

FORTUITY AND THE ARTICLE III “CASE”: A CRITIQUE OF
FLETCHER’S *THE STRUCTURE OF STANDING*

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INTRODUCTION	290
I. THE CURRENT STANDING STRUCTURE AND ITS DEFECTS	294
A. <i>The Origins of Modern Standing Doctrine: From the New Deal to the Warren Court</i>	295
B. <i>The Transformation of Standing</i>	298
1. <i>Injury in Fact</i>	298
2. <i>Causation and Redressability</i>	301
3. <i>Standing and Advisory Opinions</i>	302
4. <i>Summary</i>	303
II. FLETCHER’S PROPOSAL: DETERMINING STANDING BASED ON THE PARTICULAR FEDERAL RIGHT AT ISSUE	304
A. <i>Standing to Sue Under Statutes</i>	304
B. <i>Standing in Constitutional Cases</i>	306
1. <i>Standing to Sue Under the Constitution Itself</i>	306
a. <i>Taxpayer Standing</i>	307
b. <i>Causation and Redressability</i>	308
2. <i>Congressional Grants of Standing to Enforce Constitutional Rights</i>	308
C. <i>Summary</i>	311
III. REFLECTIONS ON <i>THE STRUCTURE OF STANDING</i> AT 25	311
A. <i>Post-1988 Precedent</i>	312
1. <i>Standing Based on Statutes</i>	312
a. <i>1988–1998: Rigorous Application of Standing Requirements</i>	312
b. <i>1998–2007: Relaxing Standing</i>	314
c. <i>2009–2013: A Reversion to Strict Standing</i>	316
2. <i>Standing to Enforce the Constitution</i>	317
a. <i>Private Lawsuits</i>	317
b. <i>Special Congressional Grants of Standing</i>	319
B. <i>The Practical Case Against Radical Reform of Standing Doctrine</i>	323

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IV. LIMITING STANDING TO “ACCIDENTAL” PLAINTIFFS.....	324
A. <i>The Historical Meaning of Article III “Cases” and Separation of Powers</i>	324
1. <i>The Linguistic and Historical Evidence About “Cases”</i> ...	325
2. <i>Separation of Powers</i>	326
3. <i>Modern Developments</i>	328
B. <i>Incorporating the Original Meaning of “Cases” into Modern Standing Law</i>	328
C. <i>Statutory Standing</i>	331
D. <i>Standing to Bring Constitutional Claims</i>	337
1. <i>Individual Constitutional Rights</i>	339
2. <i>Collective Constitutional Rights</i>	342
E. <i>Comparing My Approach to Fletcher’s and Answering Potential Objections</i>	346
CONCLUSION.....	347

INTRODUCTION

In law school, I struggled for two years to write a paper on standing to sue in federal courts. I read the major cases, in which the Supreme Court established two main points. First, Article III of the Constitution confines standing to plaintiffs who can show (1) a particularized “injury in fact,” (2) caused by the defendant, (3) that is likely to be redressable.¹ Second, as a matter of prudence, the Court would not permit suits by taxpayers or citizens who set forth “generalized grievances” that the government had not followed the law, unless Congress explicitly granted such standing within Article III limits.² The Justices’ application of the foregoing principles, however, led them to wildly different conclusions. Each standing decision typically contained vehement dissenting opinions (and assorted concurrences), and the results across cases were inconsistent.³

The relevant literature added more heat than light. Scholars were far better at deconstructing standing doctrine than proposing workable solutions. Most often, they accused the Burger and Rehnquist Courts of manipulating standing rules to achieve the conservative goal of shutting out parties who sought either to vindicate their Warren Court-created constitutional rights or to enforce liberal federal statutes, such as those

1. The Court articulated and refined these three standards in a series of cases from 1970 to 1984. *See infra* Part I.B.

2. *See infra* notes 120–132, 155–156 and accompanying text.

3. *See infra* notes 35–39, 50–54, 59–68, 72–85, 96–97, 100–101, 120–136, 143–159, 163–164, 254–255 and accompanying text.

protecting the environment and civil rights.⁴ Unfortunately, these commentators manifested the opposite ideological bias. They usually recommended a return to the approach of the Warren Court, which had creatively applied standing law for the political purpose of maximizing federal court access for liberal plaintiffs.⁵ Standing thus seemed to be inherently indeterminate and prone to partisan chicanery.

When I had almost given up hope, *The Structure of Standing*⁶ appeared. William Fletcher cut through standing’s technical doctrinal clutter and identified the root problem: The Court mistakenly treated standing as a preliminary jurisdictional inquiry in which the same general standards (individualized injury, causation, and redressability) could be applied across all legal areas.⁷ Instead, Professor (now Judge) Fletcher argued that standing “should simply be a question on the merits of plaintiff’s claim” and should therefore focus on the particular provision of substantive law at issue.⁸ For example, if a legal right derives from a statute, Congress—which has exclusive power to create such rights and corresponding duties—should have unlimited authority to determine who is entitled to seek judicial enforcement.⁹ If the plaintiff’s complaint is based on a constitutional clause, however, that provision both grants the legal right and indicates who can sue over alleged violations of it, and Congress cannot confer standing more broadly.¹⁰

Professor Fletcher’s article has earned well-deserved acclaim because it supplied an intellectually coherent framework for analyzing standing, perhaps the most important and confusing doctrine in the federal jurisdiction field. His proposal was simple yet sophisticated, original but not wild-eyed, practical yet attentive to constitutional and jurisdictional theory. Best of all, his approach could be applied in an impartial manner because it urged courts to examine a federal law merely to determine who may sue to enforce it—not to consider its political provenance or whether it is perceived as “liberal” or “conservative.”

4. See, e.g., Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985) (making this accusation); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977) (contending that the Court has set forth unclear standing rules and applied them dishonestly as a surrogate for its view of the substantive merits). This theme has remained popular. See, e.g., Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999) (decrying the politicization of standing doctrine, illustrating that federal courts have reached conflicting results in identical fact situations, and demonstrating that Republican judges are four times as likely as Democratic appointees to deny standing in environmental cases).

5. See, e.g., Nichol, *supra* note 4, at 635–37, 642–59.

6. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

7. *Id.* at 223–24, 232–34, 239, 242–43, 246–47, 250–51, 265–66, 289–91.

8. *Id.* at 223–24.

9. *Id.* at 223–24, 251–65.

10. *Id.* at 224, 265–90.

Professor Fletcher's thesis struck me as so logical that I adopted it wholeheartedly in my early writing on standing.¹¹ Moreover, I have continued to embrace many of his ideas, two of which are especially noteworthy. First, the Court has misinterpreted Article III as importing requirements of particularized "injury in fact," causation, and redressability.¹² Second, standing should depend critically on the statutory or constitutional right at stake.¹³ Nonetheless, I have gradually come to doubt Fletcher's conclusion that federal judges should concentrate *exclusively* on that substantive law, which rests on his assumption that Article III contains no general principles of standing. On the contrary, I submit that Article III's text, drafting and ratification history, and early implementation—materials that Professor Fletcher explicitly declined to consider¹⁴—reveal a basic and universally applicable standing principle.¹⁵

The pertinent section of Article III provides that courts can exercise "judicial Power" to decide "Cases" that arise under the federal Constitution

11. See, e.g., Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 525, 530 (1994) [hereinafter Pushaw, *Case/Controversy*]; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 398, 472–90 (1996) [hereinafter Pushaw, *Justiciability*]; Robert J. Pushaw, Jr., *Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 847–48, 851, 860–89 [hereinafter Pushaw, *Congressional Power*]; Tracey E. George & Robert J. Pushaw, Jr., *How Is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1284–89 (2002); Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory That Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1314–155 (2005); Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1516–19, 1541–71 (2007).

12. See Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 3–6, 17–54 (2010) (echoing the criticism of these three standing elements voiced by Fletcher and other scholars).

13. See *id.* at 68–83 (demonstrating that, for many centuries before 1970, courts in England and America had always granted standing to plaintiffs who could demonstrate that their specific legal rights had been invaded).

14. Fletcher, *supra* note 6, at 224. Coincidentally, his article was published at the same time as an exhaustive history of standing. See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) (tracing the Court's twentieth-century development of standing doctrine and arguing that it conflicts with the Founders' understanding that private parties should be allowed to sue to vindicate public law rights). Professor Winter's monumental work greatly influenced my scholarship. See, e.g., Pushaw, *Justiciability*, *supra* note 11, at 425–72. However, I was prompted to rethink his (and my) position by Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (maintaining that, even though the Framers did not articulate the modern formulation of standing law, they understood that the Constitution circumscribed the ability of private plaintiffs to bring public actions).

15. It is perhaps unfair to criticize Professor Fletcher on historical grounds when he disavowed reliance on history. Rather, his approach was to describe the Court's modern standing doctrine, explain why it is unworkable, and propose a more sensible alternative. By contrast, I have always applied a "Neo-Federalist" methodology that pays close attention to the Constitution's language, history, underlying theory, and early implementing precedent. See, e.g., Pushaw, *Justiciability*, *supra* note 11, at 397–472; Robert J. Pushaw, Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress's Powers*, 2012 U. ILL. L. REV. 1703, 1705–34. I believe that a historical study of Article III yields certain timeless principles about standing that can usefully be applied today.

and laws.¹⁶ The core meaning of the word “case” is a chance event or action that violates a person’s legal rights in a way that gives rise to a cause of action or later appeal, the resolution of which requires a court to expound (i.e., interpret and apply) the law.¹⁷ Consequently, standing should hinge on whether the plaintiff is presenting a true Article III “Case,” which requires a showing that her federal legal rights have been invaded fortuitously (i.e., involuntarily as a result of a chance occurrence) so that she can legitimately seek a judicial declaration of the law.¹⁸

Restricting federal courts to their Article III role of expounding federal law only as needed to exercise their “judicial Power” to decide genuine “Cases” helps implement the Constitution’s system of separation of powers.¹⁹ Most obviously, in both statutory and constitutional cases, this Article III limit avoids unnecessary judicial interference with the majoritarian political judgments of Congress and the President.²⁰ More subtly, unduly broad grants of standing to enforce statutes (e.g., to “any citizen”) raise two related concerns. First, Congress should not be permitted to undermine the Executive Branch’s Article II power by transferring the execution of federal law, which inevitably involves discretionary determinations based on policy considerations and resource constraints, to unelected federal judges acting at the request of anyone with the desire and resources to litigate.²¹ Second, each agency administers its organic statute in light of certain standards and enforcement priorities, and therefore can decide to decline to pursue regulated individuals or entities (either because they acted lawfully or committed *de minimis* violations), to reach a settlement with them, or to conduct a formal hearing (followed by appeals).²² When such agency action does not fortuitously violate the legal rights of others, they should not be given standing to challenge either the agency (because its executive discretion should be respected) or the regulated parties (because their liberty interests should not be infringed).²³

My theory that only “accidental” plaintiffs have standing to bring “Cases” leads me to modify Professor Fletcher’s approach in two key

16. See Pushaw, *Case/Controversy*, *supra* note 11, at 449.

17. I noted this longstanding definition of “case” in my first article. *See id.* at 449–50, 472–76. Many years later, I fully developed the idea that a “case” can be brought only by someone whose legal rights have been invaded fortuitously. *See* Pushaw, *supra* note 12, at 9–17, 66–105.

18. *See* Pushaw, *supra* note 12, at 9–17, 66–105.

19. *See id.* at 10, 77–78, 82–104.

20. *See id.* at 8, 33, 77–78, 96–104; *see also infra* notes 260, 276–286, 296–310, 316–326, 343–344, 348–349, 354–355, 363, 367–383, 400, 415 and accompanying text.

21. *See id.* at 8, 33, 65, 83, 96–101; *see also infra* notes 269–271, 278–286, 311–355 and accompanying text.

22. *See id.* at 8, 23–26, 96, 99–100; *see also infra* notes 311, 317–318, 320–321, 324, 334–335, 343, 349, 354 and accompanying text.

23. *See id.* at 8, 12–15, 23–26, 33, 77–94, 96–104; *see also infra* notes 311–312, 316–324, 343–344, 349 and accompanying text.

ways. First, whereas he contended that Congress has plenary power to confer standing to vindicate statutory rights,²⁴ I would accord such legislative judgments only a strong presumption of constitutionality—but one that can be overcome in certain circumstances where blind judicial deference threatens separation of powers.²⁵ An example would be special interest groups that deliberately manufacture lawsuits by invoking a statutory provision authorizing “any person” to sue, even though they and their members have not experienced a chance violation of their rights under that statute.²⁶

Second, I continue to agree with Fletcher that particular constitutional clauses implicitly suggest who can enforce them and that Congress cannot grant standing more generously. For instance, standing under an individual rights provision (e.g., free speech or equal protection) should be given only to those whose rights have been invaded by the government, not to citizens generally.²⁷ I would add, however, that plaintiffs who bring “Cases” arising under the Constitution must demonstrate that their constitutional rights have been violated by happenstance events beyond their control.²⁸

The foregoing themes will be developed in four sections. Part I describes modern standing law and identifies its serious flaws. Part II discusses Professor Fletcher’s proposed solution to these problems. Part III evaluates his thesis in light of the intervening twenty-five years of standing cases and scholarship. Part IV sets forth my “accidental plaintiff” theory of standing as a more practical and historically grounded alternative.

I. THE CURRENT STANDING STRUCTURE AND ITS DEFECTS

Professor Fletcher began by tracing the development of modern standing law and explaining why its analytical framework presented

24. Fletcher, *supra* note 6, at 251–65. I formerly endorsed the notion of absolute congressional power over statutory standing, which represents the prevailing scholarly view. See Pushaw, *Justiciability*, *supra* note 11, at 398, 472–90 (citing Richard Fallon, David Logan, Gene Nichol, Richard Pierce, and Cass Sunstein).

25. See Pushaw, *supra* note 12, at 9 n.37, 12–16, 82–104.

26. See *id.* at 8, 12–16, 52–53, 75, 83–89, 92–95. An association can obtain standing when (1) at least one of its members would have standing, (2) it aims to protect interests germane to its purpose, and (3) the case does not require its members’ participation in the lawsuit. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). Thus, attorneys for special interest organizations often seek out members willing to allege facts to satisfy standing requirements (e.g., that they suffered an “aesthetic” injury to their enjoyment of the environment), add the organization as a party plaintiff, and then ignore the members who are nominal plaintiffs as they mastermind the litigation. See Pushaw, *supra* note 12, at 4–5.

27. See Pushaw, *Justiciability*, *supra* note 11, at 485–90. I will detail this thesis in Part IV.D.1.

28. I would apply this “fortuity” requirement in a more relaxed way, however, in the relatively rare instances when a plaintiff credibly alleges that a federal official has violated a constitutional provision that guarantees rights that are held collectively by “We the People.” See *infra* Part IV.D.2 (explaining this point).

intractable problems. Summarizing his analysis provides the background for understanding our areas of agreement and disagreement.

A. The Origins of Modern Standing Doctrine: From the New Deal to the Warren Court

Fletcher noted that standing law arose to address two developments. First, the explosive growth of the administrative state in the 1930s raised questions about who could enforce regulatory statutes—a designated government agency; the intended beneficiaries or objects of the legislation; other parties harmed by the agency’s action; citizens acting as “private attorneys general” to ensure that the agency fulfilled its duties; or some combination.²⁹ The Court responded by focusing on congressional intent. For example, it honored express statutory denials of standing to private parties, even those whose legal interests had been directly affected by the agency.³⁰ Conversely, the Court deferred to explicit congressional conferrals of standing, including broad provisions such as the Federal Communication Act’s grant to “any person” aggrieved or adversely affected by an FCC decision.³¹ If a statute was silent, however, the Court would allow suits only by plaintiffs who asserted a right that had a common law analogue (i.e., that involved physical harm or financial loss).³² The foregoing approach to standing was codified in Section 10(a) of the Administrative Procedure Act of 1946 (APA), which authorized judicial review for any person “adversely affected or aggrieved by [agency] action within the meaning of [a] relevant statute.”³³

Second, the increase in litigation to vindicate public (especially constitutional) values in the 1960s prompted the Warren Court to liberalize

29. Fletcher, *supra* note 6, at 225–27; *see also* Pushaw, *supra* note 12, at 20–26 (describing how New Deal regulatory legislation complicated standing doctrine).

30. Fletcher, *supra* note 6, at 226 (citing *Ala. Power Co. v. Ickes*, 302 U.S. 464, 480 (1938)). I read these cases somewhat differently. The Court presumed that, when Congress specified that an agency could sue to remedy statutory violations, Congress did not intend to confer standing on anyone else—a presumption that protected the liberty interests of potential defendants, who could pursue their preferred course of action without worrying about private lawsuits. *See* Pushaw, *supra* note 12, at 24 n.87 (citing *Woolhandler & Nelson*, *supra* note 14, at 699–700, 712, 732–33).

31. Fletcher, *supra* note 6, at 226 (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)).

32. *Id.* at 227 (citing *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939); *Ala. Power*, 302 U.S. at 480). I would add that the Court inferred standing in those cases in part to avoid due process problems that would arise if government agencies could violate property, tort, or contract rights with impunity. *See* Pushaw, *supra* note 12, at 25. For similar reasons, the Court presumed congressional intent to authorize standing where a plaintiff alleged that federal officials had infringed his individual constitutional rights. *Id.*

33. Fletcher, *supra* note 6, at 227 (citations omitted).

standing.³⁴ For instance, *Baker v. Carr*³⁵ held that a plaintiff could meet the Article III “injury” requirement merely by alleging a sufficiently “personal stake in the outcome.”³⁶ The Court concluded that this standard had been satisfied by a Tennessee voter who claimed (seemingly in common with millions of others) that his legislature was not apportioned by population and thereby violated the Equal Protection Clause.³⁷ Furthermore, *Flast v. Cohen*³⁸ carved an exception to the longtime ban on taxpayer standing by permitting such suits to challenge federal spending on religious institutions as violating the Establishment Clause.³⁹

Professor Fletcher’s summary of the early development of modern standing doctrine is generally sound. However, he does not mention several details that I find significant.

For example, although Fletcher correctly observed that the New Deal raised novel statutory enforcement questions,⁴⁰ he did not explain why the Court created standing. The reasons are both practical (a need to preserve judicial resources) and political (to thwart conservative judicial challenges to progressive federal and state laws, which threatened the fledgling administrative agencies).⁴¹ Instead of frankly acknowledging these policy goals, however, the Court under the intellectual leadership of Justice Frankfurter asserted that standing reflected historical constitutional understandings.⁴² Specifically, the Court maintained that Article III’s extension of federal “judicial Power” to “Cases” and “Controversies” limited federal courts to resolving actual disputes brought by a plaintiff who had personally suffered an injury to a legal right cognizable under the Constitution, a federal statute, or the common law.⁴³ That conception of standing casts doubt upon Professor Fletcher’s suggestion that the Court

34. See *id.* at 227–28.

35. 369 U.S. 186 (1962).

36. *Id.* at 204.

37. *Id.* at 204–37.

38. 392 U.S. 83 (1968).

39. *Id.* at 99–106.

40. See Pushaw, *supra* note 12, at 95–96.

41. See *id.* at 20–22 (documenting this point). Here I built upon the work of several excellent scholars. See, e.g., *id.* at 19, 21–22 (citing Winter, *supra* note 14, at 1374–78, 1422–24, 1443–57); *id.* at 11–12, 21 (citing MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 23–24, 35–38, 157–80, 190–91, 198–211, 218–29, 257–78 (2000)); *id.* at 19, 21, 25–26 (citing Daniel E. Ho & Erica Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 594–607, 634–47 (2010)); *id.* at 19–22 (citing Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436–38 (1988)).

42. See Pushaw, *Justiciability*, *supra* note 11, at 458–63 (describing Frankfurter’s influence on standing doctrine).

43. Justice Frankfurter first set forth this theory in *Coleman v. Miller*, 307 U.S. 433, 460–70 (1939) (Frankfurter, J., concurring). The majority of the Court adopted this position in *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952).

deferred to Acts of Congress making “any person” a private attorney general,⁴⁴ and I have found no case in which the Court granted standing to such a plaintiff.

The absence of such precedent is reflected in APA Section 10(a), which codified existing standing case law. This provision authorized judicial review not for self-appointed guardians of the public interest, but only for persons (1) “suffering [a] legal wrong” (i.e., at common law or under the Constitution) inflicted by an agency, or (2) “adversely affected or aggrieved by agency action within the meaning of a relevant statute” (a reference to new rights created by Congress).⁴⁵ Fletcher suggested that Section 10(a) incorporated the Court’s standing jurisprudence solely through its second clause,⁴⁶ but the first part is equally important because it alluded to cases in which the Court had conferred standing when agencies allegedly violated common law or constitutional rights.⁴⁷

In any event, Professor Fletcher’s central argument was on target: The Court (and the APA) asked whether a plaintiff had experienced an injury to a *legal* interest, not an injury in *fact*.⁴⁸ Indeed, several cases held that, unless a plaintiff could credibly claim such an invasion of a legally protected interest, any actual harm suffered would be *damnum absque injuria* (harm without legal injury).⁴⁹ As Fletcher pointed out, however, the rise of public law (especially constitutional) actions during the Warren Court era weakened the traditional “legal interest” test.⁵⁰ The Court’s effort to retool standing law created doctrinal chaos.

44. See Fletcher, *supra* note 6, at 225–26 (citing *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)). Neither case, however, supports the proposition that plaintiffs could sue simply as concerned public citizens.

In *Sanders*, the Court initially ruled that a radio station’s FCC-issued license did not confer a property right to be free of competition and that the FCC did not have to consider the station’s probable financial loss in deciding whether to grant a license to a rival broadcast company. *Sanders*, 309 U.S. at 473–77. Nevertheless, the Court concluded that this “economic injury” satisfied Section 402 of the Federal Communications Act, which authorized judicial review for “any other person aggrieved or whose interests are adversely affected” by an FCC decision. *Id.* at 471, 477. Hence, the plaintiff was not a representative of the public interest, but rather a business that had suffered financial losses because of an agency’s action.

Similarly, in *Scripps* the Court applied *Sanders* in giving standing to a corporation that claimed economic injury as a result of the FCC’s allegedly unlawful grant of a license to a competitor. See *Scripps*, 316 U.S. at 14–15. Again, the Court did not recognize the standing of roving private attorneys general. See Pushaw, *supra* note 12, at 24.

45. Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (2006).

46. See Fletcher, *supra* note 6, at 227.

47. See Pushaw, *supra* note 12, at 25.

48. See Fletcher, *supra* note 6, at 224–33.

49. See *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–40 (1939); *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479 (1938); see also Pushaw, *supra* note 12, at 25–26 (elaborating this argument).

50. See Fletcher, *supra* note 6, at 227–28 (citing as examples *Baker* and *Flast*, discussed *supra* notes 35–39 and *infra* notes 60–61 and accompanying text).

B. *The Transformation of Standing*

Beginning in 1970, the Court revolutionized Article III standing by (1) recharacterizing the relevant injury as one of “fact” rather than “law,” and (2) adding the causation and redressability requirements. Professor Fletcher explained why those new standards could not be meaningfully applied as a threshold jurisdictional inquiry independent of the substantive law that formed the basis of a plaintiff’s claim.⁵¹

1. *Injury in Fact*

In *Association of Data Processing Service Organizations v. Camp*,⁵² the Court announced that Article III standing under the APA required a plaintiff to demonstrate an “injury in fact” and that the “legal interest” test came into play only during the subsequent examination of the merits.⁵³ The Court then swiftly extended this novel injury-in-fact requirement to constitutional cases.⁵⁴

Professor Fletcher argued that “[t]here cannot be a merely factual determination whether a plaintiff has been injured except in the relatively trivial sense of determining whether plaintiff is telling the truth about her sense of injury.”⁵⁵ Rather, a court’s conclusion that a plaintiff has or has not suffered an “injury in fact” is a disguised normative legal judgment about what counts as a cognizable injury in a particular context.⁵⁶ Fletcher lamented that Congress cannot change such judicial determinations through statutes that create new legal interests or expand standing because the Court has deemed “injury in fact” a constitutional command.⁵⁷ In his view, the Court thereby ran afoul of separation of powers by aggrandizing judicial power at the expense of Congress, which should have exclusive “legislative power” to define certain kinds of injuries and protect against their invasion through standing grants.⁵⁸

I agree with Professor Fletcher that the notion of “injury in fact” divorced from the underlying substantive law is incoherent, but I find his account incomplete. Most importantly, he does not explore why the Court adopted such a misguided test. The answer is that the predominantly liberal

51. *See id.* at 228–50.

52. 397 U.S. 150 (1970).

53. *See id.* at 152–54.

54. *See, e.g.,* Singleton v. Wulff, 428 U.S. 106, 112 (1976); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974).

55. Fletcher, *supra* note 6, at 231.

56. *See id.* at 232–33.

57. *See id.*

58. *See id.* at 233.

Justices believed that the “legal interest” approach barred too many plaintiffs who sought to vindicate new—and invariably liberal—constitutional and statutory rights.⁵⁹

For instance, the Warren Court dramatically relaxed Article III standing to allow private attorneys general to vindicate its freshly minted constitutional rights in cases like *Baker*⁶⁰ and *Flast*.⁶¹ Similarly, the Court loosened statutory standing either by deferring to Congress’s express—and often broad—standing grants in substantive statutes (most notably those dealing with civil rights and the environment) or by broadening access under the APA’s general standing provisions.⁶² This lenient approach reflected two factors.

First, historically regulatory statutes imposed duties on agencies without creating legal rights in individuals, who thus lacked standing under the “legal interest” test even if they had actually been injured (a problem that increased as agencies mushroomed).⁶³ In *Camp*, Justice Douglas addressed this perceived unfairness by declaring that (1) Article III standing to sue agencies required a plaintiff merely to allege an “injury in fact” (which could be “aesthetic” or “recreational”), and (2) the “legal interest” test did not concern standing, but rather the merits.⁶⁴ The *Camp* Court then reinterpreted APA Section 10(a)’s phrase “aggrieved by agency action within the meaning of a relevant statute” to include not only intended beneficiaries or objects of legislation (the traditional view), but also anyone who fell “arguably within the zone of interests to be protected or regulated by the statute.”⁶⁵

Second, the *Camp* approach guaranteed that almost any asserted violation of federal law would create an “injury in fact” because that

59. See Pushaw, *supra* note 12, at 26–33 (describing how the Court expanded standing from 1962–1970 by initially defining “injury” as having a sufficiently “personal stake in the outcome” and then adopting the injury-in-fact test).

60. *Baker v. Carr*, 369 U.S. 186, 204–37 (1962) (upholding an Equal Protection Clause claim that state legislatures must be apportioned by population).

61. *Flast v. Cohen*, 392 U.S. 83, 102–06 (1968) (allowing a taxpayer to allege that Congress violated the Establishment Clause by taxing to support religious institutions); see *supra* notes 35–39 and accompanying text (discussing *Baker* and *Flast*).

62. See Pushaw, *supra* note 12, at 28, 33.

63. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 293 (2008).

64. See *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–54 (1970).

65. *Id.* at 153. A plaintiff who was in this “zone of interests” and who claimed an “injury in fact” could then litigate issues of public interest. *Id.* at 150–54. Professor Fletcher assailed this “zone of interests” test as a confusing and unnecessary surrogate for a determination on the merits as to whether plaintiff had a right under the statute to judicial enforcement of a defendant’s duty. See Fletcher, *supra* note 6, at 234–39. Although this point is well taken, there is a lingering question: *Why* did the Court adopt such a convoluted approach? The most likely answer is that Justice Douglas deliberately used vague language—like “zone of interests” and “injury in fact”—to give federal judges maximum discretion to greatly expand the universe of plaintiffs who had standing to enforce statutes. See Pushaw, *supra* note 12, at 28–33.

standard could easily be manipulated.⁶⁶ For example, the Court recognized newfangled “injuries” that seemed abstract and generalized, such as decreased “aesthetic” enjoyment of the environment⁶⁷ and the inability to live in an integrated community.⁶⁸ Professor Fletcher astutely pointed out that such “injuries” are not matters of “fact,” but rather become intelligible only by reference to underlying substantive statutes.⁶⁹ To illustrate, Congress recognized that environmental harms tend to be diffuse and that people who witness things such as air and water pollution are often affected more emotionally than physically or economically.⁷⁰ Similarly, federal statutes prohibiting racial discrimination in housing were intended to create rights not only in the directly affected minority groups, but also in whites who lost the opportunity to experience a diverse community.⁷¹

Nonetheless, such nontraditional injuries are typically widely shared rather than particularized. For instance, *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*⁷² concerned Washington, D.C. law students who contested a federal agency order that increased railroad freight rates, which allegedly would discourage use of recycled goods because of higher shipping costs, which in turn would increase the exploitation of natural resources, which ultimately would damage the environment (a possibility the agency had not considered).⁷³ The Court found “injury in fact” because the plaintiffs had alleged that some of this environmental harm might eventually occur in the Washington area, which would reduce their aesthetic enjoyment of its scenery.⁷⁴ Because the students had not personally suffered any actual or imminent injury and their asserted future harm was speculative, however, *SCRAP* reduced the “particularized injury” standard to a pleading technicality.⁷⁵

The ease of establishing “injury in fact” led to a surge of private plaintiffs (often organizations) bringing “public interest” actions.⁷⁶ Liberal judges and scholars championed standing for such private attorneys general as an antidote to the Executive Branch’s perceived under-enforcement of

66. See Pushaw, *supra* note 12, at 30–31.

67. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972).

68. See, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208–11 (1972).

69. See Fletcher, *supra* note 6, at 231–33. Put differently, the Court responded to Congress’s creation of new rights by inventing equally novel “injuries,” which could easily be claimed. For instance, it is impossible to factually dispute an asserted “aesthetic” injury because “aesthetics” is a subjective matter of personal taste. See Pushaw, *supra* note 12, at 4–5.

70. See Pushaw, *supra* note 12, at 4–5, 30–33.

71. See Fletcher, *supra* note 6, at 245, 253–54.

72. 412 U.S. 669 (1973).

73. *Id.* at 674–80.

74. *Id.* at 683–90.

75. See Pushaw, *supra* note 12, at 32.

76. See Ho & Ross, *supra* note 41, at 646–47.

federal statutes, which resulted from political considerations and agency capture.⁷⁷

As conservative Justices began to gain a majority in the mid-1970s, however, they opposed such broad standing as contrary to separation of powers, for two related reasons.⁷⁸ First, it undercut the President’s Article II power by transferring the enforcement of federal law (which entailed discretionary policy judgments) to unelected Article III judges acting at the behest of anyone who had the desire and resources to sue (usually special interest groups).⁷⁹ Second, unduly generous standing ignored the judiciary’s traditional function in our constitutional democracy of resolving individual legal disputes.⁸⁰ The Court cut back on standing by applying the injury-in-fact requirement more rigorously and by creating two new Article III barriers, causation and redressability.⁸¹

2. *Causation and Redressability*

The Burger Court complicated Article III standing by insisting that a plaintiff show that his injury was “fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”⁸² Professor Fletcher evaluated these “causation” and “redressability” requirements primarily through the lens of the first case in which they appeared, *Linda R.S. v. Richard D.*⁸³ Linda, the mother of an illegitimate child, sought to enjoin Texas prosecutors, on equal protection grounds, from pursuing only fathers of legitimate children for violating child support orders.⁸⁴ The Court denied Linda standing because granting her the relief she requested (prosecution) might result only in throwing the father in jail, not in his payment of child support—a merely “speculative” possibility.⁸⁵

Fletcher correctly noted that this outcome was defensible only if one shared the Court’s assumption that the mother’s “injury” was not receiving

77. See, e.g., Heather Elliott, *The Functions of Standing*, 61 *STAN. L. REV.* 459, 485–90 (2008).

78. See, e.g., Elizabeth Magill, *Standing for the Public: A Lost History*, 95 *VA. L. REV.* 1131, 1134–35, 1182–98 (2009) (describing this trend). In constitutional law, the conservative backlash began in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974). In statutory cases, the reversal of position took longer, as the Court always deferred to Congress’s express grants of standing until *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992).

79. See, e.g., *Schlesinger*, 418 U.S. at 222; *Lujan*, 504 U.S. at 576–78; see also Pushaw, *supra* note 12, at 8, 33.

80. See, e.g., *United States v. Richardson*, 418 U.S. 166, 175–79 (1974); see also Pushaw, *supra* note 12, at 8, 33.

81. See Pushaw, *supra* note 12, at 34–43 (citing cases).

82. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

83. 410 U.S. 614 (1973), discussed in Fletcher, *supra* note 6, at 240–43, 272–76.

84. *Linda R.S.*, 410 U.S. at 614–16.

85. *Id.* at 618.

child support payments.⁸⁶ However, if the Court had characterized the injury as discrimination against mothers of illegitimate children, then the remedy sought—prosecution of deadbeat fathers—would have provided redress.⁸⁷ Applying his thesis, Fletcher argued that the Court should have focused on whether the Equal Protection Clause gave Linda and those similarly situated the legal right to challenge the unequal treatment of mothers of legitimate and illegitimate children.⁸⁸

I agree with Professor Fletcher’s critique, but I would add that the causation and redressability standards are hopelessly vague and that their application entails discretionary and subjective judgments about probabilities and sound policy.⁸⁹ Therefore, it is usually impossible to determine whether a court has “correctly” applied these requirements, and cases often turn on trivial facts and pleading technicalities.⁹⁰

3. *Standing and Advisory Opinions*

Fletcher rejected the Court’s assertion that standing doctrine appropriately prevents federal courts from issuing “advisory opinions.”⁹¹ This phrase historically referred to political officials’ requests for legal advice outside the context of a litigated case, which have been forbidden since the beginning of the Republic.⁹² This traditional ban on advisory opinions has little bearing on modern standing law, with the possible exception of attempts by Congress to give its own members (or other interested parties) the right to obtain an immediate judicial ruling on the constitutionality of federal legislation.⁹³

86. Fletcher, *supra* note 6, at 240–41, 272.

87. *See id.* at 242–43, 272.

88. *Id.* at 242, 274–75. Professor Fletcher also considered cases involving Equal Protection Clause challenges to cities’ exclusionary zoning practices. *See id.* at 275–76. He concluded that, because establishing a violation of that Clause requires a showing of discriminatory intent, the Court could sensibly require a plaintiff to demonstrate that the government had denied a specific proposed building project (as contrasted with the speculative possibility that housing might be constructed) to ensure a tight causal connection between plaintiff’s claimed injury and its redress. *Id.* at 275–76. (contrasting *Warth v. Seldin*, 422 U.S. 490 (1975) (denying standing to plaintiffs who alleged that they wished to live in low-income housing if it were ever built in an exclusive suburb that zoned out such residences), with *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (allowing plaintiffs to assert an equal protection claim where the government had rejected a builder’s plan to construct low-cost housing)).

89. *See* Pushaw, *supra* note 12, at 5–6, 39–40. “Causation” necessitates the exercise of judicial discretion, guided by policy considerations, to decide how far back in a related chain of events it is logical to go. Similarly, determining whether the remedy requested is “likely” to redress an injury entails guessing about probabilities. *Id.*

90. *See id.* at 39–40 (citing several illustrative cases).

91. Fletcher, *supra* note 6, at 247–50.

92. *Id.* at 247–48.

93. *Id.* at 248, 250, 281–90.

Rather, the modern Court has co-opted the label “advisory opinions” to describe the decisions that would be rendered if plaintiffs did not suffer an “injury in fact” that was “particularized” and “concrete.”⁹⁴ Fletcher deemed such verbiage meaningless, as the pertinent injury should depend on the specific federal law involved.⁹⁵ For example, some plaintiffs who have experienced actual harm might not have standing because they cannot demonstrate that any positive legal rights have been invaded.⁹⁶ On the other hand, some who have not suffered a conventional factual injury might be able to sue if they are granted that right by a particular provision of a statute (as in *SCRAP*) or the Constitution (as in *Flast*).⁹⁷ Professor Fletcher contended that this approach did not abandon proper limits on the judiciary’s role, but rather reflected the judicial tradition of remedying the violation of legally recognized rights.⁹⁸

Once again, I am sympathetic to Fletcher’s main criticism: that modern standing doctrine does not promote the appropriate functioning of federal courts, including their refusal to give advisory opinions. As I will argue, however, his proposed solution—that a plaintiff’s right to sue be determined *solely* by examining specific provisions of federal law—would sometimes lead federal judges beyond their Article III boundaries.⁹⁹

4. Summary

Professor Fletcher is entirely correct that Article III standing should not depend on a court’s application of the vague and malleable standards of “injury in fact,” causation, and redressability. For many years, I agreed with his suggested alternative framework¹⁰⁰: “The essence of a standing inquiry is thus the meaning of the specific statutory or constitutional provision upon which the plaintiff relies rather than a disembodied and abstract application of general principles of standing law.”¹⁰¹ I have gradually come to conclude, however, that there is one such “general principle” that sets an outer limit on attempted grants of standing: Article III “Cases” can be brought only by plaintiffs whose legal rights have been

94. *Id.* at 248.

95. *Id.* at 249.

96. *Id.*

97. *Id.*

98. *Id.* at 249–50.

99. *See infra* notes 264–268, 274–275, 284–287, 289–310, 315–326, 336–337, 343–344, 348–349, 354–355, 367, 402, 415 and accompanying text (arguing that Article III “Cases” arise only when plaintiffs’ legal rights have been violated as a result of a chance occurrence beyond their control and that Congress cannot ignore this limit in conferring standing).

100. *See supra* notes 11–13 and accompanying text.

101. Fletcher, *supra* note 6, at 239.

violated fortuitously. To understand the differences in our approaches, it is necessary first to summarize and critique Fletcher's theory of standing.

II. FLETCHER'S PROPOSAL: DETERMINING STANDING BASED ON THE PARTICULAR FEDERAL RIGHT AT ISSUE

Professor Fletcher argued that courts should always focus on the nature of the protection afforded by the underlying federal law, but that Congress can confer standing more broadly to bring statutory—as opposed to constitutional—claims.¹⁰² I will examine those two categories of cases in turn.

A. *Standing to Sue Under Statutes*

In Fletcher's view, statutory standing should be straightforward because Congress has plenary power to create statutory duties and to decide who may enforce them judicially.¹⁰³ Accordingly, courts should simply discern and effectuate Congress's intent.¹⁰⁴

That intent is clearest when a statute directly gives standing to a class of plaintiffs—even those who do not experience traditional common law injuries (as with many civil rights and environmental claimants), and even private attorneys general.¹⁰⁵ Professor Fletcher asserted that courts would violate separation of powers by refusing to honor such express congressional grants of standing through the invocation of concepts like “injury in fact.”¹⁰⁶ Indeed, he surmised that the Court had implicitly recognized this principle because it had never demanded that any plaintiff show an injury beyond that set out in the statute.¹⁰⁷

102. *Id.* at 250–90.

103. *Id.* at 251.

104. *See id.* at 251, 264–65.

105. *See id.* at 251, 253–54.

106. *Id.* at 254.

107. *Id.* at 253–54. For instance, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), involved a black “tester” who pretended he wanted to rent an apartment from the defendant and was falsely told that nothing was available. The Court granted him standing under the Fair Housing Act, which protected people against racially motivated false statements about housing. *Id.* at 373–74. However, strict application of the injury-in-fact requirement would have led to the opposite result, because the tester did not actually want the apartment and hence had suffered no real-world injury. *See Fletcher, supra* note 6, at 253.

The Court eventually perceived this inconsistency and held that Congress could not confer statutory standing that ran afoul of Article III limits such as “injury in fact.” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–78 (1992), discussed *infra* notes 166–171, 328–338 and accompanying text. *Lujan* has proved to be controversial, and the Court has never again invalidated a congressional grant of standing to enforce a statute.

Fletcher then turned to suits against administrative agencies, which are filtered through the APA.¹⁰⁸ He contended that the Court should revert back to its pre-1970 jurisprudence, which had properly interpreted APA Section 10(a) as providing that standing should be determined by examining the “meaning of a relevant statute,” which might grant a right to sue restrictively (e.g., to regulated industries rather than consumers) or broadly (e.g., to “all persons”).¹⁰⁹ Conversely, the Court should repudiate *Camp*’s holding that the APA incorporates a requirement of “injury in fact.”¹¹⁰

To illustrate, the Court in *SCRAP* ruled that the plaintiffs had suffered such an injury because they might one day experience the aesthetic harm of witnessing environmental damage in the Washington area, which might result from a long chain reaction triggered by an agency’s decision to raise railroad freight rates.¹¹¹ Professor Fletcher noted that *SCRAP* has been heavily criticized because the Court treated the injury as a question of “fact,” and the plaintiffs did not appear to have suffered any actual harm.¹¹² But he defended the result as consistent with the “relevant statute”—the National Environmental Policy Act (NEPA), which directs agencies to prepare an “environmental impact statement” before issuing orders and which contemplates broad standing to enforce that duty.¹¹³ Until that statement was issued, plaintiffs did not have the information necessary to determine the nature or severity of their injuries. Therefore, Fletcher concluded, NEPA should be interpreted as granting standing to “anyone who can make a colorable claim that the proposed actions may possibly affect her . . . even if the effect is remote or speculative and even if the person’s sense of what constitutes [an] injury is somewhat idiosyncratic.”¹¹⁴

108. Administrative Procedure Act §10(a), 5 U.S.C. § 702 (2006); see Fletcher, *supra* note 6, at 255–65.

109. Fletcher, *supra* note 6, at 255–56.

110. See *id.* at 258.

111. See *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*, 412 U.S. 669, 674–90 (1973) (asserting that this agency action would deter use of recycled goods, which would exploit more natural resources and thereby damage the environment throughout the country (including the Washington area), which might eventually inflict aesthetic harm on the plaintiffs); see also *infra* notes 299–305, 323 and accompanying text (discussing *SCRAP*).

112. Fletcher, *supra* note 6, at 258–60.

113. *Id.* at 259–62.

114. *Id.* at 259. Similarly, he construed the National Park statute, which regulated the use of such parks to ensure the enjoyment of natural scenery, as indicating that environmental protection groups should have had standing, contrary to the Court’s holding in *Sierra Club v. Morton*, 405 U.S. 727 (1972). Fletcher, *supra* note 6, at 260–61.

Fletcher saw a potential analytical breakthrough in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), in which the Court determined standing under APA Section 10(a) by examining the “relevant statute”—the National Bank Act, which prohibited banks from creating “branches” in other states. *Id.* at 391–94. The Court found that Congress’s intent would be effectuated by giving standing to a securities trade association to challenge the Comptroller of Currency’s decision allowing banks to

To take another example, Professor Fletcher maintained that the Court should often deny standing in tax cases because the governing statute, the Internal Revenue Code, generally commits enforcement to the IRS and prohibits private parties from challenging someone else's tax status or liability.¹¹⁵ Such an analysis would be far more persuasive than the Court's decisions, which rely on abstract assertions about "injury in fact," causation, and redressability.¹¹⁶

B. *Standing in Constitutional Cases*

Fletcher assailed the Court's "one-size-fits-all" approach to standing as obscuring the unique complexities presented by constitutional claims.¹¹⁷ Unlike statutory provisions, constitutional clauses are open-ended both as to the duties imposed and the parties who can enforce them, which makes Congress's power to confer standing less clear.¹¹⁸ Professor Fletcher sorted the pertinent precedent into two categories: standing based directly on the Constitution and plaintiffs' actions brought pursuant to a special statutory grant to raise constitutional challenges.

1. *Standing to Sue Under the Constitution Itself*

In these cases, Fletcher chided the Court for failing to focus on the nature of the underlying constitutional right and instead creating abstract and confusing headings such as "federal taxpayer standing" and "causation and redressability."¹¹⁹

provide discount brokerage services at "branches" around the nation. *Id.* at 390–403. Fletcher hoped that *Clarke* might signal the Court's shift to an approach focusing on the specific substantive statute. See Fletcher, *supra* note 6, at 263–64.

115. See Fletcher, *supra* note 6, at 261–62; see also *id.* at 265 (describing the presumption against judicial review in tax cases).

116. See *id.* at 262. For instance, in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), indigent patients who had been denied medical care by tax-exempt hospitals challenged an IRS rule that did not require these hospitals to provide such services. The Court rejected standing on the theory that the plaintiffs had not demonstrated that (1) the defendant IRS—as contrasted with the hospitals—had caused their injury, and (2) the relief requested (overturning the IRS decision) would redress the injury, as the hospitals might continue to refuse to serve the poor for reasons having nothing to do with taxes. See *id.* at 40–46. Fletcher decried this analysis as "nonsense" in light of other decisions, like *SCRAP*, where the Court had stretched to find causation and redressability in factual situations where such elements were much more attenuated. Fletcher, *supra* note 6, at 262.

117. Fletcher, *supra* note 6, at 265.

118. *Id.*

119. *Id.*

a. *Taxpayer Standing*

The Court historically rejected attempts by taxpayers to sue the government for allegedly unconstitutional spending because they had not suffered any individualized injury, but rather had a “minute and indeterminable” interest shared with millions of others.¹²⁰ In *Flast v. Cohen*,¹²¹ however, the Warren Court allowed a taxpayer to claim that Congress had violated the Establishment Clause by allocating funds to religious schools.¹²² But in the 1982 *Valley Forge* decision,¹²³ a more conservative Court denied a taxpayer standing to file an Establishment Clause complaint against the Executive Branch for exercising its Article II power to dispose of federal property by giving such property to a Christian college.¹²⁴ The Court distinguished *Flast* as involving congressional funding under the Taxing and Spending Clause.¹²⁵

As Professor Fletcher emphasized, however, this distinction was immaterial, as the substance of both cases was the same: Taxpayers alleged that the federal government had transferred something of economic value to a religious institution, thereby contravening the Establishment Clause.¹²⁶ Thus, the Court should have effectuated the meaning and purpose of that Clause—to prevent the government’s financial support of religion—and helped to vindicate it by granting standing in both *Flast* and *Valley Forge*.¹²⁷

A similar analysis would have illuminated landmark companion cases from 1974. The initial decision, *United States v. Richardson*,¹²⁸ rejected taxpayers’ standing to assert that a statute authorizing secret CIA funding violated Article I’s requirement that Congress provide a “Statement and Account” of all expenses.¹²⁹ The Court declared that these plaintiffs had failed to show any individualized “injury in fact,” but instead had brought an abstract grievance about the government’s conduct that affected all Americans equally.¹³⁰ Likewise, *Schlesinger v. Reservists Committee to*

120. *Id.* at 225 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923)).

121. 392 U.S. 83 (1968).

122. *Id.* at 99–106.

123. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

124. *Id.* at 479–84.

125. *Id.* at 479–80.

126. Fletcher, *supra* note 6, at 267–68.

127. *See id.* at 269. Professor Fletcher added that even those who disagreed with his reading of the Establishment Clause should still accept his approach to standing, which hinged on determining federal court access based on one’s interpretation of substantive constitutional provisions—which would invariably be subject to debate. *Id.* at 270.

128. 418 U.S. 166 (1974).

129. *Id.* at 166–70 (citing U.S. CONST. art. I, § 9, cl. 7).

130. *Id.* at 175–78.

*Stop the War*¹³¹ held that taxpayers and citizens, who had claimed that congressmen who served in the United States military reserves violated the Incompatibility Clause (which prohibited simultaneous legislative and executive office-holding), lacked standing because they could not show any particularized and concrete injury.¹³² Again, Fletcher contended that the Court instead should have ascertained whether a grant of broad standing would have promoted or undercut the purposes of the Statement & Accounts Clause (*Richardson*) or the Incompatibility Clause (*Schlesinger*).¹³³

b. Causation and Redressability

Plaintiffs who sue directly under the Constitution sometimes become embroiled in needlessly complicated wrangling over whether the defendant caused their injury or the relief requested is likely to redress it.¹³⁴ For instance, in *Linda R.S. v. Richard D.*,¹³⁵ the Court denied standing to the mother of an illegitimate child because providing her with the remedy she sought—prosecuting the father of her child for failure to pay child support—would not necessarily redress her injury because he might be jailed rather than make the payments.¹³⁶ By contrast, Professor Fletcher thought the Court should have examined whether the Equal Protection Clause would have been effectuated by allowing mothers of illegitimate children to sue to challenge state discrimination against them in the prosecution of deadbeat fathers.¹³⁷

2. *Congressional Grants of Standing to Enforce Constitutional Rights*

Sometimes Congress attempts to confer standing to bring constitutional claims on plaintiffs who would not ordinarily be permitted to sue under the Court's rules. Fletcher conceded that such cases can be difficult to decide, especially where constitutional provisions are unclear as to the precise legal duties imposed on the government and the parties (if any) who are entitled to enforce that law.¹³⁸ Nonetheless, he argued that, if the Court interpreted a

131. 418 U.S. 208 (1974).

132. *Id.* at 209–28.

133. Fletcher, *supra* note 6, at 270–71; *see also id.* at 271–72 (recommending that the Court adopt a presumption against taxpayer standing, which can be overcome when allowing such standing would best serve the purpose of a particular constitutional provision).

134. *See supra* notes 82–90 and accompanying text.

135. 410 U.S. 614 (1973).

136. *Id.* at 614–19.

137. Fletcher, *supra* note 6, at 240–43, 272–76; *see also supra* notes 82–88 and accompanying text (detailing this argument).

138. Fletcher, *supra* note 6, at 224, 265–90.

constitutional provision either as not granting legal rights to individuals or as not contemplating that a particular class of persons could sue to vindicate a right that was conferred, Congress could not bestow standing more broadly.¹³⁹

For example, Congress could not authorize judicial review of alleged violations of constitutional clauses that are committed to the political branches for final determination, such as declaring war or guaranteeing each state a Republican Form of Government (so-called “political questions”).¹⁴⁰ Similarly, the constitutional rights of people directly affected by government conduct, such as criminal defendants claiming Fourth, Fifth, and Sixth Amendment violations, might be undercut if Congress granted standing more generously (e.g., to the defendant’s relatives or concerned outsiders).¹⁴¹ Especially troubling to Professor Fletcher were instances in which Congress had used standing as a device to obtain federal court judgments on the constitutionality of questions that concerned Congress.¹⁴²

In one line of precedent, a statute that adversely affected the property rights of certain private parties afforded them immediate judicial review of their Fifth Amendment claims. For instance, *Muskrat v. United States*¹⁴³ involved a congressional attempt to authorize named members of an Indian tribe to get a declaratory judgment on the constitutionality of a statute that reduced the value of land they had been given in an earlier federal allotment.¹⁴⁴ The Court struck down this law as a request for a proscribed advisory opinion, because the United States had no interest adverse to that of the claimants.¹⁴⁵ After sustaining the constitutionality of declaratory judgments in 1937, however, the Court in *Northern Cheyenne Tribe v. Hollowbreast*¹⁴⁶ upheld a federal law almost identical to the one in *Muskrat*. Fletcher stressed that, although *Hollowbreast* seemed to countenance advisory opinions, at least the plaintiffs had pre-existing property rights at stake and therefore would have had standing to sue eventually; the statute merely expedited review.¹⁴⁷

139. *Id.*

140. *Id.* at 278.

141. *Id.* at 278–79.

142. *Id.* at 280.

143. 219 U.S. 346 (1911).

144. *Id.* at 352–61.

145. *Id.* at 361–62.

146. 425 U.S. 649, 659–60 (1976) (allowing Congress to condition the operation of a statute transferring property from individual Indians to their tribe on the tribe’s first obtaining a declaratory judgment that this law did not abridge the Fifth Amendment).

147. Fletcher, *supra* note 6, at 282.

In contrast, another set of cases featured a federal statute that created new substantive rights and conferred standing to enforce them.¹⁴⁸ To illustrate, the Federal Election Campaign Act of 1971 regulated campaign expenditures and authorized three groups to bring constitutional challenges: the Federal Election Commission, any political party's national committee, or any eligible voter.¹⁴⁹ The Court granted standing to a United States senator who quickly sued as an "eligible voter,"¹⁵⁰ but not to political action committees or trade associations (which were not listed in the statute but presumably could have been).¹⁵¹ As Professor Fletcher noted, these cases allow Congress to enact a constitutionally doubtful law and choose who has standing to litigate those constitutional issues immediately—even if, absent that statute, the Court would not have accommodated the plaintiffs (e.g., voters generally).¹⁵² The Court thereby renders the very sort of "highly abstract" opinion that its standing doctrine is supposedly designed to prevent.¹⁵³

Finally, Fletcher turned to decisions which concerned Article I's provision prohibiting sitting members of a Congress that had voted to increase the compensation of a federal office (e.g., a judgeship) from being appointed to that office.¹⁵⁴ In *Ex parte Levitt*,¹⁵⁵ the Court rejected a citizen's standing to claim that Senator Hugo Black's appointment as a Justice had violated this "Ineligibility Clause" because the plaintiff had not suffered a direct individual injury, but merely had the same interest shared by all Americans.¹⁵⁶ In *McClure v. Carter*,¹⁵⁷ the Court summarily affirmed a United States District Court's denial of standing to a senator who had invoked a federal law that authorized members of Congress to bring an Ineligibility Clause challenge in their home-state federal district court to the appointment of U.S. Representative Abner Mikva to the D.C. Circuit.¹⁵⁸

148. *Id.* at 283–90.

149. *Id.* at 283 (citation omitted).

150. *See Buckley v. Valeo*, 424 U.S. 1, 11–12 (1976).

151. *See Bread Political Action Comm. v. FEC*, 455 U.S. 577, 584 (1982).

152. Fletcher, *supra* note 6, at 285–86 (making this point, but emphasizing that Congress could not deny standing to someone whose campaign spending had been limited by the statute, allegedly in violation of his First Amendment rights).

153. *Id.* at 286.

154. *Id.* at 287–90.

155. 302 U.S. 633 (1937).

156. *Id.* at 634.

157. *McClure v. Reagan*, 454 U.S. 1025 (1981), *aff'g McClure v. Carter*, 513 F. Supp. 265 (D. Idaho 1981).

158. *Id.*

It was not clear why Congress’s explicit grant of standing did not overcome the Court’s reluctance to allow citizen suits.¹⁵⁹

However, Professor Fletcher agreed with the *McClure* result because he believed that Congress’s peculiar and narrow choice of potential plaintiffs was self-serving and not designed to further the purpose of the Ineligibility Clause: to avoid congressional corruption.¹⁶⁰ But he added that Congress should have discretion to confer standing that would further that purpose—including through citizen suits.¹⁶¹

Overall, Fletcher criticized the Court for automatically applying the standing rules it had developed in statutory cases to the different context of constitutional litigation. Instead, he urged the Court to determine standing based upon the nature and purpose of each constitutional clause and to prohibit Congress from granting standing more generously than such a clause would reasonably permit.¹⁶²

C. Summary

According to Professor Fletcher, “to think, or pretend, that a single law of standing can be applied uniformly to all causes of action is to produce confusion, intellectual dishonesty, and chaos.”¹⁶³ In his mind, the central problem was that the Court had formulated standing principles too generally, and the solution was to focus on whether a plaintiff had the right to enforce the particular statutory or constitutional provision in question.¹⁶⁴

III. REFLECTIONS ON *THE STRUCTURE OF STANDING AT 25*

William Fletcher’s critique of standing remains trenchant today because *stare decisis* has led the Court to adhere to its injury-causation-

159. One possibility is that Congress did not seek constitutional review of a statute (as in *Buckley*), but rather of a Senate confirmation of a judicial appointee who had already begun serving as a judge. See Fletcher, *supra* note 6, at 287.

160. *Id.* at 289 (noting that Congress had sharply limited standing (1) to members of Congress to sue in their home-state federal trial court (which might be biased in their favor), (2) for the purpose of challenging the appointment of a single judge, (3) on a question (eligibility) that the Senate had already resolved by confirming the judge).

161. See *id.* Fletcher thought it clear that a litigant appearing before a judge who had allegedly been appointed in violation of the Ineligibility Clause would have standing, given the analogous case of *Glidden v. Zdanok*, 370 U.S. 530 (1962) (holding that a plaintiff had a due process right to challenge the presence of an Article I judge serving on an Article III court that was hearing his claim). However, Fletcher pointed out that Congress might reasonably conclude that restricting standing to such parties would lead to few if any challenges because of the fear of alienating the judge, and therefore it might allow citizen suits to promote the public interest in avoiding corruption and ensuring the integrity of federal courts. See Fletcher, *supra* note 6, at 288–89.

162. See Fletcher, *supra* note 6, at 289–90.

163. *Id.* at 290.

164. *Id.* at 290–91.

redressability framework, even though its application of these vague standards has continued to lead to arbitrary results.¹⁶⁵ Yet the very fact that the Justices have unanimously embraced the basic Article III standing structure for over four decades makes it exceedingly unlikely that they will abandon it and substitute an entirely new approach—even one as intellectually rigorous as Fletcher’s. As a practical matter, then, it seems more useful to recommend ways that the Court can tweak, rather than replace, its existing doctrine. Before offering such suggestions, however, I will survey the main standing cases over the past quarter of a century and explain how they would have been decided under Professor Fletcher’s theory.

A. *Post-1988 Precedent*

The Court has kept the basic standing law intact, but has applied it with varying degrees of strictness. I will sort the cases into the familiar statutory and constitutional categories.

1. *Standing Based on Statutes*

a. *1988–1998: Rigorous Application of Standing Requirements*

Initially, the Rehnquist Court used standing doctrine aggressively to block access to many plaintiffs. Most notably, *Lujan v. Defenders of Wildlife*¹⁶⁶ involved a provision of the Endangered Species Act (ESA) authorizing “any person” to sue a federal agency that fails to consult with the Interior Secretary to ensure that its building projects do not threaten endangered species.¹⁶⁷ In an opinion by Justice Scalia, the Court held that two sets of plaintiffs, who claimed that the Secretary had mistakenly refused to extend this consultation requirement outside the United States, had not demonstrated a particularized “injury in fact.”¹⁶⁸ The first group consisted of those who asserted standing on behalf of anyone who had an interest in observing endangered species anywhere on earth.¹⁶⁹ The second set featured two scientists who alleged that (1) they had studied endangered species in two foreign nations and intended to return there someday, and (2) their work would suffer because the agency’s project would harm the

165. See *infra* Part III.A (analyzing these decisions).

166. 504 U.S. 555 (1992).

167. See *id.* at 557–78.

168. *Id.* at 557–61.

169. See *id.* at 566–67.

species’ habitat.¹⁷⁰ Justice Scalia asserted that the ban on “generalized grievances” was not prudential, but rather an Article III requirement that Congress could not overcome by purporting to confer standing to “all persons” (unless a plaintiff invoking that provision could show injury, causation, and redressability).¹⁷¹

Rejecting this conclusion, Professor Fletcher would have deferred to this express standing grant and allowed all the plaintiffs to proceed.¹⁷² Doing so would have furthered the purpose of the relevant statute: the ESA, which aimed to preserve endangered species.¹⁷³

Another case illustrating the Court’s stringent approach was *Steel Company v. Citizens for a Better Environment*.¹⁷⁴ Relying upon the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act (EPCRA), a private organization sought to enjoin a steel company that had not submitted timely EPCRA reports detailing its emission of toxic chemicals, but that had come into compliance pursuant to an EPA proceeding by the time the complaint was filed.¹⁷⁵ The Court denied standing because of problems with the two forms of relief requested.¹⁷⁶ First, an injunction to deter future legal wrongdoing could not redress any injury caused by the company’s late reports filed in the past.¹⁷⁷ Second, ordering the company to pay EPCRA civil penalties to the U.S. Treasury (as contrasted with the plaintiffs) would not remedy their injuries, but would simply further the generalized public interest in enforcing federal law.¹⁷⁸

Fletcher eschewed such complex “redressability” analysis and instead would have effectuated Congress’s intent in the EPCRA to give all citizens

170. See *id.* at 562–64. The Court suggested that standing might have been granted if these scientists had claimed that they planned to go back to one of these nations at a specific time and provided supporting evidence, such as an airline ticket. *Id.* at 564–65 n.2 and accompanying text.

171. *Id.* at 571–78.

172. Indeed, he noted that the Court, despite its rhetoric, had never failed to honor an explicit statutory grant of standing. See Fletcher, *supra* note 6, at 253–54. Thus, *Lujan* was a revolutionary decision.

173. The Court later gave standing to ranchers and irrigation districts that relied upon the ESA’s “any person” standing provision to allege that the federal government’s violation of the statute (by overprotecting a fish species in a reservoir they wished to use) caused them to lose money, the classic common law individualized injury. See *Bennett v. Spear*, 520 U.S. 154 (1997). It is unclear how Fletcher would have viewed this decision. On the one hand, he recommended honoring broad congressional standing grants. On the other hand, he focused on congressional intent, and conferring standing on those whose enterprises threatened endangered species would frustrate the ESA’s goal—especially when combined with *Lujan*, which shut out plaintiffs who were trying to protect such species. See Pushaw, *supra* note 12, at 38.

174. 523 U.S. 83 (1998).

175. *Id.* at 86–88.

176. *Id.* at 102–09.

177. See *id.*

178. See *id.* at 105–106.

(including plaintiffs) standing to enforce their legal right to ensure that companies filed reports when due. Interestingly, the Court moved in that direction shortly after *Steel Company*.

b. 1998–2007: Relaxing Standing

Three cases broadened federal court access. First, *Federal Election Commission v. Akins*¹⁷⁹ recognized the standing of voters to allege that the FEC, by declining to register the American-Israeli Public Affairs Committee as a “political committee” required to publicly release specified information, had violated their statutory right to that information.¹⁸⁰ Six Justices ruled that (1) Congress had negated their prudential concerns over “generalized grievances” by authorizing “any party aggrieved” by the FEC to bring suit, and (2) plaintiffs had established an “injury in fact” by alleging impairment of their ability to make informed political judgments, even though many other voters shared this same harm.¹⁸¹ In dissent, Justice Scalia argued that these holdings contradicted *Lujan*, as Congress could not circumvent Article III’s individualized injury requirement by purporting to grant standing to virtually all voters.¹⁸²

The Court in *Akins* used its familiar standing language, yet adopted an approach quite similar to the one Professor Fletcher had advocated. The majority honored Congress’s intent to authorize citizens to sue to vindicate their statutory right to obtain information about political committees, even though the denial of that right did not appear to inflict any injury that an ordinary person would consider concrete or particularized.

Second, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,¹⁸³ the Court allowed an organization to invoke the citizen-suit provision of the Clean Water Act (CWA) to claim that a corporation had polluted a river that some of its members had used for recreation and aesthetic enjoyment.¹⁸⁴ A majority of Justices concluded that the plaintiffs had shown an “injury in fact” because their pretrial affidavits stated “reasonable concerns” about perceived harms resulting from the company’s discharges of a pollutant, even though the district court found as a fact that no actual environmental damage or health risk had occurred.¹⁸⁵ Justice

179. 524 U.S. 11 (1998).

180. *Id.* at 13–14, 19.

181. *Id.* at 19–26.

182. *Id.* at 29–38 (Scalia, J., dissenting).

183. 528 U.S. 167 (2000).

184. *Id.* at 173, 180–88.

185. *Id.* at 181–84. The Court further held that civil penalties payable to the United States, if they encouraged the company to cease its current statutory violations and deterred future ones, were likely to redress the plaintiffs’ injury. *See id.* at 185–87. *But see id.* at 202–08, 215 (Scalia, J., dissenting) (arguing that the Court in *Steel Company* had rejected this same reasoning).

Scalia dissented on the ground that the plaintiffs’ incorrect perceptions of harm did not amount to an “injury in fact.”¹⁸⁶

Application of Fletcher’s theory would have avoided any debate over whether the plaintiffs’ concerns about pollution established an actual injury. Rather, the Court would have simply implemented the CWA’s explicit provision granting citizens standing to sue over statutory violations.

Third, *Massachusetts v. EPA*¹⁸⁷ concerned the EPA’s denial of a petition for a rulemaking under the Clean Air Act (CAA) to control “greenhouse gas” emissions from new motor vehicles. The EPA determined that (1) the CAA did not empower it to deal with global warming; (2) in any event, the agency’s factual findings did not support the regulation requested; and (3) such a narrowly focused regulation might impede the President’s preferred comprehensive and multinational approach to climate change.¹⁸⁸ Five Justices granted states and environmental groups standing to challenge the EPA’s decision.¹⁸⁹ At the threshold, this majority held that plaintiffs had set forth an “injury in fact” by alleging that the agency’s failure to regulate new vehicle emissions would contribute slightly to global warming, which would raise sea levels, which by the end of the century would probably erode some of Massachusetts’s coastal land.¹⁹⁰ The Court further ruled that this property loss would be caused by the EPA’s inaction and could be redressed by ordering the EPA to engage in the requested new rulemaking.¹⁹¹

Chief Justice Roberts led four dissenters in maintaining that plaintiffs had not demonstrated that (1) their asserted injury was “actual” or “imminent” (as it would not occur, if ever, for a century); (2) any such future property damage could fairly be traced to the absence of regulations on new car emissions in the United States, which would have a minuscule impact on overall global warming and an uncertain effect on the Massachusetts coast; and (3) the slight reduction in emissions sought would redress the state’s claimed future loss of land.¹⁹²

Under Professor Fletcher’s approach, the Justices would not have fought over the arcana of injury, causation, and redressability. Rather, the

186. *Id.* at 198–201 (Scalia, J., dissenting).

187. 549 U.S. 497 (2007).

188. *See id.* at 511–13.

189. *Id.* at 505–26. Asserting that states deserved “special solicitude” in standing analysis, the Court concluded that Massachusetts could vindicate its quasi-sovereign interest in protecting its coastal lands. *See id.* at 518–21. Because only one petitioner need have standing, the Court did not have to explicitly determine the standing of other plaintiffs, such as the environmental organizations. *See id.* at 518.

190. *Id.* at 521–22.

191. *Id.* at 523–25.

192. *Id.* at 541–48 (Roberts, C.J., dissenting).

Court would have ascertained whether the CAA granted standing to states and environmental organizations to challenge the EPA's refusal to engage in rulemaking on greenhouse gas emissions for new motor vehicles. The CAA authorizes judicial review of the EPA's "action . . . in promulgating any . . . standard . . . or final action taken."¹⁹³ In this situation, however, the EPA did *not* promulgate any standard, and the court of appeals upheld the agency's broad statutory discretion in deciding not to initiate a rulemaking.¹⁹⁴ But it is arguable that the EPA did take "final action" that assertedly violated its statutory duty to regulate greenhouse gas emissions.¹⁹⁵ Thus, Fletcher's standing inquiry would have centered on whether these plaintiffs were entitled to enforce that duty.

I suspect that he would have answered in the affirmative and that he would have applauded the Court for liberalizing standing in *Massachusetts v. EPA*, as well as in *Akins* and *Laidlaw*. Recently, however, the pendulum has swung back.

c. 2009–2013: A Reversion to Strict Standing

*Summers v. Earth Island Institute*¹⁹⁶ involved an effort by environmental groups to enjoin the U.S. Forest Service from exempting from statutory notice, comment, and appeal provisions the salvage sale of fire-damaged timber on federal land of less than 250 acres.¹⁹⁷ The Court denied the plaintiffs' standing because they had settled their dispute about the specific timber sale that had triggered the lawsuit, which meant that there was no longer any live controversy and thus no actual or imminent injury.¹⁹⁸ But four dissenters contended that the organizations' members had set forth a sufficient injury by alleging that their enjoyment of national forests (which they often visited) would be diminished if the Forest Service could sell timber on thousands of small parcels without following legally required procedures that, if obeyed, would lead to cancellation of some of these proposed sales.¹⁹⁹

Professor Fletcher would have avoided such elusive determinations about "injuries." Instead, he would have endorsed the concurring opinion of Justice Kennedy, who agreed with the result but stressed that he would

193. *Id.* at 514 n.16, 516 (majority opinion) (citing Clean Air Act § 307, 42 U.S.C. § 7607(b)(1) (2006)).

194. *See id.* at 514–15.

195. *See id.* at 505, 510–16 (discussing this alleged statutory violation and observing that courts routinely reviewed complaints that agencies had not complied with their governing statutes).

196. 555 U.S. 488 (2009).

197. *Id.* at 490–500.

198. *Id.* at 491–97.

199. *Id.* at 501–10 (Breyer, J., dissenting).

have come out the other way if Congress had expressly granted plaintiffs standing to vindicate a new substantive statutory right.²⁰⁰

In sum, the Court has vacillated in its statutory standing opinions, with the outcome often turning on a single vote.²⁰¹ By contrast, the Court has been more consistent in restricting plaintiffs’ ability to bring constitutional claims.

2. *Standing to Enforce the Constitution*

Following Fletcher’s lead, I will divide the pertinent cases into two categories. The first deals with private parties who sue directly under the Constitution. The second concerns Congress’s attempts to grant its own members (or other designated plaintiffs) standing to litigate constitutional questions of special interest to Congress.

a. *Private Lawsuits*

The Court has effectively foreclosed constitutional actions brought by taxpayers or citizens. Most importantly, *Hein v. Freedom from Religion Foundation, Inc.*²⁰² limited *Flast v. Cohen*²⁰³ to its precise facts: an Establishment Clause challenge to a specific federal statute enacted under the Taxing and Spending Power—not executive actions funded only indirectly through general appropriations.²⁰⁴ Professor Fletcher would deplore the denial of standing in the latter situation because it frustrated the Establishment Clause’s main purpose of barring federal government support for religion.²⁰⁵

200. *Id.* at 501 (Kennedy, J., concurring).

201. An exception is *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), in which all the Justices but one upheld the standing of conventional alfalfa farmers to challenge a Department of Agriculture order allowing the production of genetically engineered alfalfa, which would injure them because of the reasonable probability that their crops would be infected with the engineered gene. *See id.* at 2752–56. *Monsanto* is similar to a case in which the Court unanimously recognized the right of ranchers and irrigation districts to sue the federal government and claim that its alleged violation of the Endangered Species Act (giving excessive protection to a fish species in a reservoir they wanted to use) caused them to lose money. *See Bennett v. Spear*, 520 U.S. 154 (1997), discussed *supra* note 173.

In such cases, the liberal Justices, who favor broad standing, join with the conservatives, who invariably recognize that plaintiffs who suffer financial loss (the quintessential common law injury) must be permitted to sue. This consensus breaks down, however, when the Court considers non-traditional injuries such as harm to one’s aesthetic interests. Thus, *Monsanto* should not be read as suggesting that the Court was relaxing its Article III standing doctrine.

202. 551 U.S. 587 (2007).

203. 392 U.S. 83 (1968).

204. *See Hein*, 551 U.S. at 592–93; *see also Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (rejecting taxpayer standing to question a legislature’s tax credits for religious schools).

205. *See Fletcher, supra* note 6, at 267–69.

He would also be troubled by the Court's narrowing of standing for plaintiffs who have plausibly claimed that their constitutional rights have been violated by a federal statute. For example, *Clapper v. Amnesty International USA*²⁰⁶ involved the 2008 Amendments to the Foreign Intelligence Surveillance Act (FISA), which allowed the Attorney General and the Director of National Intelligence (with approval by a special FISA court) to authorize the surveillance of non-United States "persons" outside this country.²⁰⁷ Various United States "persons" (including human rights, legal, and media organizations) alleged infringement of their First and Fourth Amendment rights because they engaged in sensitive international communications with likely targets of FISA surveillance.²⁰⁸

The five conservative Justices concluded that these plaintiffs lacked Article III standing because their proffered injury was neither actual nor imminent (i.e., "certainly impending"), but rather rested on their "highly speculative" assertions that (1) the government would target their international communications; (2) it would invoke FISA rather than some other legal authority; (3) the FISA court would approve the surveillance; (4) the government would succeed in intercepting the communications; and (5) the plaintiffs would be parties to those communications.²⁰⁹ Similarly, plaintiffs could not assert a financial "injury in fact"—expending resources to protect the confidentiality of their communications—because such costs merely reflected their fear of hypothetical future harm.²¹⁰ Finally, the Court rejected as legally and factually unfounded the plaintiffs' argument that they should have standing because otherwise the constitutionality of the FISA amendments would never be adjudicated.²¹¹ Justice Breyer and his three liberal colleagues dissented on the ground that plaintiffs should have been permitted to sue because it was highly likely that the government would injure them by intercepting some of their private communications with foreigners outside of the United States.²¹²

Professor Fletcher would side with the dissenters because allowing standing would have been consistent with the meaning and purpose of the First and Fourth Amendments: to inhibit the government from curbing freedom of expression and engaging in unreasonable searches and

206. 133 S. Ct. 1138 (2013).

207. *Id.* at 1142–45.

208. *Id.* at 1142–43, 1145–46.

209. *Id.* at 1146–50.

210. *Id.* at 1150–53.

211. *Id.* at 1154. The Court reaffirmed earlier cases in which it had concluded that the absence of anyone else with standing to raise a constitutional claim was not, by itself, a reason to grant standing to a plaintiff. *Id.* Furthermore, in the future, others would have standing if they could show that they were harmed by the government's acquisition of communications through FISA surveillance. *Id.* at 1154–55.

212. *Id.* at 1155–65 (Breyer, J., dissenting).

seizures.²¹³ Moreover, he would agree with Justice Breyer that standing does not require a plaintiff to make the nearly impossible showing that future harm was certain, as opposed to reasonably probable—the Court’s traditional touchstone.²¹⁴

Yet Fletcher did not reflexively embrace broad constitutional standing. Rather, he criticized Congress’s use of standing to obtain judicial determinations on constitutional questions of special concern to federal legislators.²¹⁵ Thus, he would be heartened by the Court’s crackdown on such manipulation.

b. Special Congressional Grants of Standing

In *Raines v. Byrd*,²¹⁶ the Court rebuffed an attempt by several members of Congress, who had voted against the Line Item Veto Act, to invoke a provision of the Act authorizing them to challenge its constitutionality.²¹⁷ The Court held that these legislators could not demonstrate any concrete, particularized injury: They had been treated the same as their colleagues; their votes had been given full effect; and their failure to prevail politically should not have entitled them to pursue their dispute in a judicial forum by asserting damage to Congress as an institution.²¹⁸ Professor Fletcher would likely agree that Congress cannot grant standing to its members who lost a legislative fight over a statute to sue over its constitutionality.

The Court further cut back on standing in *McConnell v. Federal Election Commission*,²¹⁹ which reviewed provisions of the Bipartisan Campaign Finance Reform Act (BCFRA) of 2002 that addressed the use of “soft” money and issue advertising to influence federal elections.²²⁰ The BCFRA included special rules to allow expedited constitutional suits.²²¹ For present purposes, it is most significant that the Court rejected the standing of two plaintiffs. First, Senator Mitch McConnell could not show any actual or imminent injury flowing from the BCFRA’s new limits on broadcast advertising because he could not run again for five years.²²² Second, various voters, candidates, and voting organizations could not claim that the BCFRA’s increased contribution limits deprived them of the

213. See Fletcher, *supra* note 6, at 223–24.

214. See *Clapper*, 133 S. Ct. at 1155, 1160–65 (Breyer, J., dissenting) (citing numerous cases).

215. See Fletcher, *supra* note 6, at 280–90.

216. 521 U.S. 811 (1997).

217. See *id.* at 813–30.

218. *Id.* at 820–30.

219. 540 U.S. 93 (2003), *overruled on other grounds by* *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010).

220. See *id.* at 129–32 (citing statute).

221. *Id.* at 132.

222. *Id.* at 225–26.

equal ability to participate in the election process, primarily because that alleged “injury” did not invade any recognized legal interest.²²³ Fletcher would endorse the approach applied to this second group of plaintiffs, because the Court correctly examined whether the substantive legal right at issue gave rise to a cognizable injury (even though the opinion reiterated the unhelpful injury-in-fact rhetoric).

The most recent standing case, *United States v. Windsor*,²²⁴ concerned the IRS’s denial of Windsor’s request for a tax refund as a surviving spouse in a same-sex marriage because the federal Defense of Marriage Act (DOMA) excluded such couples from its definitions of “spouse” and “marriage.”²²⁵ After Windsor sued in federal district court on Fourteenth Amendment grounds, the President declined to defend DOMA’s constitutionality but continued to enforce it to enable courts to decide the constitutional question.²²⁶ The House of Representatives, through its Bipartisan Legal Advisory Group (BLAG) and with the Justice Department’s approval, intervened in support of DOMA’s constitutionality.²²⁷ The district court struck down DOMA, and the Court of Appeals affirmed, but the United States refused to comply with the judgment and denied the refund.²²⁸

Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, concluded that the United States had standing to appeal because the refund was a real economic “injury” and that Windsor’s ongoing claim to this money established a genuine Article III dispute.²²⁹ The Court acknowledged that the Executive Branch’s agreement with Windsor on the constitutional issue raised the danger of a friendly, non-adversarial proceeding.²³⁰ Nonetheless, Justice Kennedy characterized adverseness as a mere “prudential” limit that could be outweighed by other considerations, three of which were critical.²³¹ First, the amicus BLAG vigorously defended DOMA against Windsor’s challenge.²³² Second, dismissing the appeal would undercut the Court’s primary role of making constitutional

223. *Id.* at 225–228.

224. 133 S. Ct. 2675 (2013).

225. *See id.* at 2682–83.

226. *See id.* at 2683–84. The President justified this unusual approach as showing appropriate deference to the judiciary as “the final arbiter” of the Constitution. *Id.* at 2684. The dissenters, however, portrayed the Executive’s position in a negative light as effectively colluding with Windsor to obtain an advisory constitutional opinion. *See id.* at 2698–2700 (Scalia, J., dissenting) (internal quotation marks omitted).

227. *See id.* at 2684.

228. *See id.*

229. *See id.* at 2684–87.

230. *See id.* at 2687.

231. *See id.*

232. *See id.* at 2687–88.

decisions, as the President would be able to nullify a duly enacted statute based on his own interpretation of the Constitution.²³³ Third, the constitutional question was of immediate and great importance.²³⁴ On the merits, the Court held that DOMA violated the Fifth Amendment by depriving same-sex couples of equality and liberty, even if their home states had attempted to protect such rights.²³⁵

All four dissenters assailed this constitutional ruling, but they took two different approaches to standing. First, Justice Alito rejected the majority’s conclusion that the United States had standing, since the Executive Branch had agreed with the judgment below and was simply requesting an advisory opinion.²³⁶ However, he found that BLAG had standing under precedent establishing that Congress could defend the constitutionality of its statutes when the President would not, which “injured” its power to legislate.²³⁷

Second, Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, accused the majority of distorting standing rules because of an unseemly eagerness to declare a new constitutional right.²³⁸ Scalia argued that Article III required both a plaintiff who had standing and a truly adverse defendant, contrary to the majority’s labeling of adverseness as a “prudential” element of standing.²³⁹ Therefore, Article III dictated that both the Supreme Court and Court of Appeals should have dismissed because Windsor and the government accepted the district court’s judgment that DOMA violated the Fifth Amendment, with the result that there was no controversy between adverse parties.²⁴⁰

Repudiating the majority’s assertion that separation of powers obliged the Court to exercise its primary function of determining all constitutional questions, Justice Scalia pointed out that “[w]e perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us.”²⁴¹ He further contended that a case between friendly parties could not be decided merely because there were amici (such as BLAG) who could defend the opposing view.²⁴² Finally, Justice Scalia emphasized that the Constitution contemplated that Congress would challenge a President who failed to faithfully execute its statutes by taking

233. *See id.* at 2688; *see also id.* (stressing that dismissal would result in massive DOMA litigation in the lower federal courts, which would have no legal guidance from the Supreme Court).

234. *See id.* at 2688.

235. *See id.* at 2688–96.

236. *See id.* at 2711–12 (Alito, J., dissenting).

237. *See id.* at 2712–13 (Alito, J., dissenting).

238. *See id.* at 2698 (Scalia, J., dissenting).

239. *See id.* at 2697–2711 (Scalia, J., dissenting).

240. *See id.* at 2698–2700 (Scalia, J., dissenting).

241. *See id.* at 2699 (Scalia, J., dissenting). Justice Scalia articulated my “accidental” theory of standing, although he erroneously believed that it flowed from the injury-causation-redressability triad.

242. *See id.* at 2702 (Scalia, J., dissenting).

direct political action (e.g., cutting off funding or threatening impeachment), not through litigation.²⁴³

It is unclear how Professor Fletcher would react to *Windsor*. True, he criticized Congress for passing laws with obvious constitutional problems and authorizing its disgruntled members to sue immediately.²⁴⁴ But DOMA was constitutional when enacted in 1996 and contained no special standing for legislators. It was only when the Executive Branch in 2011 switched positions and refused to defend the statute that BLAG intervened.²⁴⁵

Under these unusual circumstances, I suspect that Fletcher would applaud the Court's result, but not its reasoning. His critique of "injury in fact" at the trial court level applies with even greater force when Congress or the President (or their agents) appeal, because governments cannot possibly suffer individualized harms. Rather, any such asserted "injury" (for example, to the United States' economic interest in retaining tax funds or to Congress's power to legislate) necessarily affects the entire body politic. Accordingly, Professor Fletcher would likely redirect the inquiry to the substantive legal provision at issue: the Due Process Clause. That Clause could be vindicated at trial only by a plaintiff like Windsor, who plausibly claimed that her individual rights to liberty and equality had been infringed. Moreover, in this rare situation where the President deemed a statute unconstitutional yet continued to enforce it, the substantive meaning of the Due Process Clause could best be determined by allowing an appeal.

Overall, in *Windsor* the Court strained its standing doctrine so that it could reach the constitutional issue. The Court did exactly the opposite in the companion case of *Hollingsworth v. Perry*,²⁴⁶ which involved a same-sex couple who had brought a Fourteenth Amendment challenge to a California ballot initiative that amended the state Constitution to define marriage as a union between a man and a woman.²⁴⁷ When California's governor refused to enforce or defend this initiative, the district court permitted the initiative's proponents to intervene, but ruled against them on the merits.²⁴⁸ The Ninth Circuit (1) accepted the California Supreme Court's opinion that initiative proponents have standing to assert the state's interest in defending an initiative's constitutionality when executive officials decline to do so, and (2) affirmed the district court's Fourteenth Amendment ruling.²⁴⁹

243. See *id.* at 2702–05 (Scalia, J., dissenting).

244. See Fletcher, *supra* note 6, at 265–90.

245. See *Windsor*, 133 S. Ct. at 2683–84.

246. 133 S. Ct. 2652 (2013).

247. See *id.* at 2659–60.

248. See *id.* at 2660.

249. See *id.* at 2660–61

On appeal, a bare majority of Justices held that the initiative’s proponents lacked standing because they had no particularized injury, but rather merely shared with all citizens the same general interest in vindicating the constitutional validity of a state law.²⁵⁰ The dissenters argued that the Court should have respected California law, which recognized that the integrity of the initiative process—designed to allow the people to govern themselves directly and bypass public officials—would be destroyed if those same officials failed to defend an initiative and its proponents were not permitted to do so.²⁵¹

In short, *Windsor* and *Hollingsworth* presented the same basic question: Did intervenors have standing on appeal to defend the constitutionality of a statute when executive officials refused to play this role? The Court did not cogently explain why it gave conflicting answers. Indeed, it made little sense to grant standing to the United States when its constitutional position—shared by the plaintiff—prevailed in the lower federal courts (*Windsor*), but to deny standing to initiative proponents who lost below and genuinely disputed their adversary’s constitutional claim (*Hollingsworth*).²⁵²

Of course, the Court has often rendered standing decisions that are inconsistent or contradictory, but only after the passage of several years.²⁵³ Amazingly, *Windsor* and *Hollingsworth* were decided on the same day.

B. *The Practical Case Against Radical Reform of Standing Doctrine*

Standing precedent continues to defy logical explanation. The Court’s standards are so indefinite that they can be applied to achieve almost any result.²⁵⁴ Thus, it is virtually impossible to reconcile the cases. For instance, in the statutory realm, several decisions after *Lujan* purport to apply its analysis but eviscerate it, as exemplified by *Akins*, *Laidlaw*, and *Massachusetts v. EPA*. Similar confusion abounds in constitutional cases. For example, *Hein* continues the *Valley Forge* charade that the Court is distinguishing, rather than overruling, *Flast*. In a similar vein, *Clapper* undermines the many cases allowing standing to plaintiffs who showed that their future injuries were reasonably likely—albeit not certain. Finally, *McConnell* seems to conflict with Burger Court decisions allowing Congress to grant its own members (and other political groups) special standing to raise constitutional challenges to its statutes.

250. See *id.* at 2659, 2661–68.

251. See *id.* at 2668–75 (Kennedy, J., dissenting).

252. See *Windsor*, 133 S. Ct. at 2712 (Alito, J., dissenting) (noting this anomaly and arguing that standing should have been granted in both cases).

253. See *supra* notes 52–98, 120–223 and accompanying text.

254. See Pushaw, *supra* note 12, at 49–53.

I doubt that Professor Fletcher is surprised by this sad state of affairs, for he correctly emphasized that standing's flawed analytical structure virtually guaranteed such incoherence.²⁵⁵ Remarkably, however, not a single Justice has ever hinted that the standing framework should be changed, despite bitter disputes about how this law should be applied in any given case. Therefore, the Court surely will not scrap its existing approach to standing and adopt a totally different one.²⁵⁶

That reality has led me to conclude that it is more practical to accept the Court's basic doctrine, warts and all, and to propose certain refinements to it.²⁵⁷ My recommended modifications, however, do not reflect mere pragmatic concerns. Rather, they also account for Article III's text, history, and early precedent—sources that Fletcher purposely did not consider.²⁵⁸ Because the Court has insisted that its standing doctrine is based on these materials, however, they deserve close attention.²⁵⁹

IV. LIMITING STANDING TO “ACCIDENTAL” PLAINTIFFS

A. *The Historical Meaning of Article III “Cases” and Separation of Powers*

According to the Court, standing law reflects the original understanding of Article III and the judiciary's appropriate role in the Constitution's separation-of-powers scheme.²⁶⁰ Unfortunately, no Justice has ever seriously studied the relevant history. Such an analysis yields insights that help to clarify standing.²⁶¹

255. Fletcher, *supra* note 6, at 221–24.

256. Professor Fletcher's proposal is the most widely accepted alternative, but there have been other thoughtful ones. See, e.g., Elliott, *supra* note 77, at 464, 507–08 (arguing that the Court, instead of considering separation-of-powers concerns indirectly through standing analysis, should abandon that approach and confront those concerns directly through an abstention doctrine).

257. See Pushaw, *supra* note 12, at 9, 16, 65, 82, 105.

258. See Fletcher, *supra* note 6, at 224.

259. Even though the Court has made the Constitution's eighteenth-century meaning relevant, a realist might dismiss this history on the ground that it cannot illuminate standing law, which actually arose as a response to the twentieth-century administrative state. See *supra* notes 29–33, 41–43 and accompanying text. However, recovering the genuine historical understanding of Article III and separation of powers can provide clear standing principles that are useful today. See Pushaw, *supra* note 12, at 102–03.

260. See *supra* notes 42–43 and accompanying text.

261. The next few pages will summarize my historical research concerning standing, which I have presented in great detail in several articles. See, e.g., Pushaw, *Case/Controversy*, *supra* note 11, at 448–50, 465–517; Pushaw, *Justiciability*, *supra* note 11, at 397–454; Pushaw, *supra* note 12, at 9–11, 66–82. Interested readers should consult those works for supporting evidence, which I will not repeat here.

1. *The Linguistic and Historical Evidence About “Cases”*

The Court has long maintained that its standing doctrine rests on the historical meaning of “Cases” and “Controversies” as used in Article III.²⁶² But the Justices have never noticed that all standing decisions involve only one type of Article III jurisdiction—“Cases” arising under the federal Constitution and laws—and that none deals with party-based “Controversies” (such as diversity jurisdiction).²⁶³ This oversight can be rectified by focusing on “Cases.”

The word “case” derives from the Latin root *casus*—a chance occurrence.²⁶⁴ In 1787, “case” in the legal context referred to a particular kind of happenstance event or action: one that invaded someone’s legal rights and thereby gave rise to a cause of action or later appeal.²⁶⁵ Courts resolved such “Cases” by exercising the “judicial power” of expounding the law (interpreting it and applying it to the facts presented) and rendering a judgment.²⁶⁶ The Framers and Ratifiers, then, thought that an Article III “Case” involved a violation of a plaintiff’s federal legal rights that came about fortuitously—that is, involuntarily as a result of a chance occurrence beyond his control, rather than as part of a calculated effort to manufacture a lawsuit.²⁶⁷ Only such “accidental” plaintiffs could legitimately request a judicial ruling, with its attendant exposition of the law.²⁶⁸

In the eighteenth century, “Cases” generally could be brought by (1) private individuals or entities to vindicate their personal legal rights, typically protected by the common law of torts, property, and contracts, or (2) the government to enforce public rights held by the entire citizenry, such as those embodied in penal laws and regulatory statutes.²⁶⁹ Occasionally, English and American legislatures authorized private parties to bring public actions to supplement the government’s law enforcement efforts, but never to challenge its decision to decline to prosecute a particular matter.²⁷⁰ The Constitution reflects this understanding that

262. See *supra* note 43 and accompanying text.

263. Pushaw, *supra* note 12, at 11, 67.

264. *Id.* at 67–68; Pushaw, *Case/Controversy*, *supra* note 11, at 472.

265. Pushaw, *supra* note 12, at 11, 67–68.

266. Pushaw, *Justiciability*, *supra* note 11, at 417–18; see also Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 746, 789, 805–06, 809, 827, 844–46 (2001) (tracing the historical evolution of the Anglo-American concept of “judicial power”).

267. See Pushaw, *supra* note 12, at 9–17, 66–105. Max Stearns has come to a similar conclusion about the necessity of “fortuity” to obtain standing, albeit through application of a totally different methodology: the economic theory of “social choice.” See STEARNS, *supra* note 41, at 37–38, 157–80, 190–91, 257–78.

268. See Pushaw, *supra* note 12, at 74.

269. See *id.* at 68–73 (citing Woolhandler & Nelson, *supra* note 14, at 691–732).

270. See *id.* at 69–71.

politically accountable officials could be trusted to enforce public rights in a rational and systematic way, whereas private citizens would bring such suits arbitrarily (often to harass their opponents).²⁷¹ Consequently, Congress could not enact a statute and grant any private person standing to enforce it on behalf of the public if the plaintiff's legal rights had not been infringed by chance.

The word "case" also conveyed the idea of precedent, which generally obliges courts to follow the law announced in their previous decisions.²⁷² This doctrine of stare decisis, which has remained intact, makes the order in which cases are presented critical.²⁷³ The legitimacy of precedent (and attendant judicial lawmaking) has always depended on random sequencing: Plaintiffs may properly invoke a court's jurisdiction only when, by happenstance, their legal rights have been violated because of circumstances beyond their control.²⁷⁴ Conversely, the validity of precedent is undermined when parties manipulate the order of case presentation by manufacturing a lawsuit with the aim of obtaining an advantageous legal ruling that will then be applied or extended in later decisions.²⁷⁵

As used in Article III, then, "Cases" referred to a court action brought by someone whose legal rights had been violated fortuitously. Only in this context could federal judges appropriately expound the law and set precedent.

2. *Separation of Powers*

The foregoing understanding of Article III "Cases" promoted separation of powers. The Constitution incorporated the novel Federalist idea that "We the People" were sovereign and delegated their power to their government agents.²⁷⁶ The People sought to prevent tyranny, protect liberty, and promote the rule of law by dividing power between the states and the federal government, then separating the latter's powers.²⁷⁷ Hence, the Constitution's first three Articles symmetrically provide that each general category of power—legislative, executive, and judicial—"shall be vested" in a corresponding independent institution: Congress, the President, and Courts.²⁷⁸

271. See *id.* at 71–72.

272. See *id.* at 73–76; Pushaw, *Case/Controversy*, *supra* note 11, at 475–76.

273. See Pushaw, *supra* note 12, at 74 (relying upon STEARNS, *supra* note 41, at 98, 158–59, 177–204).

274. See *id.* at 74–75, 101.

275. See *id.* at 74–75.

276. This paragraph summarizes the detailed historical study presented in Pushaw, *Justiciability*, *supra* note 11, at 411–35.

277. See *id.* at 411–15, 434–35.

278. *Id.* at 412–19.

These three departments, however, inherently have very different modes of operation and amounts of discretion. As the first actor, Congress in exercising “legislative power” has total control over its agenda and can therefore choose to enact, amend, or repeal laws—or to refrain from doing so—as to any of the subjects listed in Article I.²⁷⁹ Next, Article II imposes a duty on the President to “faithfully execute” the law, which at minimum means that he cannot totally refuse to enforce a duly-enacted federal statute²⁸⁰ (except perhaps in the rare situation where he concludes that it violates the Constitution).²⁸¹ Nonetheless, “executive power” necessarily entails the exercise of considerable discretion in light of policy priorities and resource constraints.²⁸² All federal statutory and regulatory provisions cannot be carried into effect with equal vigor, and the impossibility of total enforcement is a structural protection of liberty.²⁸³

Unlike the political branches, the judiciary has no control over the timing of its legal decisions.²⁸⁴ Federal courts cannot assert “judicial Power” and expound the law on their own initiative, but rather must passively wait for a party who has experienced a chance invasion of her legal rights to institute an Article III “Case.”²⁸⁵ In short, federal judges cannot legitimately pursue an active agenda of making laws (like Congress) or executing them to achieve broad policy aims (like the President).²⁸⁶

279. See Pushaw, *supra* note 12, at 77.

280. See Sai Prakash, *Take Care Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 222–23 (2005).

281. Most Presidents enforce a statute, despite their constitutional doubts, unless and until it is struck down by the Supreme Court (as illustrated in the recent DOMA litigation). See *supra* notes 226–28 and accompanying text. Others have argued that the President should not enforce a law that he independently determines is unconstitutional. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994).

282. See Prakash, *supra* note 280, at 222–23; see also Pushaw, *supra* note 12, at 77, 83–84, 96, 99–100. Admittedly, it is sometimes hard to pinpoint when the President’s discretionary administration of a federal statute becomes so lax as to constitute a breach of his duty to execute the law. Pushaw, *supra* note 12, at 83–84 n.361 and accompanying text (discussing this problem). Unless the President simply refuses to enforce a statute, however, he and his executive subordinates should be given very broad latitude.

283. See Pushaw, *supra* note 12, at 24, 96 (citing the illuminating work on this topic by Ann Woolhandler, Caleb Nelson, and Tara Leigh Grove).

284. See *id.* at 77; see also STEARNS, *supra* note 41, at 158–66, 198–211 (explaining how these institutional differences concerning timing and discretion fit into the Constitution’s separation-of-powers scheme). No federal court has authority to act until a plaintiff with standing properly invokes its jurisdiction conferred by Congress pursuant to Article III. At that point, federal district and circuit courts must exercise that jurisdiction. Since 1988, however, Congress has granted the Supreme Court discretion to determine which cases it will fully consider. In this sense, the Court now can shape the timing of its decisions. Nonetheless, the Court still cannot act and expound the law on its own initiative, but must await an appeal by a proper party.

285. See Pushaw, *supra* note 12, at 77.

286. Of course, this traditional division of powers has eroded over the years. Most notably, the Warren Court appeared to have a specific agenda to refashion constitutional law to achieve liberal policy goals. Nonetheless, no Justice has ever asserted freestanding authority to make law outside of the litigation context. Furthermore, courts have always “executed” the law in the limited sense of enforcing

3. *Modern Developments*

For about a century and a half, the Court generally implemented the Constitution's original design by deciding only genuine Article III "Cases" and thereby respecting separation of powers.²⁸⁷ Since the New Deal, the Court has tried to maintain this traditional judicial role through its standing rules. Although this effort has not been very successful, the Justices have unanimously approved the basic injury-causation-redressability analysis.²⁸⁸ Because this framework is settled, it seems fruitless to recommend a radical new approach to standing. Thus, I will propose modifications to this doctrine to better reflect Article III's text and history.

B. Incorporating the Original Meaning of "Cases" into Modern Standing Law

The Court could integrate my suggested Article III "Case" requirement into its existing standing doctrine fairly easily. Initially, the particularized injury-in-fact element would remain, but would focus on whether the harm befell the plaintiff by happenstance.²⁸⁹ Violations of federal law that produce common law injuries (i.e., to one's person, property, finances, or liberty) will virtually always meet this fortuity standard.²⁹⁰ Other claimed "injuries" may not, such as reduced aesthetic enjoyment of the environment (as in *SCRAP* and *Laidlaw*).²⁹¹ In such cases, courts should ensure that the plaintiff has suffered a distinctive harm that occurred by chance while she was engaging in lawful activity for its own sake, as opposed to deliberately exposing herself to a technical legal violation so that she could allege an "injury."²⁹² The latter self-inflicted harms should be treated like feigned claims, which the Court has long prohibited.²⁹³

it in individual cases. However, the judiciary cannot usurp the President's core "executive power" to administer federal laws on behalf of all Americans. The Court's standing doctrine has not always respected the President's exercise of executive power and discretion. *See infra* notes 318–324 and accompanying text.

287. *See* Pushaw, *supra* note 12, at 78–81.

288. *See supra* notes 29–51, 165, 256 and accompanying text.

289. *See* Pushaw, *supra* note 12, at 12, 82–83.

290. *See id.* at 68, 83.

291. *See supra* notes 64, 67, 74, 97, 111–114, 184–185 and accompanying text.

292. *See* Pushaw, *supra* note 12, at 12–13, 82–89. Such manufactured "injuries" are especially common in environmental law. Organizations often locate members who are willing to claim that they have suffered an "injury" (e.g., to their "aesthetic" or "recreational" interests) caused by a targeted defendant (usually a corporation), then use those members as nominal plaintiffs while directing the litigation. *See supra* notes 26, 183–186 and accompanying text.

I have elsewhere addressed two likely objections to my proposed analysis. First, it might be difficult for judges to determine whether a plaintiff's asserted injury actually occurred fortuitously, especially because attorneys are so skilled at drafting pleadings and affidavits to meet the "injury" standard. *See* Pushaw, *supra* note 12, at 13 n.47, 104. Nonetheless, courts have a duty to make this inquiry to stay

My proposed fortuity requirement would be rendered largely perfunctory, however, if judges had to blindly accept plaintiffs’ assertions that they subjectively felt injured by defendants’ actions. Therefore, an objective test should be applied: whether a reasonable person in plaintiff’s position would have regarded the harm as so significant that she would have been motivated to sue.²⁹⁴ Such an inquiry would respond to Professor Fletcher’s point that “[t]here cannot be a merely factual determination whether a plaintiff has been injured except in the relatively trivial sense of determining whether plaintiff is telling the truth about her sense of injury.”²⁹⁵ As long as the Court adheres to the injury-in-fact standard, however, ascertaining whether or not a plaintiff is making up an injury (or is hypersensitive) is not “trivial.”²⁹⁶ Furthermore, insisting that a plaintiff show that her “Case” arose by chance would greatly clarify causation and redressability analysis. When a person has been harmed involuntarily and accidentally, it is ordinarily obvious who caused the injury and whether the relief requested would likely redress it.²⁹⁷ For example, when a competent female employee is fired because of her gender, she has fortuitously suffered an invasion of her legal rights under federal employment discrimination statutes; her employer clearly caused the injury; and the relief requested (damages or reinstatement) will probably remedy it.

Conversely, a plaintiff who has manufactured an injury for the purpose of challenging government action on ideological grounds usually has to be

within their Article III boundaries, and doing so seems no harder than the many other tough calls judges have to make. *See id.* Second, although critics might deplore my approach as privileging common law rights over statutory ones, this preferential treatment is inherent in the very notion of Article III “Cases.” *See id.* at 86–87 n.370.

293. *See, e.g.,* Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850). The Court could deal with dubious or abusive lawsuits simply by extending its rule barring feigned claims, rather than by revising its standing doctrine. *See* Flast v. Cohen, 392 U.S. 83, 100 (1968) (recognizing that standing is closely connected to the ban on feigned and collusive litigation). However, after *Flast* the Court has never mentioned this relationship and instead has crafted elaborate standing standards. Thus, as a practical matter, it seems preferable to propose that the Court modify its existing standing regime than to suggest an entirely new approach. *See* Pushaw, *supra* note 12, at 80–81 n.355, 87 n.371 and accompanying text.

294. Without this objective test for injury, almost any plaintiff could claim that a violation of federal law (even one that was incurred on purpose) harmed her fortuitously because she had no control over the defendant’s conduct. Thus, the asserted injury must be substantial enough that a reasonable person would be induced to sue. *See* Pushaw, *supra* note 12, at 13–14, 88–91. Such an objective test, while hardly perfect, has long been used successfully in many areas of the law, such as negligence and contract formation. *See id.* at 88 n.376.

295. Fletcher, *supra* note 6, at 231.

296. *See* Pushaw, *supra* note 12, at 88–89. I recognize a strong counterargument: that courts should focus on “whether a plaintiff’s assertion of [a non-traditional] injury was sincere, without considering whether a reasonable person would have considered this injury to be serious enough to justify litigation.” *See id.* at 14 n.49. Although such a “sincerity” inquiry might be viable in some legal areas (such as the Free Exercise Clause), it does not work well in determining standing under certain statutes, especially those dealing with the environment. *Id.*

297. *See id.* at 14–15, 92.

equally creative with causation and redressability.²⁹⁸ The classic illustration is *SCRAP*.²⁹⁹ Law students in Washington, D.C. disliked an agency order that increased railroad freight rates without considering possible environmental impacts.³⁰⁰ The students did not seem to have any real interest at stake, however, because they did not ship goods by rail and would not experience any environmental effects distinct from those shared by all Americans. Nonetheless, the Court granted them standing based on their allegations that the order would raise the cost of transporting recycled goods, which would deter the use of such products, which would necessitate manufacturing replacement goods, which would require further depletion of natural resources, which would despoil the environment (possibly including the Washington area), which would lead the students to suffer “aesthetic” injury to their ability to enjoy the local scenery.³⁰¹

My approach would have foreclosed such a tenuous claim.³⁰² From an objective standpoint, the *SCRAP* plaintiffs had not fortuitously experienced any actual or imminent violation of their legal rights that would have induced a reasonable person to sue. Indeed, even their asserted future harm was speculative, as they had not identified any adverse environmental effects in Washington that would flow from the agency’s decision (or even that they would still be living there if and when such damage occurred).³⁰³ Moreover, to establish that the agency caused this make-believe “injury,” the students had to hypothesize that a complicated chain of events would transpire over a long period of time in a particular order.³⁰⁴ Finally, halting the rate increase was not likely to redress their supposed injury because this remedy would produce no discernible real-world impact on pollution in Washington.³⁰⁵

In sum, the Article III requirement that federal law “Cases” arise by chance should be used as a linchpin to rationalize the injury, causation, and redressability factors.³⁰⁶ This fortuity standard must, however, be

298. See *id.* at 92–93.

299. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), discussed *supra* notes 72–75, 111–114 and accompanying text.

300. See *supra* note 73 and accompanying text.

301. See *SCRAP*, 412 U.S. at 674–90.

302. See Pushaw, *supra* note 12, at 84–85, 92.

303. See *supra* notes 74–75, 111–112 and accompanying text.

304. See *supra* notes 73–74, 111, 301 and accompanying text.

305. See *supra* notes 75, 112, 303 and accompanying text.

306. Critics might argue that my approach favors the “haves” over the “have nots,” who can only be protected by granting standing to public interest organizations that have the resources, expertise, and willingness to litigate particular federal law issues (e.g., concerning the environment and civil rights). See Pushaw, *supra* note 12, at 95 n.408 and accompanying text, 96–97 (flagging this criticism). To be clear, I would allow such special interest groups to sue on behalf of their members who have genuinely suffered a fortuitous violation of their legal rights, but not to serve as self-appointed public watchdogs who manufacture litigation for purely ideological purposes.

harmonized with the fundamental constitutional principle that “[l]aws are a dead letter without courts to expound and define their true meaning and operation.”³⁰⁷ Article III judges, despite their guaranteed independence,³⁰⁸ cannot vindicate laws on their own.³⁰⁹ To ensure that federal legal rights remain viable, at least one party must be capable of enforcing them judicially. This enforcement goal can be achieved by applying the fortuity test rigorously when federal statutory and individual constitutional rights are at stake, but more leniently in those relatively rare cases arising under constitutional provisions that protect the rights of “We the People” collectively.³¹⁰

I will explore the foregoing ideas by considering, in turn, standing to sue under statutes and the Constitution. I will examine the latter category by distinguishing between individual and collective constitutional rights.

C. Statutory Standing

Regulatory legislation can always be enforced by three sets of plaintiffs. First, executive agencies have broad discretion to implement their organic statutes by promulgating regulations, prosecuting suspected legal violations, and seeking judicial enforcement of their orders.³¹¹ Second, intended beneficiaries or objects of regulation can sue an agency for failing to comply with its governing statute.³¹² Third, the Due Process Clause requires standing for plaintiffs who plausibly claim that an agency has invaded their common law or constitutional rights.³¹³

The central issue is how far Congress may constitutionally go beyond these three standard enforcement mechanisms if it concludes that they are inadequate to ensure full vindication of its laws. For instance, Congress might authorize concerned citizens to sue an agency on the grounds that the agency either under-enforced its statute or infringed the legal rights of a regulated entity or individual—or anyone else—who declined to assert them. Alternatively, Congress might allow any person to bring an action

307. See, e.g., THE FEDERALIST NO. 22, at 143–44 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

308. See Pushaw, *Justiciability*, *supra* note 11, at 417–18, 420–27, 431–34 (describing how the Framers ensured such impartiality by giving federal judges life tenure and an irreducible salary).

309. See *supra* notes 285–286 and accompanying text.

310. The need for this differential application of the fortuity standard reflects complicated legal considerations, which I hope to explain below in Parts IV.C–D.

311. See *supra* note 22 and accompanying text. More generally, the United States Government always has power to enforce its own laws. That seemingly basic principle was not observed in the Articles of Confederation. See THE FEDERALIST NO. 21, *supra* note 307, at 129–30 (Alexander Hamilton) (lamenting the “striking absurdity” of “a government, destitute even of the shadow of constitutional power to enforce the execution of its own laws.”).

312. See *supra* notes 29–33, 65 and accompanying text.

313. See *supra* notes 32, 45–47, 290 and accompanying text.

against a private party who has allegedly violated a statute or regulation where the agency either decided not to pursue the matter or resolved it in a way perceived by the plaintiff as too lenient.

Professor Fletcher urged total deference to all statutory grants of standing, however unorthodox.³¹⁴ I would not go that far. Rather, I would accord such congressional determinations a strong presumption of validity, but one that can be rebutted where other constitutional principles are jeopardized.³¹⁵ This threat is presented most starkly when an Act of Congress permits “any person” to sue the agency or a private party for violating the statute, regardless of whether that person has suffered a fortuitous invasion of legal rights that would objectively warrant a lawsuit or instead has manufactured a claim by asserting a vague and subjective “injury.”³¹⁶ This problem can also arise when such ideologically driven plaintiffs persuade courts to generously interpret statutory standing grants to those “adversely affected or aggrieved” by agency action.³¹⁷

Such suits raise serious concerns under the Constitution, especially its separation-of-powers structure. Most obviously, federal courts exceed their Article III bounds by expounding the law outside the parameters of a true “Case.”³¹⁸ Another danger, often overlooked, is that expansive standing can run afoul of Article II, which vests in the President alone the “executive power.”³¹⁹ That grant includes broad discretion to set administrative priorities based on policy considerations and resource limitations, which in turn preserves freedom from an oppressive regime that enforces every jot and tittle of the law.³²⁰ Hence, an agency may decline to proceed against a private party (e.g., where a technical statutory violation is small), reach a settlement, or conduct a full-blown administrative proceeding (perhaps followed by later appeals in federal courts).³²¹ On the other side of the coin, regulated individuals or entities might have a claim that the agency violated their statutory rights, but choose not to pursue the matter.

When an agency and a regulated party have resolved a statutory dispute, they should not then be subjected to lawsuits by politically unaccountable organizations or individuals who are unhappy with the result but have not experienced a chance violation of their legal rights that would

314. Fletcher, *supra* note 6, at 223–24, 251–65.

315. See Pushaw, *supra* note 12, at 12–16, 82–104.

316. See *supra* notes 24–26, 291–294, 298–306 and accompanying text.

317. Administrative Procedure Act § 101(a), 5 U.S.C. § 702 (2006); see *supra* notes 31, 33, 45–49, 65, 79 and accompanying text.

318. See *supra* notes 16–20, 264–287 and accompanying text.

319. See U.S. CONST. art. II, § 1, cl. 1.

320. See Pushaw, *supra* note 12, at 77, 83–84, 96, 99–100; see also *supra* notes 21–23 and accompanying text.

321. See *supra* notes 21–22 and accompanying text.

prompt a reasonable person to sue.³²² Allowing such plaintiffs to upset the agency’s judgment undermines executive power, as exemplified by *SCRAP*.³²³ Furthermore, both Article II and liberty are threatened when courts confer standing on self-appointed watchdogs of the public interest against private defendants who have already endured an administrative proceeding.³²⁴

Finally, Congress has other ways besides citizen suits to address under-enforcement of its laws. For example, the Constitution authorizes Congress to investigate such foot-dragging, to amend statutes to reduce or eliminate agency discretion, and to refuse to adequately fund the President’s preferred programs.³²⁵ And, of course, the Senate can decline to confirm the President’s agency-head nominees if it believes they will not execute statutes energetically enough.³²⁶

The Court has never systematically analyzed all of the foregoing separation-of-powers issues.³²⁷ Nonetheless, certain Justices have identified some of them as a basis for denying standing. Most notably, in *Lujan v. Defenders of Wildlife*,³²⁸ Justice Scalia considered the Interior Secretary’s determination that the ESA, which required every agency to consult with

322. See Pushaw, *supra* note 12, at 8, 12–15, 23–26, 33, 77–104. Such private attorneys general might either (1) seek a court order against the agency to remedy its failure to initiate or continue an enforcement action against another private party, or (2) sue that party directly. *See id.* at 99–100.

323. See *United States v. SCRAP*, 412 U.S. 669 (1973). There an agency exercised its statutory discretion to increase railroad freight rates, and those affected by this order (consumers and people who shipped goods) did not request judicial review. Nevertheless, the Court reopened the Executive Branch’s proceeding at the behest of student environmental activists who manufactured a complaint. *See supra* notes 72–75, 299–305 and accompanying text.

324. See *supra* note 23 and accompanying text.

325. See Pushaw, *Justiciability*, *supra* note 11, at 415–35 (describing the Constitution’s scheme for separating and checking federal government power, including congressional weapons to fight the executive).

326. See U.S. CONST. art. II, § 2, cl. 2 (granting the Senate power to approve or reject presidential nominees).

327. Moreover, at times a majority of Justices have articulated a different separation-of-powers rationale: that limiting standing protects Congress’s power to monitor the Executive Branch. For instance, in *Allen v. Wright*, 468 U.S. 737 (1984), the Court prohibited private parties from bringing a broad constitutional claim against an agency (the IRS) to force it to restructure its framework for fulfilling its legal duties (administering tax exemption policies). *See id.* at 759–61. The Court emphasized that Congress, not the judiciary, had primary responsibility for overseeing the wisdom and soundness of executive action. *Id.* at 760.

This reasoning suggests that courts should defer to Congress’s determination about how it can most effectively review the Executive Branch’s implementation of federal statutes. Put differently, the availability of traditional oversight mechanisms like investigations should not preclude Congress from authorizing citizen suits if it concludes that this tool best promotes statutory compliance. Although that position is logically consistent, it minimizes the unique threats that such suits pose to the appropriate constitutional roles of both the judiciary and the executive. *See supra* notes 21–23 and accompanying text. Those threats are not present when Congress exercises its other long-standing monitoring functions.

328. 504 U.S. 555 (1992). For a summary of *Lujan*, see *supra* notes 166–171 and accompanying text.

the Secretary to ensure that their proposed building projects would not threaten endangered species, did not apply to federal government-funded projects outside of the United States.³²⁹ The ESA gave “any person” the right to sue over the failure to consult.³³⁰ The Court held that this standing provision could be invoked only by those who satisfied Article III’s requirements.³³¹ The Court concluded that two groups of plaintiffs could not show individualized “injury in fact”: (1) an organization that sued on behalf of anyone who had an interest in observing endangered species,³³² and (2) scientists who alleged that they had studied such species in two foreign nations and that their professional work would be adversely affected because the agency’s project would harm the species’ habitat.³³³

Justice Scalia added that Congress could not create a procedural right, enforceable by any citizen in federal court, to ensure that executive officials followed the statutory consulting guidelines—a matter of generalized public interest.³³⁴ He argued that Article II left decisions regarding the proper administration of the law to the President, who could be checked by Congress and the voters.³³⁵

Justice Scalia’s opinion swept too broadly in suggesting that Article II executive power was inevitably compromised when a private party brought a court challenge to an agency’s interpretation and application of its statutory duties (particularly procedural ones). Under my approach, the Interior Secretary’s actions could be judicially reviewed at the request of someone whose legal rights had been fortuitously invaded in a way that would have motivated a reasonable person to sue.³³⁶ That test was met by one set of plaintiffs: the scientists, who credibly claimed that a statutory violation beyond their control—the agency’s failure to follow the consulting requirement—would harm the endangered species they studied and hence directly affect their livelihood, which would induce rational professionals to bring suit.³³⁷

Although recognizing the scientists’ standing would necessitate federal court examination of the Secretary’s interpretation of the ESA, resolving such a purely legal question is an ordinary exercise of Article III “judicial Power” that does not unduly interfere with Executive Branch prerogatives.

329. See *Lujan*, 504 U.S. at 557–59.

330. See *id.* at 571–72 (citing 16 U.S.C. § 1540(g) (2006)).

331. *Id.* at 559–62, 572–78.

332. *Id.* at 565–67, 571–78.

333. *Id.* at 562–64.

334. *Id.* at 571–78.

335. *Id.* at 577–78.

336. See *supra* notes 17–26, 264–275, 284–286, 289–290, 294–306, 315–324 and accompanying text.

337. See Pushaw, *supra* note 12, at 90–91.

Moreover, granting standing to the plaintiffs who sought to represent anyone interested in endangered species, while problematic under Article III,³³⁸ would make no difference from an Article II perspective because the executive agency’s decision would already be subject to judicial review.

Article II concerns would have arisen, however, in two hypothetical situations. First, Congress could have given the Secretary discretion to determine whether the consulting requirement should extend outside of the United States based on the facts of each case (such as the magnitude of the federal building project and the likelihood that an endangered species would be harmed). Second, a plaintiff could have asked a federal court to second-guess an agency decision applying a regulatory statute to a private party (e.g., refraining from a prosecution, settling a dispute, or conducting a proceeding and issuing a final order). *Lujan* presented neither of these two scenarios, and no liberty interests were at stake.

These two Article II problems have actually surfaced in other cases, however. Perhaps the best illustration is *Steel Co. v. Citizens for a Better Environment*,³³⁹ in which the Environmental Protection Agency (EPA) successfully ordered a steel corporation to rectify its failure to submit timely reports under a federal right-to-know law.³⁴⁰ Subsequently, an environmental organization invoked the statute’s citizen-suit provision and sought an injunction against the company.³⁴¹ The Court rejected standing based on a complicated analysis of its redressability rules.³⁴²

I agree with this result, but would have rested it upon three constitutional considerations. First, under Article III, the special interest group had not brought a “Case” to remedy the chance, and objectively significant, invasion of its members’ legal rights. Rather, the organization had manufactured a complaint to punish the company with additional litigation costs and negative publicity, even though the lawsuit would have no real-world impact because the company had already complied with the statutory reporting requirements. Second, under Article II, politically unconstrained individuals or entities should not be permitted to rehash a legal violation that has already been remedied by the Executive Branch.³⁴³ Third, such lawsuits infringe on the liberty interests of private parties who should be able to rely on that government resolution.³⁴⁴

338. Under my approach, such plaintiffs had not suffered a fortuitous invasion of their statutory rights. Thus, permitting them to sue would take a court outside the bounds of a true Article III “Case.” See *supra* notes 16–20, 264–287 and accompanying text.

339. 523 U.S. 83 (1998); see *supra* notes 174–178 and accompanying text (analyzing *Steel Co.*).

340. See *Steel Co.*, 523 U.S. at 87–88.

341. See *id.* at 88.

342. See *id.* at 102–09.

343. See *supra* notes 21–23, 270–271, 318–324 and accompanying text.

344. See *supra* notes 21–23, 271, 320, 322–324 and accompanying text. One objection would be that only individuals, not organizations like companies, have liberty interests worth protecting.

Similar reasoning would have clarified analysis in *Friends of the Earth v. Laidlaw*.³⁴⁵ After a state agency, acting pursuant to the federal Clean Water Act (CWA), prosecuted and reached a settlement with a company that had violated the CWA by discharging a pollutant into a river, a national environmental organization located members who lived near the river and brought a citizen suit on their behalf.³⁴⁶ The Court granted standing on the theory that the river-area residents had demonstrated aesthetic “injury in fact” based on their pretrial affidavits expressing concern that the water pollution had harmed them, despite the district court’s factual finding that there was no actual environmental damage or health risk.³⁴⁷ I would have reached the opposite result. Even assuming that these plaintiffs fortuitously experienced technical CWA violations, it is objectively unreasonable to sue over factually unfounded perceptions about harm.³⁴⁸ Furthermore, Article II and liberty concerns should have led the Court to prevent special interest groups from targeting private defendants who had already been subject to agency proceedings and then finding some locals who were willing to assert nonexistent “injuries” to be listed as nominal plaintiffs.³⁴⁹

Even more troubling than *Laidlaw* was *Massachusetts v. EPA*.³⁵⁰ There, five Justices granted environmental organizations and states standing to compel the EPA to issue regulations on greenhouse gas emissions from new motor vehicles,³⁵¹ despite the agency’s discretionary judgment not to engage in such a rulemaking based on myriad domestic and foreign policy considerations.³⁵² At the threshold, the Court ignored its established rule (faithfully applied by the circuit court) prohibiting judicial review of agency inaction, such as declining to promulgate regulations.³⁵³ Even if such lawsuits were generally allowed, however, these specific plaintiffs should not have been given standing to bring them. Objectively speaking, they had not suffered a chance invasion of their legal rights, but rather had

However, such organizations are composed of people who should be free to go about their business after they have complied with a federal regulatory statute to the government’s satisfaction.

345. 528 U.S. 167 (2000); see *supra* notes 183–186 and accompanying text (discussing *Laidlaw*); see also Pushaw, *supra* note 12, at 88–89, 93 (critiquing this case).

346. *Laidlaw*, 528 U.S. at 173, 176–77, 180–84.

347. *Id.* at 181–84.

348. Put in traditional standing terms, incorrect perceptions of harm do not constitute “injury in fact.” See *id.* at 198–201 (Scalia, J., dissenting).

349. See *id.* at 201, 209–10 (warning that allowing such lenient standing would greatly increase litigation).

350. 549 U.S. 497 (2007); see *supra* notes 187–192 and accompanying text (analyzing *Massachusetts v. EPA*).

351. *Massachusetts v. EPA*, 549 U.S. at 505–26.

352. See *supra* note 188 and accompanying text (describing these factors).

353. See *Massachusetts v. EPA*, 549 U.S. at 514–15 (noting, but declining to follow, the lower court’s decision).

concocted a subjective and speculative “injury” for the purpose of attacking an EPA policy decision they disliked.³⁵⁴

Other examples of separation-of-powers problems could be adduced.³⁵⁵ The takeaway is that overly generous grants of statutory standing raise serious constitutional questions.

D. *Standing to Bring Constitutional Claims*

Professor Fletcher argued that particular constitutional provisions suggest who can enforce them and that Congress should not grant standing more broadly.³⁵⁶ I reach a similar conclusion, albeit through a different analytical route: applying my Article III “Case” requirement of fortuity in view of the Constitution’s underlying structure and political theory.

Through a written Constitution, “We the People” delegated a portion of their sovereign power to their representatives in the federal government, but restrained that government in many ways.³⁵⁷ Perhaps most importantly, the Framers gave each branch jurisdiction only over enumerated subjects of special national and international significance, and thereby implicitly withheld any powers not granted.³⁵⁸ The Constitution also imposed certain express limits, such as Article I’s prohibition against ex post facto laws and bills of attainder.³⁵⁹ Moreover, the Constitution contains various checks—for instance, Congress’s ability to impeach executive and judicial officials and the President’s prerogative to veto legislation.³⁶⁰ Most germane for present purposes, federal judges received tenure and salary guarantees to make them immune from direct political pressure so that they could impartially exercise “judicial Power,” especially when they were policing

354. See Pushaw, *supra* note 12, at 14–15, 89, 92–93. The plaintiffs showed similar creativity in attempting to meet the other two standing requirements. First, as to causation, they tenuously alleged that the EPA’s failure to regulate new vehicle emissions (a tiny fraction of overall air pollution) would contribute to global warming, which would increase sea levels, which might eventually erode coastal lands. *Id.* at 15, 93. Second, they asserted that ordering the EPA to act would redress their claimed property injury, even though the regulation requested would not stop such land loss because of massive air pollution from other sources, particularly Chinese and Indian industries. *Id.*

355. For example, in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), the Court granted standing to voters to claim that the FEC, by failing to register a Jewish organization as a “political committee” required to disclose certain information publicly, had violated their statutory right to that information. *Id.* at 13–26. These plaintiffs were allowed to upend the FEC decision even though they failed to demonstrate that their legal rights had been violated fortuitously by the agency in any way that distinguished them from millions of other American voters. See Pushaw, *supra* note 12, at 6, 15, 43, 51, 100 (critiquing *Akins*).

356. Fletcher, *supra* note 6, at 265–90.

357. See *supra* notes 276–286 and accompanying text.

358. See Pushaw, *Justiciability*, *supra* note 11, at 414–18.

359. U.S. CONST. art. I, § 9, cl. 3.

360. See Pushaw, *Justiciability*, *supra* note 11, at 428–30 (describing such checks).

the limits on the government fixed by the Constitution, the People's supreme and fundamental law.³⁶¹

The Constitution thereby created a “natural presumption” that all of its provisions could be judicially reviewed, as prominent Federalists noted.³⁶² That presumption could be rebutted only by evidence that a particular clause, interpreted in light of the Constitution's structure and political theory, must be left to the final judgment of either Congress (as with impeachment) or the President (for example, pardons), or both (such as appointments and military decisions affecting the nation as a whole).³⁶³ Such “political questions,” then, were exceptions to the general rule that federal courts in deciding a case must be able to examine government actions that allegedly violate the Constitution.

This strong presumption favoring judicial review can be implemented only by ensuring that at least one party has standing to enforce every constitutional provision that does not raise a political question.³⁶⁴ At the federal level, that plaintiff cannot possibly be the United States, which will never sue itself for violating the Constitution.³⁶⁵ This absence of standing by the federal government directly contrasts with its ability and incentive to initiate litigation to vindicate its own statutes.³⁶⁶ That elementary, and largely overlooked, distinction between enforcement of the Constitution and statutes leads to a crucial insight: Some *private party* must have

361. See *id.* at 417–18, 420–27, 431–34.

362. See THE FEDERALIST NO. 78, *supra* note 307, at 524–25 (Alexander Hamilton); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169–71 (1803).

363. See Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1166–68, 1185–1201 (2002).

364. See Pushaw, *Justiciability*, *supra* note 11, at 485–90.

365. The original Constitution enumerated and limited the powers of the federal government, with only a few provisions restricting the states. Moreover, the Bill of Rights, which was the *quid pro quo* for the Constitution's ratification, applied only to the federal government. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Therefore, from a historical perspective, the Framers and Ratifiers likely contemplated that Article III “Cases” arising under the Constitution would occur most frequently against the federal government.

Of course, the Thirteenth, Fourteenth, and Fifteenth Amendments brought about a sea change by guaranteeing civil and political rights against invasion by the states and empowering Congress to enact legislation to effectuate such rights. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 351–401 (2006). Thus, the federal Executive Branch unquestionably has standing to enforce certain constitutional rights, particularly those protecting racial minorities, against the states. However, almost all of the major standing cases concern alleged constitutional violations by the federal government, and I will focus on that situation here.

366. See *supra* notes 21–22, 271, 280, 311, 320, 322, 343–344, 349, 365 and accompanying text. The only possible exception would be the exceedingly rare situation in which the President determines that a statute is unconstitutional, and even then the Executive Branch typically continues enforcement efforts until the Supreme Court strikes down the law. See *United States v. Windsor*, 133 S. Ct. 2675 (2013), discussed *supra* notes 224–245 and accompanying text. The key point, which is consistent with my thesis, is that the federal government never commences a court action to invalidate its own statutes (as contrasted with occasionally declining to defend their constitutionality when a private party sues).

standing to challenge the federal government’s alleged violation of any constitutional clause.

Under my thesis, the appropriate plaintiff would be one who has experienced a fortuitous invasion of her constitutional rights that would have induced a reasonable person to sue.³⁶⁷ Because the Constitution is our fundamental law, its violation would rationally justify a suit. The person entitled to such standing, however, will vary depending on whether the constitutional provision at issue protects individual or collective rights.

1. *Individual Constitutional Rights*

My methodology can be applied in a straightforward way to any Article III “Case” that arises under the Bill of Rights, Article I’s prohibition of bills of attainder or ex post facto laws, and amendments guaranteeing various civil and voting rights.³⁶⁸ Initially, plaintiffs must have experienced an interference with such rights because of a chance event beyond their control. If so, it is almost always reasonable for these victims to seek a judicial remedy, as rights are enshrined in the Constitution precisely because they are uniquely important. Some people in this position, however, will choose not to litigate. In that situation, standing should not be granted to anyone else by either the Court or Congress.³⁶⁹ As I have argued, this recommended framework balances competing constitutional considerations:

On the one hand, it protects liberty by allowing the person whose constitutional freedom has been infringed to sue—or to decide not to sue. As long as one individual can enforce such constitutional provisions, they retain vitality, and the government will be deterred from disregarding them. On the other hand, the Court promotes efficiency by insulating the government’s conduct from attack by paternalistic busybodies.³⁷⁰

The main drawback to my suggested approach is that it seemingly would have precluded several key cases that did not arise fortuitously, most notably those in which activists deliberately broke laws for the sole purpose of testing their constitutionality.³⁷¹ A familiar example would be Americans

367. See *supra* notes 17–18, 27–28, 264–275, 285–286, 294–298, 310 and accompanying text.

368. See Pushaw, *Justiciability*, *supra* note 11, at 486.

369. See *id.*

370. *Id.* (internal footnote omitted).

371. For example, *Griswold v. Connecticut*, 381 U.S. 479 (1965), arose when Planned Parenthood leaders intentionally violated Connecticut’s law banning the distribution of contraceptives in order to attack it as a violation of the constitutional right to privacy. See Robert J. Pushaw, Jr.,

who intentionally defied racially discriminatory statutes in order to challenge them as violating the constitutional right to equality.³⁷²

Almost all of these cases, however, involved laws enacted by states and are therefore not directly relevant to standing to sue federal officials. In any event, my theory does not prevent the vindication of individual constitutional rights. Most obviously, those who are prosecuted for violating a law can always raise such rights as a defense. Furthermore, people who wish to avoid the risk and stigma of breaking a law that the government will likely enforce against them have standing to bring a declaratory judgment action to determine its constitutionality.³⁷³ Either way, individual constitutional rights have an inherent significance that always renders their invasion worthy of judicial protection.³⁷⁴ To illustrate, since *Brown v. Board of Education*,³⁷⁵ the Court has recognized that unconstitutional racial discrimination inflicts grave harms on African Americans by denying their human dignity and depriving them of educational, economic, and political opportunities.³⁷⁶ At first glance, my proposal seems to cast doubt on the validity of the NAACP's litigation strategy of eliminating racial segregation in public education gradually, starting with blatantly unequal state graduate schools and eventually moving to elementary schools.³⁷⁷ However, as I have acknowledged:

[T]he Court should permit special interest groups to join (or serve as counsel for) plaintiffs who have fortuitously suffered an actual and legally cognizable injury, but not to fabricate lawsuits when such circumstances are absent. The former situation occurred when states deprived black children of their constitutional right to equality, which inflicted real and serious injuries [I]f people

Partial-Birth Abortion and the Perils of Constitutional Common Law, 31 HARV. J.L. & PUB. POL'Y 519, 529–31 (2008) (analyzing *Griswold*).

372. See MICHAEL KLARMAN, *BROWN V. BOARD AND THE CIVIL RIGHTS MOVEMENT* (2007).

373. See Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 (2006), discussed in Pushaw, *Justiciability*, *supra* note 11, at 494.

374. I realize that federal courts have previously recognized (or simply assumed) the “injury”–and hence the standing–of people who intentionally subjected themselves to the government's enforcement of a criminal or civil law in order to test its constitutionality. Consequently, one might reasonably argue that such suits should continue to be permitted, even if individual rights could also be litigated in other ways (e.g., as a defense to a criminal prosecution or as a claim in a declaratory judgment action). My limited point is that my proposed fortuity requirement would not foreclose the vindication of constitutional rights.

375. 347 U.S. 483 (1954).

376. See Pushaw, *supra* note 12, at 89–90 n.383. By contrast, statutory rights typically are less significant, and their alleged violation often produces harms that are at best trivial, as exemplified by *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*, 412 U.S. 669 (1973), *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), and *Massachusetts v. EPA*, 549 U.S. 497 (2007). See *supra* notes 72–75, 111–114, 183–190, 291–293, 299–305, 345–354 and accompanying text.

377. See KLARMAN, *supra* note 372.

involuntarily suffer a chance injury stemming from the violation of a law . . . , they should be granted standing, and concerned organizations should be able to join such suits (or bring them directly on behalf of genuinely injured members).³⁷⁸

In short, my approach ensures that all individual constitutional rights can be litigated by an appropriate party. Interestingly, I end up at the same place as Professor Fletcher, who recognized that individual constitutional rights are personal to their holders.³⁷⁹ For instance, he contended that the Fourth, Fifth, and Sixth Amendments create rights that vest only in criminal defendants and that Congress would undermine those rights by attempting to expand the class of plaintiffs permitted to litigate them to include either the defendants’ relatives or concerned citizens.³⁸⁰

Furthermore, the Court could incorporate my proposal without significantly changing its jurisprudence. Most notably, the *individualized* injury requirement, whatever its flaws, makes sense as applied to determining standing under constitutional provisions that safeguard *individual* rights.³⁸¹ So does the Court’s prudential rule that such rights can be invoked only by someone who has experienced their violation, not by third parties claiming injury based on their mere awareness of unconstitutional conduct directed against the victim.³⁸² Consequently, the existing standing regime, despite its shortcomings, usually leads to correct results in cases involving individual constitutional rights.³⁸³

378. Pushaw, *supra* note 12, at 103.

379. See Fletcher, *supra* note 6, at 224, 278–79.

380. *Id.* at 278–79.

381. See Pushaw, *Justiciability*, *supra* note 11, at 486.

382. See *id.*

383. A recent example of this “right result, wrong reasoning” pattern is *United States v. Windsor*, 133 S. Ct. 2675 (2013), discussed *supra* notes 224–245 and accompanying text. Plaintiff Windsor credibly alleged that her Fifth Amendment due process rights had been violated fortuitously because of circumstances beyond her control: the death of her same-sex spouse and the IRS’s refusal to give her the tax exemption for surviving “spouses” as defined in DOMA. See *id.* at 2682–84. Moreover, Windsor could properly invoke an individual rights provision because she was suing on behalf of herself—not all citizens or all same-sex couples. In short, Windsor unquestionably had standing in the federal district court.

If the Executive Branch had followed its ordinary protocol, it would have appealed to vindicate DOMA and defend its constitutionality. The President, however, chose to enforce DOMA (thereby denying Windsor the tax refund ordered by the trial court) yet refuse to make a constitutional defense. See *id.* at 2683–84.

Under such unusual circumstances, dismissing the appeal would have meant that no victim of this asserted constitutional violation could ever get a remedy and that the Supreme Court could never determine the Due Process Clause’s meaning in this context. The Constitution, however, contemplates that the violation of every legal right must be remedied and that at least one party must have standing to litigate every constitutional provision. See *supra* notes 357–367 and accompanying text. In *Windsor*, that party was BLAG, which had successfully intervened in the district court to contest the plaintiff’s constitutional claim and would do the same on appeal. See *Windsor*, 133 S. Ct. at 2684, 2687–88. Thus,

2. *Collective Constitutional Rights*

The Court's standing rules function poorly, however, when applied to constitutional clauses that guarantee rights held in common by "We the People."³⁸⁴ Logically, violations of such provisions harm the entire populace, so the Court's insistence on a showing of "particularized injury" renders them judicially unenforceable.

Three cases illustrate this point. First, *Ex parte Levitt*³⁸⁵ denied a citizen standing to challenge Hugo Black's appointment to the Court as unlawful under Article I's Ineligibility Clause, which bars members of Congress (like then-Senator Black) from any judicial or executive office that has been created or has received extra compensation during their legislative service.³⁸⁶ Second, in *Schlesinger v. Reservists Committee to Stop the War*,³⁸⁷ the Court concluded that citizens could not sue congressmen who simultaneously served in the United States military reserves (an executive office) and thereby ran afoul of Article I's Incompatibility Clause, which prohibits such dual office-holding.³⁸⁸ Third, *United States v. Richardson*³⁸⁹ rejected taxpayers' standing to claim that a law authorizing secret CIA funding failed to comply with Article I's requirement that Congress provide a public "Statement and Account" of all expenditures.³⁹⁰

Each of these opinions rested on the rationale that the plaintiffs had not personally suffered an injury, but rather had brought a grievance about the government's conduct shared equally by all Americans.³⁹¹ The Court dismissed the argument that it should confer standing because if it did not, then no one would be able to sue.³⁹² The Court thereby implicitly signaled that standing would not be granted in the future, even to plaintiffs who could plausibly allege that they had been injured in a distinct way by the unconstitutional action—for example, a party who lost a case in which the

the Court correctly granted BLAG standing, albeit under a strained application of its "injury in fact" and prudential standing rules. *See id.* at 2687–88.

384. *See* Pushaw, *Justiciability*, *supra* note 11 at 487–90. Here I built on the pioneering work of other scholars, such as Donald Doernberg and Martin Redish. *See id.* at 487 (citing sources).

385. 302 U.S. 633 (1937) (per curiam).

386. *Id.* at 633–34 (citing U.S. CONST. art. I, § 6, cl. 2).

387. 418 U.S. 208 (1974).

388. *Id.* at 209–28 (citing U.S. CONST. art. I, § 6, cl. 2); *see supra* notes 131–132 and accompanying text (discussing *Schlesinger*).

389. 418 U.S. 166 (1974).

390. *Id.* at 167–70 (citing U.S. CONST. art. I, § 9, cl. 7); *see supra* notes 128–130 and accompanying text (examining *Richardson*).

391. *See Schlesinger*, 418 U.S. at 216–28; *Richardson*, 418 U.S. at 175–78; *Levitt*, 302 U.S. at 633–34.

392. *See Schlesinger*, 418 U.S. at 227; *Richardson*, 418 U.S. at 179.

ineligible Justice Black had cast the deciding vote.³⁹³ Indeed, such “follow up” standing has never been allowed.

Decisions like *Levitt*, *Schlesinger*, and *Richardson* invert the fundamental idea that “We the People” established a written Constitution that limits the federal government and that ultimately depends on independent federal courts to enforce those restrictions.³⁹⁴ For instance, Article I imposes various constraints on Congress, often to prevent corruption. Most importantly, the Ineligibility and Incompatibility Clauses protect citizens by prohibiting their legislative servants from having conflicts of interest or engaging in self-dealing.³⁹⁵ Similarly, the Statement and Accounts Clause ensures fiscal transparency by requiring Congress to inform Americans how their tax dollars are being spent.³⁹⁶ Obviously, federal legislators cannot impartially enforce limits on themselves. Only Article III judges, who are immune from direct political pressure, can be trusted to do so.³⁹⁷ Remarkably, the Court has made such judicial review impossible by denying standing to virtually everyone.³⁹⁸ Many provisions of the Constitution have thereby been rendered legally meaningless.³⁹⁹

393. Realistically, the Justices would never confer standing where doing so would lead to a decision on the merits that one of their colleagues was constitutionally ineligible to serve and therefore must be thrown off the Court. This pragmatic consideration also holds true when a member of Congress has been unconstitutionally appointed to an Executive Branch position, as has occurred with increasing frequency over the past forty years. For example, no one had standing to challenge President Clinton’s nomination of an ineligible Senator as Secretary of the Treasury. See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 915–16 (1994).

In theory, the constitutional invalidity of such an appointment could be invoked later to protest a coercive action by the executive official (e.g., the Treasury Secretary implementing a tax hike that directly affected the defendant). See *id.* at 916–17. In reality, however, such litigation never succeeds because courts will not “disturb commonplace, accepted government practices, even those that fairly clearly violate the Constitution.” *Id.* at 917.

Professor Paulsen laments that federal officials routinely flout inconvenient constitutional provisions when they know that such misconduct cannot result in a justiciable lawsuit. *Id.* at 915–16. He does not, however, question the standing doctrine that leads to such a bizarre state of affairs.

394. See *supra* notes 357–367, 384–390 and accompanying text.

395. See U.S. CONST. art. I, § 6, cl. 2. The definitive analysis of the Incompatibility Clause is Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994). These authors expressly decline to address standing issues, however. See *id.* at 1049 n.12.

396. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 213 (1833).

397. See *supra* note 361 and accompanying text.

398. See *supra* notes 392–393 and accompanying text.

399. Although I cannot here address the extensive literature on under-enforced constitutional norms, I should clarify that I am not arguing that the entire Constitution must always be judicially reviewable to retain its legal meaning. Most notably, certain of its clauses, such as those concerning impeachment and war powers, remain legally viable even though they are entrusted exclusively to Congress or the President (or both). See *supra* notes 363–364 and accompanying text. Similarly, a particular plaintiff might not be the appropriate party to file a complaint under a constitutional provision, thereby leaving it judicially unenforceable in that case (but not in others). Nonetheless, I submit that the Court should not categorically deny standing to all plaintiffs who seek to vindicate constitutional claims that do not raise political questions.

To avoid this indefensible result, I adopt the Federalists' presumption that every constitutional clause is judicially reviewable, except those involving political questions.⁴⁰⁰ Neither the Court nor any scholar has presented evidence that the Incompatibility, Ineligibility, or Statement and Account Clauses raise political questions. Therefore, they are judicially enforceable, which necessarily means that some private plaintiff must have standing to litigate them.⁴⁰¹

Under my analytical framework, this constitutional requirement of private enforcement can be fulfilled through two rules. First, when the federal government violates a constitutional provision that protects "We the People" as a whole, all citizens have been fortuitously harmed because they had no control over the government's misconduct. Second, it should always be deemed reasonable for Americans to sue to vindicate such collective constitutional rights. Accordingly, in *Levitt*, *Schlesinger*, and *Richardson*, I would have granted standing to the plaintiffs because they were acting reasonably in challenging federal officials who had fortuitously infringed such rights.⁴⁰²

The Court in *Flast v. Cohen*⁴⁰³ implicitly grasped the constitutional necessity of granting standing broadly to enforce collective rights, but did not explicitly articulate this idea in a coherent manner. Rather, Chief Justice Warren distorted existing doctrine, which flatly banned taxpayer standing, by crafting an exception for Establishment Clause challenges to congressional spending on religious institutions.⁴⁰⁴ Conservative Courts have similarly manipulated *Flast*, confined it to its precise facts, and stymied suits by taxpayers or citizens.⁴⁰⁵

Clarity would be gained by recognizing that the Establishment Clause was originally designed to protect "We the People" from federal government attempts to establish or control religion.⁴⁰⁶ In the post-World

400. See *supra* notes 362–364 and accompanying text.

401. See *supra* notes 364–367 and accompanying text.

402. Many would disagree that federal courts should decide cases involving constitutional provisions such as the Incompatibility and Ineligibility Clauses, unless Congress specifically authorizes such suits (thereby effectively transforming collective constitutional rights into justiciable individual rights). This argument reflects the prevailing doctrine that Congress has plenary control over federal court jurisdiction. See Pushaw, *Congressional Power*, *supra* note 11, at 848 (describing this view). But I have long rejected the notion that Congress can deprive the entire federal judiciary of its Article III "judicial Power" to decide "all Cases," most importantly those "arising under the Constitution." See *id.* at 847–97. Most pertinently, Congress should not be allowed to prohibit independent federal courts from interpreting and applying those constitutional clauses that were designed to restrict Congress itself. See *id.* at 856–64, 873–96.

403. 392 U.S. 83 (1968).

404. See *id.* at 99–106.

405. See *supra* notes 124–1257 and accompanying text.

406. See STEVEN D. SMITH, *FOREORDAINED FAILURE* (1995) (contending that the Establishment Clause was a jurisdictional principle that rejected the federal government's power to control the church but left the states with discretion to deal with religion as they saw fit).

War II era, the Court has also interpreted the Clause as generally prohibiting any support for religion, financial or otherwise, by either the federal or state government.⁴⁰⁷ Whatever one thinks of this jurisprudence, for standing purposes it should be taken as correct. If the Establishment Clause creates a collective right to a federal government that does not aid religion, the violation of that right cannot cause an individualized injury.⁴⁰⁸ Strict application of standing doctrine will render that Clause a legal nullity—an outcome that defeats the very purpose of a written Constitution that is founded upon popular sovereignty and enforced judicially as supreme law.⁴⁰⁹ Therefore, any citizen with a plausible claim that the federal government has violated the Establishment Clause should be allowed to sue.

The main objection to such liberalized standing is that it might overwhelm federal courts. That possibility is unlikely, however, for three reasons. First, only a tiny percentage of the overall federal question docket involves collective constitutional rights. Second, if the number of such cases began to increase substantially, Congress could require all plaintiffs to proceed in a single class action in the Washington, D.C. federal district court.⁴¹⁰ Such a scheme would preserve the Constitution while maintaining efficiency. Third, as an alternative, the Court could adopt prudential limits, such as by restricting standing to plaintiffs who live in the geographic area where the alleged violation occurred.⁴¹¹

407. Most modern Establishment Clause cases do not involve the federal government, but rather state laws that provide financial assistance to religious schools, authorize or allow prayer in public schools, fund or permit religious displays on government property, grant religious exemptions to regulatory laws, and the like. I do not consider such decisions here, but rather focus on the relatively small number of cases concerning the federal government, which usually raise the issue of taxpayer standing.

408. See William P. Marshall & Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 217, 230–47, 252. Under this theory, even beneficiaries of government largesse, such as Catholic schools, might experience harm if the government attaches strings to funding and thereby compromises and corrupts the church’s religious mission. See *id.* at 243–46 (arguing that the Court’s narrowing of taxpayer standing frustrates the purpose of the Establishment Clause, which was designed to prevent intangible, psychic, widely shared harms caused by government efforts to compel citizens to support religion). The Court, however, has strained to reconcile its Establishment Clause jurisprudence with its standing doctrine, often by limiting access to plaintiffs who appear to have been hurt in some distinct way (e.g., atheists who oppose prayer in public schools). In many cases, however, the Court has simply assumed plaintiffs had standing and has reached the merits of their Establishment Clause claims. See *id.* at 215–16, 223–24.

409. See *supra* notes 276–286, 357–367 and accompanying text.

410. One might respond that Congress should not be able to force a plaintiff to cede her right to sue to a class. That contention would be far more powerful, however, if an individual rather than a collective right were at stake.

411. See Marshall & Nichol, *supra* note 408, at 247–49. Similar prudential rules might be useful in other areas. For example, standing to bring a claim that a Supreme Court nominee’s appointment would violate the Ineligibility Clause could be confined to active members of that Court’s bar, who would face the prospect of appearing before a Justice who should have been constitutionally disqualified. See *supra* notes 385–386, 391–402 and accompanying text.

Ultimately, my approach to collective constitutional rights leads me to results that are similar to those reached by Professor Fletcher. For example, he argued that the Court should grant standing to taxpayers to vindicate the meaning and purpose of the Establishment Clause—to prevent the government from financially assisting religion.⁴¹² He took a similarly broad view of the Ineligibility and Incompatibility Clauses.⁴¹³ Thus, Professor Fletcher and I usually agree on whether or not standing should be granted in particular constitutional cases, albeit through the application of different methodologies.

E. Comparing My Approach to Fletcher's and Answering Potential Objections

Professor Fletcher and I share the conviction that the Court's existing standing doctrine is fundamentally flawed. Nonetheless, our proposed solutions diverge in three major respects.

First, he recommended treating standing not as an inflexible jurisdictional inquiry requiring uniform application of identical legal standards (injury, causation, and redressability), but rather as an *ad hoc* determination that depends upon the particular substantive federal law at issue.⁴¹⁴ I contend, however, that Article III contains a legal principle that applies to all "Cases": They can be brought only by a plaintiff who can demonstrate that her legal rights have been invaded by chance, which triggers a federal court's "judicial Power" to expound the law.⁴¹⁵

Second, Fletcher helpfully distinguished statutory from constitutional standing, but drew the wrong inference from that distinction. He concluded that Congress's power to confer standing is plenary as to its own legislation, but limited as to constitutional provisions (which often create rights that are personal to their holders and thus cannot be enforced by citizens generally, even if Congress purports to say otherwise).⁴¹⁶ By contrast, I maintain that the critical difference between statutes and the Constitution is that the federal government has both the power and incentive to judicially enforce the former, but not the latter. Conversely, private parties must have standing to sue to vindicate the Constitution, but not statutes (except for private plaintiffs who (1) are objects or beneficiaries of legislation, or (2) have suffered an invasion of their common law or constitutional rights by an agency). Thus, contrary to

412. Fletcher, *supra* note 6, at 267–69, discussed *supra* note 127 and accompanying text.

413. Fletcher, *supra* note 6, at 270–71, 288–89, discussed *supra* notes 128–133 and accompanying text.

414. Fletcher, *supra* note 6, at 223–24, 232–34, 242–43, 246–47, 250–51, 265–66, 289–91.

415. See *supra* notes 14–28, 264–275, 285–286 and accompanying text.

416. Fletcher, *supra* note 6, at 223–24, 251–90.

Professor Fletcher, I would not leave Congress with absolute discretion to grant statutory standing to private parties more broadly, especially citizen suits that thwart the federal Executive Branch’s enforcement of regulatory laws.

Third, and relatedly, Fletcher treated constitutional cases monolithically, whereas I would divide them according to whether they involved “individual” or “collective” rights. In the former category, we both agree that Congress cannot confer standing more broadly than a constitutional clause bestowing individual rights reasonably permits (such as by authorizing citizens to sue to enforce the Fourth Amendment rights of accused criminals). In the latter category, however, I reach an issue that Fletcher did not consider: whether Congress can restrict standing to enforce constitutional provisions that protect collective constitutional rights. I submit that Congress cannot deprive citizens of the opportunity to sue it for violating such provisions, which invariably impose limits on Congress itself.

Admittedly, my endorsement of citizen standing to vindicate collective constitutional provisions appears to conflict with my rejection of such generous standing to enforce either statutory or individual constitutional rights. That inconsistency, however, reflects the necessity of interpreting and applying Article III in light of the rest of the other provisions of the Constitution and its underlying structure and political theory.

To summarize, independent federal courts can fulfill their duty to decide “all Cases . . . arising under [the] Constitution”⁴¹⁷ only by allowing broad standing—and hence relaxing the fortuity requirement—when plaintiffs sue under constitutional clauses that protect rights held by “We the People” as a whole. Otherwise, federal officials will flout these provisions with impunity. By contrast, individual constitutional and statutory rights can be preserved by confining standing to those who have personally been harmed by the government’s fortuitous transgression of those rights. Finally, Acts of Congress, unlike constitutional provisions, can always be enforced by the federal government.

CONCLUSION

The Structure of Standing made a highly original and lasting contribution to our understanding of a vitally important legal subject. Professor Fletcher’s deceptively simple thesis—that standing should be determined by examining the specific substantive federal law at issue—provides an intellectually rigorous and coherent approach to a doctrine that is notoriously complicated and confusing.

417. U.S. CONST. art III, § 2, cl. 1.

Not surprisingly, I agree with much of Fletcher's analysis. Nonetheless, I would add a historical perspective by incorporating the original meaning of Article III "Cases," which would restrict standing to plaintiffs who have suffered a fortuitous violation of their federal legal rights. Adopting this limitation would significantly clarify standing law.