has sued to stop greenhouse gas regulation.[184]

The argument for state standing in the health care cases is problematic, however. In *Massachusetts v. EPA*, despite ample handwaving about state sovereignty, the state's standing was ultimately predicated on harm to state property itself.[185] In *Florida v. Department of Health and Human Services* and *Virginia ex rel. Cuccinelli*, the states claimed injury based on the conflict between their state laws and an allegedly unconstitutional federal law. But, as amici in both cases have pointed out, this argument overreaches. To explain why requires a little background.[186]

States can sue to protect their citizens *in parens patriae* (as the protective parent).[187] The concept originally applied to justify the state's action to protect

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178. *See* 549 U.S. 497 (2007).

179. *Id.* at 518.

180. *Id.* (citing Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

181. *See id.* at 522–23 (focusing on Massachusetts's loss of shoreline thanks to rising sea levels, which is a straightforward injury in fact that could happen to any riparian landowner, state, or individual); *see also id.* at 540 (Roberts, C.J., dissenting) ("It is not at all clear how the Court's 'special solicitude' for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms.").

182. *Virginia ex rel. Cuccinelli*, 702 F. Supp. 2d at 603, 606–07.

183. *See* Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 245 (D. Mass. 2010) (finding standing for Massachusetts to challenge the federal Defense of Marriage Act because "[t]he Commonwealth has amassed approximately $640,661 in additional tax liability and forsaken at least $2,224,018 in federal funding because DOMA bars HHS's Centers for Medicare & Medicaid Services from using federal funds to insure same-sex married couples").

184. *See Texas' Bid to Stop EPA Plan Reaches Washington Court*, FORT WORTH STAR-TELEGRAM, Dec. 31, 2010, 2010 WLNR 25652781 ("Once again the federal government is overreaching and improperly intruding upon the state of Texas and its legal rights." (quoting Tex. Att'y Gen. Greg Abbott)).

185. *See Massachusetts*, 549 U.S. at 526.

186. *See, e.g.*, Brief of Professors of Federal Jurisdiction as Amici Curiae Supporting Defendants-Appellants at 3–4, Florida v. U.S. Dep't of Health & Human Servs., No. 11-11021 (11th Cir. Apr. 12, 2011). For an excellent and thorough discussion of the standing of states, see Woolhandler & Collins, *supra* note 54 (concluding, after a thorough review of the history of state standing—strictly limited in the nineteenth century and incoherently expanded in the twentieth—that state standing should be limited, in part to "reinforce the principle that constitutional rights are held by people, not government").

187. "'This prerogative of *parens patriae* is inherent in the supreme power of every State,

those who could not help themselves—children and incompetents—but expanded to justify the state's action to protect all its citizens in certain circumstances.[188] So, for example, the Supreme Court has recognized the standing of a state to sue another state over natural gas policy[189] and of a state to sue companies for antitrust violations[190] and violations of civil rights laws.[191]

But it has long been settled that states may *not* sue the federal government *in parens patriae*:

> It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate . . . .[192]

On this logic, the federal courts have declined to hear cases brought by states challenging federal laws regarding maternal and infant mortality,[193] transportation,[194] taxes,[195] water pollution,[196] air pollution,[197] and the decision about where to locate the national high-level nuclear waste repository.[198] This limitation derives, the Court has said, from the fundamental purpose of the Constitution: to protect individual rights. "The Constitution does not protect the sovereignty of States for the benefit of the States . . . [but] for the protection of individuals."[199]

Thus, Florida and Virginia would not have standing to sue simply because they allege that their citizens are suffering under the operation of an allegedly unconstitutional federal law, the PPACA. To be able to sue the federal government, a state must show that *it* (and not its citizens) has suffered injury. That injury can

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whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.'"Alfred L. Snapp & Son v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982) (alteration in original) (omission in original) (emphasis in original) (quoting Mormon Church v. United States, 136 U.S. 1, 57 (1890)).

188. *See id.* at 600.

189. *See* Pennsylvania v. West Virginia, 262 U.S. 553, 591–92 (1923).

190. *See* Georgia v. Pennsylvania R.R., 324 U.S. 439, 45–52 (1945).

191. *See Snapp*, 458 U.S. at 607–10.

192. Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923) (emphasis added) (citation omitted).

193. *See id.* at 488–89.

194. *See* Texas v. Interstate Comm. Comm'n, 258 U.S. 158, 160, 165 (1922).

195. *See* Florida v. Mellon, 273 U.S. 12, 18 (1927); *cf.* New Jersey v. Sargent, 269 U.S. 328, 337–39 (1926) (rejecting New Jersey's standing to challenge the Federal Water Power Act, which New Jersey argued would interfere with its own revenue-raising water projects).

196. *See* Michigan v. EPA, 581 F.3d 524, 531 (7th Cir. 2009).

197. *See* Citizens Against Ruining the Env't v. EPA, 535 F.3d 670, 676 (7th Cir. 2008).

198. *See* Nevada v. Burford, 918 F.2d 854, 856–58 (9th Cir. 1990).

199. New York v. United States, 505 U.S. 144, 181 (1992).

occur to the state in its proprietary capacity—as a market participant, for example—and in its sovereign capacity—the ability to create and enforce a criminal code, for example. Florida and Virginia have thus passed statutes that purport to replace the PPACA, or to exempt their citizens from the operation of the PPACA, and they argue that they sue, not *in parens patriae*, but on their own account, to protect their sovereign interests in seeing these laws enforced.

But the Court has given quite uneven treatment to standing based on a state's sovereign interest in seeing its law enforced when a federal law preempts that state law. One might argue that the states gave up the ability to litigate such interests when they entered the Union; those interests are, after all, protected by the state's representatives in the national legislature.[200] While some cases have allowed states to litigate such sovereignty interests against federal officials,[201] the Court has quite strictly parsed the state's claims to make sure the state is not violating the *Mellon* prohibition on litigating the interests of state citizens against the federal government.[202]

Thus, although the district court in Virginia stated that "[f]ederal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy" standing requirements (and the Florida district court wrote in substantially similar terms),[203] the Fourth Circuit disagreed: the statute that Virginia was litigating did nothing more than purport to protect Virginia's citizens from the operation of federal law, which Virginia has no right to do.[204] That the lawsuits further argue that the PPACA is unconstitutional does not change the analysis; it is the individuals who will be regulated by the allegedly unconstitutional law who have standing to challenge it, not the states.

Indeed, as amici pointed out in the appeal of the Florida case, allowing state standing in these circumstances would vitiate Article III standing in many circumstances. "[I]f a putative conflict between state and federal law itself sufficed to satisfy the injury-in-fact prong of standing analysis, there would be no way of ensuring that the challenged federal law actually injured an individual party; the existence of standing would be governed simply by the abstract—and quite possibly hypothetical—conflict between state and federal law."[205]

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200. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) ("[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.").

201. *See* Woolhandler & Collins, *supra* note 54, at 492–94 (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966) and Oregon v. Mitchell, 400 U.S. 112 (1970)).

202. *Id.* (noting certain claims that South Carolina was not permitted to pursue against the federal government because those claims were really held by South Carolina citizens).

203. Virginia *ex rel*. Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 607 (E.D. Va. 2010); *see also* Florida *ex rel*. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1272 (N.D. Fla. 2011).

204. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 269 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420).

205. Brief for Professors of Federal Jurisdiction as Amici Curiae in Support of Appellant at 34, Virginia *ex rel.* Cuccinelli v. Sebelius, No. 11-1057 (4th Cir. Mar. 7, 2011) (citations omitted); *cf.* Woolhandler & Collins, *supra* note 54, at 504.

The Court has found a ready way to avoid creating such a problem for standing doctrine: it has granted certiorari in a PPACA case with no standing question. Thus, the health care litigation will not illuminate these interesting questions of state standing, at least not anytime soon.

C. Stem Cell Research

1. Recent Litigation over Expansion of Stem Cell Research

The National Institutes of Health (NIH) began funding research involving human embryonic stem cells in 2001.[206] Such cells, as their name makes clear, are derived from human embryos, and the destruction of those embryos for research has been a source of great controversy.[207] NIH funding during the Bush administration was restricted to cell lines already in existence as of August 9, 2001; federal funds could not be provided for any research that involved destruction of additional embryos to create stem cells.[208] On March 9, 2009, President Obama asked NIH to issue guidelines for expanded federal funding for human embryonic stem cell research.[209] Final regulations were issued a few months later, providing that individuals who had used in vitro fertilization (IVF) for reproductive purposes could donate excess embryos for use in stem cell research.[210] Because an estimated 400,000 excess embryos exist,[211] the number of stem cell research projects that could be funded by

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206. Doe v. Obama, 631 F.3d 157, 159 (4th Cir. 2011). Such research, it is argued, may lead to major medical and scientific breakthroughs. *See* Stephen R. Latham, *The Once and Future Debate on Human Embryonic Stem Cell Research*, 9 YALE J. HEALTH POL'Y L. & ETHICS 483, 484 (2009) ("Both adult and embryonic stem cells have tremendous potential for exploitation in the development of therapies for disease. . . . [T]hey are of great utility in testing and comparing cellular responses to different drugs and biological materials. Moreover . . . stem cells may become a source of replacement cells for people with cellular diseases like diabetes, Parkinson's and Alzheimer's.").

207. Dan W. Brock, *Creating Embryos for Use in Stem Cell Research*, 38 J. L. MED. & ETHICS 229, 229 (2010) ("Some commentators assign full moral status of normal adult human beings to the embryo from the moment of its conception. At the other extreme are those who believe that a human embryo has no significant moral status at the time it is used and destroyed in stem cell research. And in between are many intermediate positions that assign an embryo some degree of moral status between none and full.").

208. *See* George W. Bush, *Address to the Nation on Stem Cell Research from Crawford, Texas*, 37 WKLY. COMP. PRES. DOC. 1149, 1150–51 (Aug. 9, 2001); *see also* Exec. Order No. 13435, 72 Fed. Reg. 34591 (June 20, 2007).

209. Exec. Order No. 13505, 74 Fed. Reg. 10667 (Mar. 9, 2009).

210. National Institutes of Health Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32170, 32170–71 (July 7, 2009). *See generally* Brock, *supra* note 207, at 231–32 (explaining that many find such donations for stem cell research appropriate because, regardless of such research, "it is typical . . . for fertility clinics to fertilize a number of eggs for potential use in IVF since it is unclear . . . how many will be needed [for] a successful pregnancy. As a result, there are many excess embryos no longer needed for further reproductive use . . . ; these are now typically stored in freezers in IVF clinics"); Gregory Dolin, *A Defense of Embryonic Stem Cell Research*, 84 IND. L.J. 1203 (2009).

211. Brock, *supra* note 207, at 231.

NIH increased dramatically. At least two lawsuits have challenged the expansion of NIH funding.

In the first *Sherley v. Sebelius* case,[212] the plaintiffs included two researchers who worked with adult stem cells, the Christian Medical Association, the class consisting of "all individual human embryos that were created for reproductive purposes, but are no longer needed for those purposes," a Christian adoption agency specializing in the adoption of human embryos, and several couples who wished to adopt human embryos.[213] The district court dismissed the case after finding that all the plaintiffs lacked standing.[214] The D.C. Circuit reversed on the ground that the researchers had standing; as competitors for NIH grants, the researchers were injured because NIH's expansion of funding eligibility to more stem cell research projects "increase[d] . . . competition, [and these] increases . . . will almost certainly cause an injury in fact."[215]

In the second case, *Doe v. Obama*, a suit was brought by Mary Scott Doe (an embryo frozen in cryopreservation), other similarly situated embryos, four couples who wished to adopt embryos, and the National Organization for Embryonic Law

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212. 686 F. Supp. 2d 1 (D.D.C. 2009), *rev'd*, 610 F.3d 69 (D.C. Cir. 2010).

213. *Id.* at 3. A human embryo that is adopted is then implanted in the adoptive mother or a surrogate and, assuming no problems with the pregnancy, carried to term. Such adoptions (1) can occur because the adopting individual finds embryo adoption more affordable than IVF, *see* Alexia M. Baiman, *Cryopreserved Embryos As America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 WM. & MARY J. WOMEN & L. 133, 134 (2009), or (2) can occur as part of a deliberate pro-life strategy linked to efforts to obtain legal recognition of the personhood of embryos, *see* Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 WIS. WOMEN'S L.J. 179, 180 (2003).

214. *Sherley*, 686 F. Supp. 2d at 5–7. The Christian Medical Association asserted only that its purpose was frustrated by NIH funding of human embryonic stem cell research; such frustration is only an "abstract concern." *Id.* at 5 (quoting National Taxpayers Union v. United States, 68 F.3d 1428, 1433 (D.C. Cir. 1995)). The embryos lacked standing because they were not persons under the law. *Id.* at 5–6. The adoption agency and the couples lacked standing because their claimed injury (a lessening in the availability of embryos for adoption) was too speculative—rather than being caused directly by the new NIH guidelines, that injury would be caused by the independent and voluntary decisions of donors, who "must choose between continuing to store the embryos, discarding them, donating them for research, or giving them to an adoption agency involved in embryonic adoption." *Id.* at 5. And the researchers' claim that they were injured by an increase in competition for NIH funding was not supported by the law of competitor standing. *Id.* at 6–7.

215. *See* Sherley v. Sebelius, 610 F.3d 69, 72–74 (D.C. Cir. 2010). The other parties conceded their lack of standing, *id.* at 71, but, once the appellate court decided that the researchers had standing, the other parties would have been able to participate regardless, *see supra* note 97 and accompanying text.

According to the Justice Department, one of the researchers in fact received NIH funding despite the new rules, and the other researcher had never applied for an NIH grant. Defendants' Emergency Motion to Stay Preliminary Injunction Pending Appeal and Request for Immediate Administrative Stay, Sherley v. Sebelius, No. 10-5287 (D.C. Cir., Sept. 8, 2010), *available at* http://www.nih.gov/about/director/stemcell/stay_09082010.pdf; *see also* Greenhouse, *supra* note 16 ("To call their claim to injury-in-fact 'speculative,' as the government's brief does, is an understatement. I would call it incredible . . . .").

(NOEL).[216] Applying the same reasoning used in *Sherley*,[217] the *Doe* court found that the embryos were not legal persons,[218] that NOEL was not injured by "a mere 'conflict between [the] defendant's conduct and [the] organization's mission,'"[219] and that the adoptive parents' injury was caused, not by the government defendants, but by the independent choices of third parties (those individuals who could choose whether to donate embryos for research or for adoption, to keep them frozen, or to dispose of them).[220] The dismissal for lack of standing was affirmed on appeal.[221]

2. What Do These Cases Tell Us About Standing?

The plaintiffs in the stem cell research cases face problems very similar to those faced by environmental plaintiffs in many lawsuits. Environmental plaintiffs who sue to protect endangered species or ecosystems are really suing about the threat to the endangered species or the ecosystem, but the species/ecosystem is not a legal person whose harm is cognizable in the federal courts. Standing thus cannot derive from the harm to that entity itself. Instead, the plaintiff must argue that she depends on the entity for her research or recreation or aesthetic enjoyment.[222]

This awkward misfit between what standing requires and what the lawsuit is really about has led some to urge that Congress give standing to animals.[223] Others have suggested expanding standing to environmental resources generally.[224] Suggestions of this sort date at least to the early 1970s, when Christopher Stone

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216. Doe v. Obama, 670 F. Supp. 2d 435 (D. Md. 2009).

217. *See* Sherley v. Sebelius, 686 F. Supp. 2d 1 (D.D.C. 2009).

218. *Doe*, 670 F. Supp. 2d at 440 (citing Roe v. Wade, 410 U.S. 113, 162 (1973)).

219. *Id.* at 441 (quoting Buchanan v. Consolidated Stores Corp., 125 F. Supp. 2d 730, 737–38 (D. Md. 2001)).

220. *See id.* at 441.

221. Doe v. Obama, 631 F.3d 157, 159 (4th Cir. 2011).

222. Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64 (1992) (finding that plaintiffs lacked standing because their affidavits, while possibly supporting the conclusion "that certain agency-funded projects threaten[ed] listed species . . . plainly contain[ed] no facts . . . showing how damage to the species will produce 'imminent' injury to" the plaintiffs); *see also* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986) (noting that plaintiffs "undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting"); Sierra Club v. Morton, 405 U.S. 727, 735 (1972) ("Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." (footnote omitted)).

223. *See* Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1359–61 (2000); Joanna B. Wymyslo, *Standing for Endangered Species: Justiciability Beyond Humanity*, 15 U. BALT. J. ENVTL. L. 45, 59–65 (2007).

224. *See* Preston Carter, Note, *"If an (Endangered) Tree Falls in the Forest, and No One Is Around . . . .": Resolving the Divergence Between Standing Requirements and Congressional Intent in Environmental Legislation*, 84 NOTRE DAME L. REV. 2191, 2222–36 (2009); Cormac Cullinan, *Do Humans Have Standing to Deny Trees Rights?*, 11 BARRY L. REV. 11 (2008).

published his pathmarking article, "Should Trees Have Standing?"[225] Justice Douglas would have adopted Stone's argument as the law of land, promoting standing for "valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air."[226]

This is not as controversial as it sounds. Not only do we recognize standing for humans who cannot speak for themselves (for example, those whose mental condition makes them incompetent to handle their own affairs, or those who are not old enough to be legally recognized),[227] but we also recognize collectives of humans (corporations, for example) as legal persons.[228] We even recognize *ships* as juridical persons.[229] And we have a clear mechanism for the participation of such entities in court: if they cannot represent themselves, they can be represented by others.[230]

So it would not actually be very hard, legally, to recognize embryos as persons for purposes of standing. Just as environmental plaintiffs argue that animals and trees should have standing, pro-life litigants argue that embryos themselves should have standing. To be sure, and especially to the extent that fetuses are treated the same as *ex utero* embryos, the proposal raises especially controversial issues, with implications not only for stem cell research and embryonic adoption but also for abortion, drug use by pregnant women, and fetal medical therapy.[231]

Particularly interesting in this context is Justice Scalia's perspective. He almost certainly would not agree with the idea of recognizing the standing of "valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees,

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225. *See* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); *see also* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT (3d ed. 2010).

226. Sierra Club v. Morton, 405 U.S. 727, 742–43 (1972) (Douglas, J., dissenting).

227. *See* STONE, *supra* note 225, at 1 (the law has come to recognize, "albeit imperfectly some would say," the personhood of children, "prisoners, aliens, women (especially of the married variety), the insane, African Americans, fetuses, and Native Americans" (footnotes omitted)).

228. *See id.* at 1–2; *see also* Sunstein, *supra* note 223, at 1360–61 (explaining that Congress has conferred legal rights on corporations, trusts, and municipalities).

229. *See* STONE, *supra* note 225, at 1–2 (citing United States v. Cargo of the Brig Malek Adhel, 43 U.S. (2 How.) 210, 234 (1844) ("This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel; which is not the less an offense . . . because it was committed without the authority and against the will of the owner." (quotation marks omitted)); *see also* Sunstein, *supra* note 223, at 1360–61 (ships as legal persons).

230. *See* STONE, *supra* note 225, at 1–2; *see also* Sunstein, *supra* note 223, at 1359.

231. *Compare, e.g.*, Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 WASH. L. REV. 503, 504 (1991) ("Because a fetus is physically dependent upon and resides within the woman carrying it, according such entities independent legal rights threatens the privacy and autonomy of pregnant women."), *with* Sam S. Bails, Note, *Maternal Substance Abuse: The Need To Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1230 (1987) ("[A] guardian *ad liter* can evaluate the risks to the fetus from the mother's conduct, the benefit from any intervention, and the risks to the mother from the intervention.").

swampland, or even air."[232] His view on the standing of animals is, as far as I can discover, unknown. As far as the standing of embryos and fetuses, he has stated that their personhood is not resolved by the Constitution itself,[233] but commentators suggest he would be receptive if Congress recognized fetuses and/or embryos as legal persons.[234]

III. A WINDOW TO REFORM STANDING?

In this Part, I discuss the desirability of granting standing in these conservative impact lawsuits and assess the likelihood that the Court will seize on these conservative cases (or on congressional enactments prompted by them) to reform standing doctrine.

A. Do These Cases Present a Strange-Bedfellows Moment?

These cases might prompt some liberal schadenfreude: "[W]e've suffered under this doctrine for years, and now, to our delight, you are suffering, too." Certainly the news coverage of these issues has sometimes had such a tone.[235] Perhaps these cases provide a reason for liberals to begin to support the current, restrictive standing doctrine. Remember that standing's recent role as a barrier to liberal public-interest litigation was preceded by a period in which progressive causes were *protected* by standing doctrine. In the 1930s and 1940s, standing protected President Roosevelt's New Deal legislation from the pro-business federal courts.[236] Now add to this history the fact that the federal courts are now vastly more conservative than they were in the 1960s and 1970s.[237] Some on the left are

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232. Sierra Club v. Morton, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting); *see also* Minnesota v. Carter, 525 U.S. 83, 98 n.3 (1998) (Scalia, J., concurring) (describing the idea that trees have rights as "druidical").

233. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 982 (1992) (Scalia, J., concurring in part and dissenting in part) ("The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its 'balancing' is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so." (emphasis in original) (discussing Roe v. Wade, 410 U.S. 113 (1973)).

234. Keith S. Alexander, *Federalism, Abortion, and the Original Meaning of the Fourteenth Amendment Enforcement Power: Can Congress Ban Partial-Birth Abortion After* Carhart*?*, 13 TEX. REV. L. & POL. 105 (2008); *cf.* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1322 n.310 (2007).

235. Greenhouse, *supra* note 16.

236. *See* Ho & Ross, *supra* note 39, at 639–44; Sunstein, *supra* note 39, at 179–81; Winter, *supra* note 5, at 1456.

237. *See* Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 879–80 (2008) ("The Supreme Court's increasingly prominent conservative center of gravity coincides with an overwhelmingly conservative set of federal courts of appeals."); Charles H. Whitebread, *The 2005-2006 Term*

concerned that we have entered a new age of conservative jurisprudence.[238] The gay marriage, health care, and stem cell research cases suggest that the doctrine can play a liberal role again, by closing the door of the courts to conservative plaintiffs (and thus preventing judgments for those plaintiffs on the merits).

Of course, this very fact may lead to changes in the doctrine. Professor Stearns has suggested that, if the federal courts become safely conservative, standing doctrine may expand to allow more lawsuits: "Over time, an increasingly conservative Roberts Court will seek to relax the strictest features of standing doctrine to facilitate its broader doctrinal agenda."[239] However, as Professor Stearns himself notes (writing before the 2008 presidential election), "historical events could certainly overtake the predictive thesis on the future direction of standing doctrine, assuming for example that a Democrat is elected President in 2008."[240] Since President Obama, rather than a Republican, was elected, the entrenchment of a conservative Supreme Court has been at least delayed: recent appointees, Justices Sotomayor and Kagan, have kept the seats of Justices Stevens and Souter occupied by liberals.[241]

Nevertheless, Professor Stearns points in an interesting direction. Are liberals right to continue to fight for expanded standing doctrine, if the courts have become increasingly hostile to liberal causes?[242] It is my view that expanded standing doctrine is still the right answer. Given the ample and convincing criticisms of current standing doctrine,[243] and given the widespread arguments for opening the federal courts to more plaintiffs, only the most naked political calculation could lead liberals to argue that standing doctrine is properly applied to conservative impact lawsuits but not to lawsuits involving environmental and consumer protection, civil rights, and the like.

One might thus see these cases as a strange-bedfellows opportunity to persuade a majority of the Court to alter existing standing doctrine. Liberal members of the Court generally advocate for a more expansive doctrine of standing; conservative members of the Court usually support restrictive standing doctrine, but their interest in reaching the merits of certain cases may lead them to agree to certain reforms. Together, liberal and conservative strange bedfellows could cure some of the problems of standing doctrine.

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of the United States Supreme Court: A Court in Transition, 28 WHITTIER L. REV. 3, 6 (2006); Adam Liptak, *The Roberts Court; the Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1.

238. *See* Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 292 (2005) ("I've suspended work on a revision [of my constitutional law treatise] because . . . conflict over basic constitutional premises is today at a fever pitch [due to recent conservative decisions].").

239. Stearns, *supra* note 237, at 880.

240. *Id.* at 882.

241. Joan Biskupic, *Rookies on Bench May Recast Liberal Wing: "Dynamic" Duo of Kagan and Sotomayor Are Adding a Forceful Style of One-Upmanship and Vigor to Supreme Court*, USA TODAY, Mar. 4, 2011, at A9.

242. *See supra* notes 222–26 and accompanying text.

243. *See supra* Part I.B.

B. Will the Court Take the Opportunity?

First, note that the Court has recently declined the opportunity to address standing in the health-care cases by granting certiorari in the one case where standing was conceded by all parties.[244] This is no great loss, as most of the standing issues in these cases are garden variety: individual injury, imminence, and generalized grievances.[245] But the Court has avoided the complicated and interesting standing issue raised by Virginia's suit in her sovereign capacity.[246]

If the Court decides to grant certiorari in the gay marriage or stem cell areas, it must address not only standing doctrine but also (if standing is found) the merits of the underlying cases. The merits of these cases will almost certainly divide the Court along predictable political lines. If the four liberals—Justices Ginsburg, Breyer, Sotomayor, and Kagan—line up on one side on the merits of gay marriage or stem cell research, and the four conservatives—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—line up on the other, Justice Kennedy will be the deciding vote.[247] Thus, even if four Justices would otherwise vote to grant the writ of certiorari,[248] serious doubt about Justice Kennedy's merits vote[249] could prevent grant of the writ: no coalition of four justices would risk granting, given the possibility that Kennedy would join the other four on the merits.

The stem cell cases are unlikely to lead to important standing decisions. After all, they may provide only opportunities for the application of ordinary standing doctrine. The *Sherley v. Sebelius* case, if taken on certiorari, would be at least as likely to be *reversed* for its standing holding based on competitive injury.[250] And the *Doe v. Obama* case, involving suit by the class of embryos that might be donated for research, relied on *Roe v. Wade* for its determination that the embryos were not legal persons.

At the same time, however, the stem cell cases offer an interesting parallel to certain forms of environmental standing.[251] Would liberal justices, tempted by the opportunity to expand environmental standing, make common cause with conservative justices, intent on providing more protection to embryos? This outcome is extremely unlikely, due primarily to the piecemeal approach to juridical personhood. The Court would not make a sweeping proclamation that all entities meeting a certain test were juridical persons; instead, it would (at most) find standing for the entity at issue in the particular case, and the Court is more likely

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244. Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1243 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011).

245. *See supra* Part II.B.2.

246. *See supra* notes 178–99 and accompanying text.

247. *See, e.g.*, Chemerinsky, *supra* note 18; Murchison, *supra* note 18.

248. *See supra* note 19.

249. *See supra* note 20.

250. *See supra* notes 193–202 and accompanying text (noting that one researcher challenging the expansion of stem cell-research funding, and basing standing on the competitive injury she suffered in competing for NIH grants, had *received* funding and thus was not harmed by the regulation, and that the other researcher had never even applied for NIH funding).

251. *See supra* notes 206–10 and accompanying text.

instead to leave the question for Congress's determination. Thus the stem cell-research cases do not make for the kind of strange-bedfellows alliance that might create change in the Court's Article III standing doctrine. It is conceivable that four justices could vote to grant certiorari in the *Doe v. Obama* case (or one like it), hoping to chip away at *Roe*'s view of the embryo and fetus without inviting the political firestorm that a more direct attack on the right to abortion would invite, but to gain a five-vote majority would be difficult: Justice Kennedy, while he joined the majority in striking down partial-birth abortion,[252] and has taken a more lenient view of restrictions on abortion than pro-choice advocates have wished,[253] has never abandoned his support for the right to abortion.[254]

The most likely prospect for standing evolution is the gay-marriage case. If the Ninth Circuit rejects the appeal because the Prop 8 proponents lack standing, would the Supreme Court take the case? The Justices who support the narrow view of standing—Chief Justice Roberts and Justices Scalia, Thomas, and Alito[255]—also (by all accounts) oppose gay marriage.[256] The Justices who support broad standing—Justices Ginsburg, Breyer, Sotomayor, and Kagan—are believed to support gay marriage.

It is widely expected that Justice Kennedy would join the liberal wing of the Court in a case raising the gay marriage issue.[257] But Justice Kennedy has gone back and forth on the standing issue.[258] It is thus possible that the Court would find standing for the Proponents and address the gay-marriage issue on the merits, without making any wholesale changes in standing doctrine.

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252. Gonzales v. Carhart, 550 U.S. 124 (2007).

253. Stenberg v. Carhart, 530 U.S. 914, 956 (2000) (Kennedy, J., dissenting).

254. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

255. *See, e.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 298 (2008) (Roberts, C.J., dissenting, joined by Justices Scalia, Thomas, and Alito).

256. *See, e.g.*, Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 253, 297–98, 303–08 (2006) (discussing established anti-gay-marriage views of Justices Scalia and Thomas and probable anti-gay-marriage views of Chief Justice Roberts and Justice Alito).

257. Justice Kennedy is noted for his divergence from the conservative justices on gay issues. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003); *see also* Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1704 (2010). I am assuming, as does Dean Chemerinsky, that Justices Sotomayor and Kagan would join Justices Ginsburg and Breyer in forming four votes in favor of gay marriage. *Id.* at 1708.

258. It is possible, for example, that the Court's out-of-place argument regarding state sovereignty in *Massachusetts v. EPA*, *see supra* notes 181 and accompanying text, was included to obtain Justice Kennedy's vote for the majority opinion. Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1738 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2039 (2008). And Justice Kennedy has not been clear in his view on Congress's authority to find standing by statute. *See* Elliott, *supra* note 22, at 193–94.

C. Could Congress Force the Issue?

Congress has sometimes taken steps to endow particular parties with standing.[259] As I have recently argued, Congress's power in this respect is limited.[260] While the Court has stated that "the question whether the litigant is a 'proper party to request an adjudication of a particular issue' is one within the power of Congress to determine,"[261] the Court has emphasized that Article III may not be altered by statute.[262]

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259. *See* Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1052–54 (2009) (noting a few bills that would have provided standing "wholesale" and a number of statutes that create private causes of action "retail").

As I have recently discussed, *see* Elliott, *supra* note 22, at 184–85, an early draft of the 2010 climate-change bill would have allowed suit by "any person who has suffered, or reasonably expects to suffer, a harm attributable, in whole or in part, to a violation or failure to act" under the statute; the draft defined harm to "include[] any effect of air pollution (including climate change), currently occurring or at risk of occurring, and the incremental exacerbation of any such effect or risk that is associated with a small incremental emission of any air pollutant . . . , whether or not the effect or risk is widely shared." *See* Discussion Draft, American Clean Energy & Security Act of 2009, H.R. 2454, 111th Cong. § 336(a) (2009), at 527–28, *available at* http://democrats.energycommerce.house.gov/Press_111/20090331/acesa_ discussiondraft.pdf (draft bill, never adopted in this form, providing broadened standing for climate-change issues). Moreover, the draft defined causation very broadly:

> an effect or risk associated with any air pollutant . . . shall be considered attributable to the violation or failure to act concerned if the violation or failure to act slows the pace of implementation of this Act or compliance with this Act or results in any emission of greenhouse gas or other air pollutant at a higher level than would have been emitted in the absence of the violation or failure to act.

Id. Later drafts abandoned this standing provision, *see* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 336 (as introduced in House, May 15, 2009).

The quoted language would have tried to change existing standing doctrine by expanding both injury in fact and causation. Injury in fact is expanded to include not only current effects of air pollution, but also risks of air pollution and incremental increases in such risk, even if not "imminent," which current doctrine requires, *see, e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148 (2009), and even if the risk is minuscule, *compare* Baur v. Veneman, 352 F.3d 625, 634 (2d Cir. 2003), *with* Ctr for Law and Educ. v. U.S. Dep't of Educ., 396 F.3d 1152, 1161 (D.C. Cir. 2005), *and* Shain v. Veneman, 376 F.3d 815, 818 (8th Cir. 2004). This provision of the climate-change bill would also have defined causation much more broadly than the Court has.

260. Elliott, *supra* note 22, at 182–94; *see also* Pushaw, *supra* note 26, at 6 ("Congress's judgments about standing are entitled not to blind obedience but rather to healthy deference. Under my revised approach, courts generally would implement statutory grants of standing, except in rare circumstances where doing so would require them to exceed the bounds of their Article III 'judicial Power' to decide 'Cases' (i.e., actions in which plaintiffs credibly allege that their legal rights have been violated involuntarily because of a fortuitous event beyond their control)." (internal cross-reference omitted)).

261. Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) (emphasis added) (quoting Flast v. Cohen, 392 U.S. 83, 100 (1968)); *see also* Warth v. Seldin, 422 U.S. 490, 500

Congress could nevertheless pass a statute that it knows would fail under the Court's current interpretation of Article III. Legislators, knowing that a statute is unconstitutional under current doctrine, may nevertheless vote for that statute, assuming that the courts will correct any constitutional infirmities or, perhaps, hoping to encourage the courts to change the law.[263] A Congress that wished to push the Court to confront standing's flaws might therefore enact a law conferring broad standing, even though legislators expect pushback from the Court.

And if the Court *agrees* with what Congress says,[264] then a statute might give the Court welcome support. It is quite possible that the current activist House of Representatives could pass a statute conferring standing on conservative plaintiffs—or, as I have noted above, even on embryos and/or fetuses.[265] Assuming for the moment that such a statute would be approved by the Senate and signed into law by President Obama—unlikely, at best—would the Court accept or reject?

The answer here departs from what one might expect, based on the merits of the underlying case. Several members of the Court have asserted their view that control of standing is Congress's to begin with: Justices Ginsburg and Breyer are likely to defer to Congress on the standing issue;[266] we do not know much about what Justices Sotomayor and Kagan would do, but if they follow liberal patterns, they are likely also to defer to Congress. Thus it would require only one Justice—Justice Kennedy, perhaps, or one of the Justices who have articulated strict limits on

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(1975) ("The actual or threatened injury required by Art. III may exist *solely* by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" (emphasis added) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973))).

262. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); *id.* at 1153 (Kennedy, J., concurring) ("This case would present different considerations if Congress had sought to provide redress for a concrete injury giv[ing] rise to a case or controversy where none existed before." (internal quotation marks and citation omitted)); Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); Lujan v. Defenders of Wildlife, 504 U.S. 555, 578, (1992) (stating that Congress may "elevat[e] to the status of legally cognizable injuries *concrete, de facto* injuries that were previously inadequate in law." (emphasis added)); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the Art. III minima . . . ."). *But see* Lujan, 504 U.S. at 580 (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."); Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (quoting Justice Kennedy's *Lujan* concurrence); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 126 n.22 (1998) (Stevens, J., dissenting) (same).

263. *See* Mark Tushnet, *Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?: Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 504 (2009).

264. *See* Elliott, *supra* note 22, at 193 ("Congress would not always lose: it could enact a statute conferring standing, and the Court could uphold it. But *the Court* would decide.") (emphasis in original).

265. *See supra* notes 218–21 and accompanying text.

266. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000).

Congress's authority to grant standing[267]—to accept a congressional statute converting, for example, embryos into juridical persons. This analysis, of course, assumes that the liberal justices would follow their usual views of standing, even if the ensuing litigation would be unpalatable to those justices on the merits.

IV. WHAT WOULD (SHOULD) THE COURT DO?

Given this strange-bedfellows moment, what might the Court actually *do* to standing doctrine? In this Part, I use the lens of the conservative standing issue to evaluate recent suggestions for amending the doctrine. I then turn to the doctrine more generally.

A. Recent Proposals in Light of Conservative Standing Problems

Does the emergence of significant standing problems for conservative impact litigation enlighten us regarding recent standing proposals? After all, if most criticisms of standing doctrine have come from the left (and most defenses from the right), then these recent cases present standing in a very different context. They thus present a helpful lens through which to analyze suggestions for revising the doctrine.

1. Pushaw's "Accidental Standing" Theory

Professor Pushaw has recently published a suggestion for refining standing doctrine[268] that expands on (and alters) his scholarship defining "cases" and "controversies."[269] In 1994, Pushaw argued for a "reformulat[ion]" of justiciability doctrines such as standing, one that took into account the historical difference in meaning between cases and controversies. Controversies, he argued, were traditional bilateral disputes over which judges were to act merely as umpires; justiciability doctrines make sense in that context—if you are going to umpire a dispute, you need to know that a dispute exists.[270] But "cases" were a different animal: they were "a formal cause of action demanding a remedy for the claimed violation of a legal right,"[271] requiring the court to answer "a legal question that transcended the interests of the immediate litigants,"[272] and (given Article III's text) asking the federal courts to expound upon law when federal questions, admiralty, or

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267. *See* Elliott, *supra* note 22, at 193.

268. Pushaw, *supra* note 26.

269. Pushaw, *Case/Controversy Distinction*, *supra* note 25.

270. *Id.* at 519–20. Pushaw further argues that the federal courts in diversity controversies and state-vs.-non-citizen controversies should consider whether federal jurisdiction is even warranted, given the availability of alternative state or administrative fore, *id.* at 520–21, something that goes well beyond current Article III justiciability doctrines.

271. *Id.* at 472.

272. *Id.* at 480 (footnote omitted).

foreign ministers were involved.[273] The key to a case is the need for *legal exposition* from a federal court[274] and the *absence* of any need for a concrete dispute.[275]

In this new piece, he adds a new wrinkle to the analysis of "case," noting that the "original meaning of the word 'case' [was] *a chance occurrence* that invades someone's individual legal rights and thereby gives rise to a cause of action, in which a court's chief function is to expound the law."[276] Thus, he argues, the right plaintiff, under Article III's "Case" provision, is "one whose federal legal rights have been violated *fortuitously* (that is, *involuntarily* as a result of a *happenstance* event or action beyond the plaintiff's control) and who can therefore legitimately trigger the court's expository function."[277] This is quite different from the 1994 article, which would have had the federal courts accept any "case" that had a clearly framed federal issue, with "quality lawyering" and "a well-developed factual record";[278] indeed, Pushaw noted, "public law 'Cases' . . . traditionally could be brought by any citizen."[279]

Pushaw's goal in *Accidental Standing* is to keep out of the federal courts cases that have been manufactured by would-be plaintiffs. Thus, under his test, standing is satisfied "only when it befalls a plaintiff by chance."[280] This would leave the standing of private-law plaintiffs and regulated entities largely undisturbed: "This sort of injury virtually always exists when the violation of a federal law results in a tort, breach of contract, or infringement of property rights."[281]

What does accidental standing do to regulatory beneficiaries? Pushaw recognizes that "the Court will not overrule its precedent recognizing environmental and 'aesthetic' injuries."[282] But plaintiffs claiming such injuries should have to rebut the presumption that they lack the kind of "fortuitous" injury that (Pushaw argues) the word "case" requires:

> Those latter plaintiffs should be able to rebut that presumption only by demonstrating that they suffered distinctive injuries that occurred fortuitously while they were engaging in lawful recreational activity for its own sake—for example, that they visited a national park one day for pleasure and unexpectedly saw illegal conduct that harmed them in a special way. By contrast, standing should be denied to those who, either on their own or at the instigation of a special interest group, go somewhere specifically to look for legal violations to use as a basis to

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273. *Id.* at 496–504.

274. *Id.* at 474–76.

275. *Id.* at 482, 526.

276. Pushaw, *supra* note 26, at 11 (emphasis added); *see also* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 165 n.* (2000) ("Litigation presents courts with the opportunity—and duty—to resolve the underlying issues necessary to deciding those cases, which, by chance, happen to be presented." (citing Pushaw, *Case/Controversy Distinction*, *supra* note 25, at 472 n.133)).

277. Pushaw, *supra* note 26, at 11 (emphasis added).

278. Pushaw, *Case/Controversy Distinction*, *supra* note 25, at 527–28.

279. *Id.* at 530.

280. Pushaw, *supra* note 26, at 12.

281. *Id.*

282. *Id.*

> file a complaint. Such self-inflicted injuries should be treated as a species of feigned claims, which have long been barred.[283]

Note that one might construe this approach as taking *Lujan*'s distinction between regulated entities and regulatory beneficiaries[284] and making it more concretely operative. Those who bring classic "private law" suits[285] and those who are burdened by regulatory action have "cases," understood as accidental happenings, while those who benefit from a law and seek to enforce it presumptively do not have "cases."[286]

Whether a plaintiff can overcome that presumption depends of course on the facts and the law at issue. A plaintiff seeking to enforce the Clean Air Act[287] might easily meet Pushaw's test: breathing contaminated air is presumably the fortuitous incident that Pushaw would require; drinking polluted water, ditto. A plaintiff seeking instead to enforce a provision of the Federal Land Management and Policy Act[288] regarding sales of forest land, on the other hand, would have a hard time: the chances that the plaintiff happened along when the law was being violated are slim to none.

Pushaw's theory, then, recognizes the standing of plaintiffs whose injuries look most like private law injuries.[289] That overlap means that Pushaw's standing theory would reinforce the narrow doctrine that obtains in current doctrine: the federal courts are for those with private-law claims or for those burdened by what someone else did to them, not for those burdened by the government's failure to make someone else do something.[290] But that fit with the accepted wisdom, while perhaps reinforcing the standing issues arising in challenges to the PPACA,[291] makes Pushaw's suggestion unhelpful for the conservative plaintiffs in the gay marriage and stem cell cases. Those plaintiffs, precisely because they are analytically similar

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283. *Id.* at 12–13.

> [T]he presumption . . . should not be rebuttable merely by a plaintiff's assertion that she subjectively felt injured by a defendant's alleged legal violations. Rather, the judicial inquiry should be whether a reasonable person in her situation would have experienced an injury so significant that she would have been motivated to sue. Such an objective test would avoid rewarding hypersensitive plaintiffs.

Id. at 13 (footnote omitted).

284. *See supra* notes 74–75 and accompanying text.

285. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 323 (2008).

286. Pushaw, *supra* note 26, at 12–13.

287. 42 U.S.C. §§ 7401–7671q (2006).

288. 43 U.S.C. §§ 1701–1782.

289. Pollution, after all, was handled under the law of nuisance before state and federal statutory regimes existed. *E.g.*, Denise E. Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10114, 10114 (2008) ("Before the start of the modern environmental era approximately 35 years ago, common law remedies were the primary tool for protecting the environment.").

290. *See supra* Part I.B.

291. *See supra* Part II.B (describing health care lawsuits as fairly typical standing cases).

to the environmental plaintiffs Pushaw would keep out of the courts, cannot satisfy the "accidental" standing theory.

2. Nash's Precautionary Standing

Another recent suggestion arose in the context of environmental law but would potentially address stem cell litigation. Jonathan Remy Nash has recently argued that certain issues involve harms that are "uncertain but . . . potential[ly] . . . large and irreversible."[292] He draws on international law's precautionary principle: "The precautionary principle addresses situations such as this and explains that the absence of certainty in the face of a large risk does not justify inaction."[293] Thus, he argues for "precautionary-based standing" for "cases in which it can be shown that there is uncertainty as to whether irreversible and catastrophic harms may occur."[294]

Nash's suggestion was prompted by *Massachusetts v. EPA*,[295] where a majority of the Court found standing for Massachusetts to challenge EPA's failure to regulate greenhouse gases.[296] In that case, the dissent contended that the science regarding global climate change was uncertain, so that Massachusetts could not meet any of the requirements of the standing test: it could not show it was being or would be harmed by global climate change, nor could it show that EPA's failure to regulate caused any such harm or that EPA's regulation would redress that harm.[297] The majority relied on EPA's concession that global climate change was occurring and was caused by human activity.[298]

But what would the Court have done, Nash asks, if it had been clear to everyone that the science was, in fact, uncertain?[299] Would standing be lacking because of the scientific uncertainty, even though the potential consequences of global climate change are catastrophic and irreversible?[300] Nash suggests that this would be the wrong outcome, since a risk of catastrophic and irreversible harm (even if uncertain) creates the kind of "case or controversy" that should be heard in the federal courts.[301]

Thus, Nash argues, "the 'injury' prong of standing is satisfied where the plaintiff can show that the harm that it might suffer would be catastrophic and irreversible, and that its occurrence is subject to great uncertainty."[302] The theory, if adopted,

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292. Nash, *supra* note 27, at 495.
293. *Id.* at 496.
294. *Id.*
295. 549 U.S. 497 (2007).
296. *Id.*
297. *Id.* at 541 (Roberts, C.J., dissenting).
298. *Id.* at 523 (majority opinion).
299. Nash, *supra* note 27, at 495.
300. *Id.*; *see also* CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES (1999).
301. Nash, *supra* note 27, at 521–24.
302. *Id.* at 511. Nash notes that his proposal could also affect the causation prong of the tripartite test. *Id.* at 511 n.81 ("Courts also might use precautionary standing to find the 'causation' prong to be met where the relevant causal link is subject to uncertainty.").

would obviously provide a good justification for standing to sue in many environmental law cases.

To the extent that stem cell research raises similar concerns, Nash's proposal might also be helpful to conservative plaintiffs. Indeed, it has been suggested that the precautionary principle provides a useful metric for evaluating technologies such as stem cell therapies.[303] The European Group on Ethics used the precautionary principle to recommend against the creation of embryos solely for research.[304] Those seeking federal court review of the Obama Administration's expansion of human embryonic stem cell research might well invoke Nash's suggestion for standing based on the precautionary principle.

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In the end, then, Pushaw's accidental standing theory appears most likely to reinforce existing narrow standing in a way unhelpful to either liberal or conservative plaintiffs. Nash's argument for standing based on the precautionary principle might provide a useful expansion of standing for both liberal and conservative plaintiffs litigating in areas of scientific uncertainty.

B. Specific Changes in the Doctrine

As should now be familiar, the tripartite test of injury in fact, causation, and redressability is the "bedrock requirement" of constitutional standing.[305] What changes to those three parts would emerge if the Court seized the moment presented by these conservative cases?

First, even if the Court tinkered with the elements of the tripartite test, it would seem to have an uphill climb finding standing for the anti-gay-marriage Proponents in the California case. The Court has long precluded litigation by those who litigate only to vindicate their value interests; it has kept such litigants out of the courts not only using the injury in fact limitation[306] but also (before that test became the standard) using limitations on the litigation of generalized grievances[307] or on taxpayer standing.[308] Even though, as Professor Karlan has recently written, a

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303. *See* Daniel Gervais, *The Regulation of Inchoate Technologies*, 47 HOUS. L. REV. 665 (2010); David G. Owen, *Bending Nature, Bending Law*, 62 FLA. L. REV. 569 (2010) (describing certain stem cell research results that raise profound questions of risk and reward).

304. Comm'n of the European Cmtys., *Report on Human Embryonic Stem Cell Research* (Comm'n Staff, Working Paper No. SEC(2003) 441, 2003), *available at* http://ec.europa.eu/research/press/2003/pdf/sec2003-441report_en.pdf.

305. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 471 (1982); *see also* Massachusetts v. EPA, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting).

306. *E.g.*, Diamond v. Charles, 476 U.S. 54, 66 (1986); *see also* Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 465 (7th Cir. 1998) ("A purely ideological interest is not an adequate basis for standing to sue in a federal court." (citation omitted)).

307. Flast v. Cohen, 392 U.S. 83, 106 (1968).

308. Frothingham v. Mellon, 262 U.S. 447, 486–87 (1923).

portion of the Court fears that "supporters of traditional marriage are at substantial risk of unfair treatment and therefore deserving of special judicial solicitude,"[309] I cannot see a way to change the current standing test to allow the Proponents into court.

As I have already noted,[310] the healthcare cases actually involve run-of-the-mill standing. Some plaintiffs suing to challenge PPACA have standing under the ordinary test, some do not. As already noted, the Supreme Court has granted certiorari in a case where the plaintiffs properly argued standing, without any need for change in the doctrine.

The most interesting possibility is raised by the stem cell cases. Those plaintiffs face problems very like those faced by plaintiffs in many environmental lawsuits involving endangered species or ecosystems. Just as the environmental plaintiffs sue to protect the endangered species or the ecosystem, the stem cell opponents sue to protect embryos. But species, ecosystems, and embryos are not legal persons who can suffer cognizable harm, and they thus lack standing, forcing the environmental plaintiff or stem cell opponent to argue her own standing.[311] The Court could therefore recognize these entities as persons for purposes of standing, a move that would dramatically alter access to the federal courts under standing doctrine without much alteration of the doctrine itself. Such a move would, however, be extremely controversial, especially to the extent that fetuses are treated the same as *ex utero* embryos, raising implications for stem cell research, embryonic adoption, abortion, drug use by pregnant women, and fetal medical therapy.[312]

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On this evaluation, the Court appears to face three wholly different cases: one in which mere alterations to the doctrine cannot help; one in which no alterations will be needed; and one in which alterations, while simple, will raise tremendous complications. Is there another option?

C. A Renewed Call for De-Constitutionalizing Standing

I have previously argued that the Article III-grounded standing doctrine should be converted to "a prudential abstention doctrine" that allows the federal courts to "explicitly confront the separation-of-powers issues [they] now address[] implicitly (and confusingly) through standing analysis."[313] The need for this change in standing doctrine is highlighted by the gay-marriage case in California.

As I described above,[314] the Prop 8 case raises the possibility that a federal judge will have declared a ballot initiative—the product of a direct democratic vote—unconstitutional, with no review by a higher court, because the government bound

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309. Karlan, *supra* note 84, at 181; *see also supra* note 150 and accompanying text.
310. *See supra* Part II.B.2.
311. *See supra* note 222.
312. *See supra* note 231 and accompanying text.
313. *See* Elliott, *supra* note 28, at 510, 517.
314. *See supra* Part II.A.

by the ballot initiative has refused to defend it. That refusal might be justified by the unconstitutionality of the ballot initiative, but it might also be an unjustified effort to avoid following the democratic will. How are we to determine whether the democratic will is being improperly thwarted or properly reined in? The older *Baker v. Carr* requirement for standing is more than satisfied here: "the appellants allege[] 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."[315]

At the same time, the Prop 8 case arises in the larger context of civil rights litigation, where "courts should be careful to maintain access for those who cannot expect a fair hearing from the political branches."[316] It is, of course, the gay plaintiffs who are the victims of the political branches here; they won at the district court level, and perhaps that should be the end of it. The Proponents seem to have at best a "generalized grievance" of the type spurned by the courts for decades, and so even under a prudential abstention doctrine the Court might refuse to hear their case. A prudential abstention doctrine might also help the Court manage the stem cell cases by giving some flexibility for dealing with resulting controversies.

These facts merely underline the need for the changes I have advocated elsewhere.[317] The decision whether or not to allow the case to proceed to the higher courts is poorly addressed by the tripartite standing test; the question is multi-faceted and troubling, and raises a number of *prudential* rather than constitutional issues.

CONCLUSION

As I have shown, the Supreme Court's Article III standing doctrine is now an equal-opportunity litigation blocker: both left-wing and right-wing plaintiffs have felt its bite. What do these cases teach us about standing doctrine? One might respond that, if standing doctrine works to keep *those* issues out of the courts, it is not as bad as many have thought. It should be remembered, however, that the very manipulability of the doctrine means that, even though certain conservative litigants are currently losing under standing doctrine, those barriers cannot be relied on.

Nor should they be. These new cases instead present opportunities for the Court to alter existing doctrine in ways long argued for by liberals: the courts should be more broadly accessible, and the strange-bedfellows moment presented by these cases might cause the Court to grant that access. Unfortunately, that moment may not produce the desired changes.

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315. 369 U.S. 186, 204 (1962); *see also* Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (quoting same language from *Baker*); Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (1992) (Stevens, J., concurring) (quoting same language from *Baker*); Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 72 (1978) (quoting same language from *Baker*); *supra* note 138.

316. Elliott, *supra* note 28, at 512.

317. *See* Elliott, *supra* note 28, at 507–17. I must concede, however, that the Court has been "astoundingly impervious" to criticisms of the standing doctrine, to quote a personal communication I had recently with Professor Pushaw.