

# IN PRAISE OF JUDGE FLETCHER—AND OF GENERAL STANDING PRINCIPLES

*Ernest A. Young\**

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In his classic article, *The Structure of Standing*,<sup>1</sup> William Fletcher undertook nothing less than a fundamental revision of the Supreme Court's standing doctrine. He proposed “that we abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of ‘injury in fact.’”<sup>2</sup> With this doctrinal detritus cleared away, he argued,

standing should simply be a question on the merits of plaintiff's claim. If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty . . . . If a duty is constitutional, the constitutional clause

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\* Alston & Bird Professor, Duke Law School. This essay is being prepared for a symposium in honor of Judge (and Professor) William Fletcher and entitled “*The Structure of Standing* at 25.” I am grateful to Heather Elliott and the University of Alabama Law School for the invitation to participate, and to Athul Acharya for valuable research assistance. Judge Fletcher is the first person who ever encouraged me to go into law teaching, and it is both a pleasure and an honor to pay tribute to him and to engage with his classic article.

1. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988). Because I am a sometime admiralty scholar, my heart will always belong first and foremost to Judge Fletcher's immortal *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984) (really—just read it). But *The Structure of Standing* certainly occupies an exalted place in the Fletcher pantheon.

2. Fletcher, *Standing*, *supra* note 1, at 223.

should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it.<sup>3</sup>

Although “Congress should have some, but not unlimited, power to grant standing to enforce constitutional rights,” he insisted that “[t]he nature and extent of that power should vary depending on the duty and constitutional clause in question.”<sup>4</sup>

For Judge Fletcher, “[t]he essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty?”<sup>5</sup> And his central insight was that “[t]his question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked.”<sup>6</sup> There is more, of course, to the article. For example, Fletcher attacked the very notion of “injury in fact” that serves as the keystone of the Supreme Court’s current standing doctrine.<sup>7</sup> But the task I am setting for myself here is not a general defense of standing doctrine, and I submit that the core insight of Fletcher’s article—that standing is unintelligible apart from the merits of the underlying claims in a lawsuit—retains its significance even if one takes much of the edifice of contemporary standing doctrine as given. It is that central insight that I wish to examine in this Essay.

Judge Fletcher’s central insight would be plainly correct even if we accept the injury-in-fact requirement. Injuries are always suffered with respect to some interest, and the relevant interests are typically related to, if not created by, the substantive rule of law that gives rise to the underlying claim. If I sue to challenge the state’s prohibition on flag burning,<sup>8</sup> my injury is simply that I cannot exercise my right to free expression. What counts as an injury to the free speech interest is a merits question under the First Amendment. The substantive contours of the relevant rights matter. Despite the Court’s general refusal to recognize taxpayer standing,<sup>9</sup> for example, the Court does recognize taxpayer standing to challenge the expenditure of public funds to support religious activities.<sup>10</sup> The history of the Establishment Clause, which was born in reaction to government expenditures of taxpayer funds to support the Anglican clergy, supports

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3. *Id.* at 223–24 (footnote omitted).

4. *Id.* at 224.

5. *Id.* at 229.

6. *Id.*

7. *See id.* at 229–34.

8. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (striking down Texas’s ban on flag burning on First Amendment grounds).

9. *See, e.g., Frothingham v. Mellon*, 262 U.S. 447 (1923).

10. *See Flast v. Cohen*, 392 U.S. 83 (1968).

taxpayer standing in a way that the background and core concerns of other constitutional provisions may not.<sup>11</sup>

The same thing is true in statutory cases. Standing is often predicated on injuries to traditional, common law interests such as property rights, but even there an important (if often undisputed) predicate to standing is the substantive question of how far those rights extend. More pertinent to current debates, however, is the fact that federal statutes often themselves create rights, injuries to which can support standing. In *Federal Election Commission v. Akins*,<sup>12</sup> for example, the Court allowed a group of voters to challenge a determination by the Federal Election Commission (FEC) that the American Israel Public Affairs Committee (AIPAC) was not covered by the disclosure requirements of the Federal Election Campaign Act (FECA). The Court upheld the FECA's broad citizen-suit provision on the ground that the statute itself conferred a broad right on all voters to information about the activities of organizations like AIPAC. The FEC's failure to require disclosure, the Court reasoned, had injured that statutorily created interest.<sup>13</sup> The Court's analysis largely vindicated Judge Fletcher's point that plaintiffs' standing cannot be divorced from the underlying substance of their claims.

I want to suggest, however, that standing can never be *solely* a merits question that varies completely according to the particular statute or constitutional provision under which the plaintiff sues. I want, in other words, to praise not only Judge Fletcher's central insight but also the notion of at least *some* general rules about standing. We still need such rules, I submit, for at least three reasons. The first, largely practical difficulty is that the inquiry that Fletcher urged for standing analysis, which was largely identical to asking whether the underlying statutory or constitutional provision created a private right of action, cannot do the work that Fletcher needs it to do. The remaining problems go deeper. The second is that, even in statutory cases, legislative intent about which plaintiffs ought to be permitted to sue will generally be fictional. Congress will not have addressed the problem, and the courts will need to rely largely on default presumptions. Those presumptions will necessarily end up looking like, well, general standing rules. And they will be even more necessary in constitutional cases, where the relevant intentions will be even more obscure. Finally, I believe that *general* values are at stake in debates about standing alongside the specific policies and purposes embodied in the law

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11. See, e.g., RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 121 (6th ed. 2009) [hereinafter HART & WECHSLER] (suggesting that the distinction between *Frothingham* and *Flast* may be best explained by Judge Fletcher's theory).

12. 524 U.S. 11 (1998).

13. See *id.* at 21.

underlying the particular lawsuit. Those values, which include separation of powers, federalism, and the need to protect the quality of judicial decision-making, require certain general rules for their vindication. Fortunately, I believe those rules can coexist alongside a more forthright recognition of the importance of the underlying substantive claims in standing cases.

The final section of this brief Essay extends Judge Fletcher's central insight in two ways suggested by the Court's recent decisions in the same-sex marriage cases. The first extension has to do with standing based on interests created by state law, such as the right to defend a state initiative that California confers on the initiative's proponents. The Court rejected that sort of interest in *Hollingsworth v. Perry*,<sup>14</sup> but Fletcher's approach helps to demonstrate why it reached the wrong result. If Fletcher is right that standing is critically a function of the underlying law, then when that underlying law is *state* law, state-created interests should generally suffice to create standing in federal court. My second point derives from the fact that both *Hollingsworth* and its companion case *United States v. Windsor*<sup>15</sup> involved standing to *defend* federal action—not to attack it. In such cases it becomes difficult to say that standing should be entirely a function of the underlying right asserted by the plaintiff; such cases support my more general thesis that standing doctrine still requires some general rules. Fletcher's analysis still has something valuable to teach us in this context, however, for it reminds us that standing cannot focus exclusively on Article III. Different instances of standing to defend government actions will raise distinct substantive concerns—in particular, concerns about separation of powers involving not only the judiciary but also the relation between the political branches. (They may also, as in *Hollingsworth*, raise concerns about federalism.) Those concerns have an appropriate place in resolving this difficult set of standing questions.

## I. STANDING AND PRIVATE RIGHTS OF ACTION

If we concede that standing is a question on the merits, we still need to know how that question is to be answered. Judge Fletcher says that “[t]he essence of a true standing question” is “[d]oes the plaintiff have a legal right to judicial enforcement of an asserted legal duty?”<sup>16</sup> That sounds identical to the question whether the plaintiff has a “right of action,”<sup>17</sup> and

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14. 133 S. Ct. 2652 (2013).

15. 133 S. Ct. 2675 (2013).

16. Fletcher, *supra* note 1, at 229.

17. *Cort v. Ash*, 422 U.S. 66 (1975) (considering whether private plaintiffs had a right to sue under a provision of the Federal Election Campaign Act); *see also Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (considering whether unsuccessful applicants for admission to a university could sue for

in fact Fletcher repeatedly invokes the Court's private right of action cases as raising a "parallel" question.<sup>18</sup> The virtue of the private right of action cases from Fletcher's perspective, however, is that they are explicitly directed to the merits, turning on the interpretation of Congress's intent with respect to enforcement of the particular statutory scheme in question. Hence, the *Cort v. Ash* test—still generally applied, albeit more strictly than heretofore—considers the following four factors:

1. "[I]s the plaintiff 'one of the class for whose *especial* benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff?"
2. "[I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?"
3. "[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" and
4. "[I]s the cause of action one traditionally regulated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"<sup>19</sup>

Fletcher's discussion suggests that something like the same inquiry should be employed whenever Congress has not expressly conferred standing on a particular class of plaintiffs.

I have two misgivings about this sort of inquiry. The first has to do with what has happened to the *Cort* test, especially in cases decided since Judge Fletcher wrote. According to the *Hart & Wechsler* authors, implication of private rights of action reached its "high water mark" as early as *J. I. Case Co. v. Borak*,<sup>20</sup> decided in 1964, and since the 1979 decision in *Cannon*, the Court "has generally rejected claims of implied federal remedies."<sup>21</sup> The leading contemporary case, *Alexander v. Sandoval*,<sup>22</sup> is widely read to mean that the Court will virtually *never* recognize an implied right of action under federal statutes.<sup>23</sup> In particular,

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discrimination under Title IX of the Education Amendments of 1972). See generally HART & WECHSLER, *supra* note 11, at 332–36 (discussing the private right of action cases).

18. See, e.g., Fletcher, *supra* note 1, at 236.

19. *Cort*, 422 U.S. at 78 (internal citations omitted) (quoting *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

20. 377 U.S. 426 (1964).

21. HART & WECHSLER, *supra* note 11, at 705–06.

22. 532 U.S. 275 (2001).

23. I have a pet theory that suggests *Sandoval* might be more a case about administrative law and the powers of agencies than an effort categorically to cut off implied private rights of action. *Sandoval* involved a claim of disparate impact discrimination under Title VI of the Civil Rights Act of 1964. The Court had read that statute to forbid only *purposeful* discrimination, but an implementing regulation promulgated by the Department of Justice extended that prohibition to disparate impact discrimination.

*Sandoval* inferred Congress's intent *not* to provide a private right of action from the fact that it had expressly provided for alternate enforcement methods.<sup>24</sup> But those enforcement methods nearly always exist; public enforcement by the agency administering the relevant statute, for example, will almost always be available.<sup>25</sup> If this move in *Sandoval* is to be taken seriously, then, the courts will end up recognizing very few implied private rights of action indeed.

The Court's tightening up of the *Cort* test and corresponding reluctance to infer private rights has some potentially important implications for Judge Fletcher's proposal. Most obviously, it means that the implied right of action jurisprudence no longer stands ready, if it ever did, to serve as a more substantive alternative to the standing tests that Fletcher decries. If the requirements for standing were applied as strictly as *Cort* is these days (especially after *Sandoval*), then precious few plaintiffs will satisfy them. Nor would it be easy to construct an alternative, but equally merits-based framework. After all, *Cort* asks the questions one would expect to ask under Fletcher's merits-based conception of standing: Did Congress intend, explicitly or implicitly, to empower private enforcement? Would such enforcement undermine or further the statutory scheme?<sup>26</sup> If we collapse standing into whether Congress meant to permit private lawsuits, then one would think that the standing and private rights inquiries would have to dovetail. The result, given current doctrine on the latter question, would either be a much stricter standing doctrine—which no one seems to want—

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In effect, the plaintiffs were claiming an implied right of action under the *regulation*, not the statute. One might thus read the case as primarily holding that agencies themselves cannot create private rights of action; the relevant intent is always Congress's. In support of this reading, I would point out that the Court decided three other important cases the same term reining in the powers of administrative agencies. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (rejecting an opportunity to revive the classic nondelegation doctrine but invalidating—for the first time—an agency regulation as “unreasonable” under the second step of *Chevron*); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (held that an agency rule that pushed the limits of Congress's authority under the Commerce Clause wasn't authorized by Congress with sufficient clarity); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (refusing to extend *Chevron* deference to a large class of informal agency interpretations of statutes). Even if we can explain *Sandoval* in this way, however, it is fair to say that the Court has not been eager to recognize private rights of action in recent years.

24. See *Sandoval*, 532 U.S. at 289–90; see also HART & WECHSLER, *supra* note 11, at 708 (discussing this aspect of *Sandoval*).

25. Both *Cannon* and *Sandoval* involved conditional spending statutes, where the substantive legal obligations at issue applied to all recipients of federal funds, and the federal administering agencies retained authority to cut off those funds if recipients did not comply with the conditions. This is an even more attenuated form of alternative enforcement than agency enforcement suits, so *Sandoval*'s conclusion that it was enough to displace an implied private remedy is highly significant.

26. We can probably do without the fourth prong of *Cort*, which asks whether the right in question falls in an area that is traditionally reserved to the states. That idea smacks of the old “dual federalism” doctrine, which purported to divide the world into separate and exclusive spheres of state regulatory authority. That doctrine collapsed after 1937, as it became extremely difficult to define and police the boundaries between such spheres. See generally Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, 55 NOMOS (forthcoming 2014).

or, perhaps, a radical reconsideration of the private rights jurisprudence. The former seems more likely than the latter.

It seems likely that the reason the implied private right jurisprudence has gotten so restrictive is that such rights have come to be viewed as a form of federal common law.<sup>27</sup> As such, they are presumptively illegitimate under *Erie Railroad Co. v. Tompkins*,<sup>28</sup> which announced that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . . There is no federal general common law.”<sup>29</sup> *Erie* has been read as a general rejection of judicial lawmaking,<sup>30</sup> and this separation-of-powers principle casts doubt on federal courts’ freedom to create private remedies in the absence of statutory authorization. To be sure, the question “who can enforce a federal statute?” is plausibly “governed . . . by acts of Congress,”<sup>31</sup> and the federal courts’ power to fill in remedial gaps in federal statutes has always struck me as the least problematic aspect of federal common law. One need only look to the extensive line of recent cases limiting *Bivens*’s implied right of action against federal officers for constitutional violations,<sup>32</sup> however, to see the bad odor of judicial lawmaking that attends implied private rights and the effect that odor has had on the scope of those rights.

Standing doctrine as it is currently conceived certainly has problems of its own—as Judge Fletcher well documents.<sup>33</sup> But it largely escapes the particular calumny of judicial lawmaking that plagues the implied private rights jurisprudence. If anything, the charge of judicial legislation with respect to standing doctrine goes to the Court’s willingness to fashion

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27. See, e.g., HART & WECHSLER, *supra* note 11, at 690–742 (placing implied private rights in the chapter on federal common law).

28. 304 U.S. 64 (1938).

29. *Id.* at 78.

30. See, e.g., Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1685 (1974); see also Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 151 (2011) (complaining that “*Erie* has been drafted into service in the war against judicial ‘activism’”). But see Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (to whom apologies are owed for my title here). Some critics have denied that *Erie* rests on a separation-of-powers rationale, see, e.g., Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 615–33 (2008), but I find that reading wildly unpersuasive. See Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J. L., ECON. & POL. 17 (forthcoming 2014).

31. *Erie*, 304 U.S. at 78.

32. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing an implied right of action under the Constitution itself to seek damages for constitutional violations by federal officers). For cases limiting *Bivens*, see, e.g., *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001); *Wilkie v. Robbins*, 551 U.S. 537 (2007). See generally HART & WECHSLER, *supra* note 11, at 736–40 (discussing this line of decisions).

33. See also Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 463–64 (2008) (arguing that “standing is ill-suited to most of the functions it is asked to serve, and that forcing standing into this variety of roles contributes to the scathing critiques leveled against the doctrine.”).

principles *limiting* access to the federal courts. My concern is that by making standing more substantive or merits based, concerns about judicial lawmaking will increase, and they will run in the opposite direction. That is, what will seem legislative is the recognition of a plaintiff's right to sue, whenever Congress has not explicitly recognized that right. That is certainly what has happened with implied private rights, and it is thus unclear that we should try to take standing to the same place.

That is not to say that Judge Fletcher's thesis will not have some important and considerably less controversial applications. So far I have been talking about *implied* private rights of action, but sometimes Congress expressly confers a right to sue on private plaintiffs. Presumably, Judge Fletcher would say that such plaintiffs always, or nearly always, have standing. That rule would certainly make cases like *Federal Election Commission v. Akins*,<sup>34</sup> in which Congress had enacted a broad citizen-suit provision, considerably easier and more predictable for all concerned. Nonetheless, it seems likely there will be very many cases in which the necessary congressional intent will have to be implied, which will raise the concerns I have noted. It will also, as I discuss next, create a pressing need for default rules.

## II. THE CONTINUING NEED FOR DEFAULT RULES

Judge Fletcher seems clearly right to argue that standing cannot be divorced from the underlying law at issue in a lawsuit. Indeed, I argue in Part III that the relevant underlying law extends even further than Fletcher suggests; it is not simply the law invoked by the plaintiff, but also potentially the institutional framework in which the parties operate. Nonetheless, standing also raises certain general questions that still require general answers. First, even if we confine our attention to Congress's intent in enacting the substantive law invoked by the plaintiffs, courts will frequently lack the information concerning that intent that Fletcher's analysis requires. We will need, as he acknowledges, default rules to fall back upon—and those default rules, I submit, will look a lot like the general standing principles that he criticizes. Second, standing also implicates certain general values and concerns about the role and competence of courts in our legal system. General principles reflecting those values have their place—not as an exclusive focus, as current law sometimes suggests—but alongside the more particularized inquiry that Fletcher prescribes.

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34. 524 U.S. 11 (1998).



*A. Legislative Intent*

The thing about Congress is that it leaves stuff out. Many of the most interesting and pressing questions in public law arise in circumstances where Congress could have acted, but has not.<sup>35</sup> In *Erie*, Congress could have enacted a statute about a railroad's duty to pedestrians but did not;<sup>36</sup> in most preemption cases, Congress may preempt as much state law as it likes but has not clearly stated its intentions; in many administrative law cases, Congress could have given more specific instructions to the agency but failed to do so. This is why there are so very many implied private right of action cases: Congress frequently fails to address who can sue under the statutes it enacts.

This basic reality poses a problem for Judge Fletcher's suggestion that standing should generally be a question of Congress's intent with regard to the statute under which the plaintiff sues.<sup>37</sup> In many cases, Congress will simply not have considered—or simply failed to reach closure on—the question who can sue to enforce a particular statutory scheme. The text may not address the question, and relevant legislative history may be unreliable, ambiguous, or nonexistent. In many statutory construction contexts, these sorts of gaps and ambiguities are handled through default rules. It seems likely that, in a Fletcheresque standing world, courts would very quickly be forced to develop such rules to handle the many cases in which the underlying merits of the plaintiffs claim do not readily address the standing question. The application of such default rules might well turn on things like: How concrete was the plaintiff's injury? How direct is the line of causation between the challenged conduct and the plaintiff's injury? Is the plaintiff asserting her own rights or those of a third party? The problem, of course, should be obvious: a set of default rules like this would like an awful lot like the set of general, non-merits-based standing rules that Fletcher decries.

It is not clear how much Judge Fletcher would disagree with the continuing need for default rules. He acknowledges that “[i]n many cases, the relevant statute may be silent or unclear on the question of who should have standing,” and he allows as how, “[i]n such cases, the Court may

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35. For example, the preface to the first edition of the Hart and Wechsler casebook asserted that [f]or every case in which a court is asked to invalidate a square assertion of state or federal legislative authority, there are many more in which the allocation of control does not involve questions of ultimate power; Congress has been silent with respect to the displacement of the normal state-created norms, leaving courts to face the problem as an issue of choice of law. Quoted in HART & WECHSLER, *supra* note 11, at vi.

36. See, e.g., Mishkin, *supra* note 30, at 1684 n.10.

37. The likelihood of ambiguity seems even greater when the plaintiff's claim rests upon the Constitution rather than a statute.

properly invoke background assumptions about the functions of judicial review in certain areas, and about traditional categories of recognized injuries and permissible plaintiffs in those areas.”<sup>38</sup> “[S]tanding questions,” he says, “need not be seen as coming into the world naked and newborn with each new statute.”<sup>39</sup> Fletcher thus recognizes that “[t]he ideas that the Court now invokes as controlling principles of standing law . . . are useful as presumptions or aids for construction. . . .”<sup>40</sup> He insists, however, that “they can never be more than presumptions,” and that “[t]he actual provision at issue must be the controlling authority, for the merits of a standing claim must always depend, in the end, on the meaning of the statute or constitutional clause upon which the plaintiff relies.”<sup>41</sup>

Our disagreement, then, is plainly one of degree or relative emphasis. But I fear that it may be a relatively *large* disagreement despite being of that mild character.<sup>42</sup> I expect that the statute-specific evidence of Congress’s intent will very frequently fail to answer the question of who is entitled to sue under that statute, forcing courts to fall back on the available default rules. If that is right, then “the actual provision at issue” will hardly be “the controlling authority,” because the default rules will be doing most of the work in most of the cases. And even if it *has* addressed the private right of action question, Congress is unlikely to have anticipated the variety of persons who might wish to bring suit under a given statute; some plaintiffs might clearly have standing, in other words, but the standing of others might remain highly ambiguous.

Consider a variant on the facts of *Warth v. Seldin*,<sup>43</sup> for example. *Warth* was an exclusionary zoning case in which the plaintiffs argued that the town of Penfield, a ritzy suburb of Rochester, New York, had enacted various ordinances that made it virtually impossible to find low-income housing. The actual plaintiff’s claims were constitutional, but let us imagine that they instead sued under a federal statute prohibiting exclusionary zoning. We might plausibly seek to determine, using the standard tools of implied right of action analysis, whether Congress intended to create a private right of action under the statute. But how would that analysis cope with the wide range of plaintiffs in *Warth*? They included low income individuals who had failed to find housing in Penfield, residents of nearby Rochester who alleged they had to pay higher taxes to support the social services needed by would-be Penfielders who

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38. Fletcher, *supra* note 1, at 265.

39. *Id.*

40. *Id.* at 239.

41. *Id.*

42. “I fear” is the right locution, because another default presumption I employ is that when Judge Fletcher and I disagree, I am probably the one who is wrong.

43. 422 U.S. 490 (1975).

were forced to live in Rochester instead, well-meaning residents of Penfield who felt deprived of the benefits of living in a more racially and economically diverse community, and a variety of membership organizations, including housing advocacy groups and organizations of for-profit homebuilders. Perhaps a general analysis of the text and purposes of our hypothetical anti-exclusionary zoning law might lead us to conclude with some confidence that Congress did, in fact, intend to provide for private enforcement suits under the statute. But that sort of conclusion will often tell us very little about precisely *who* can sue. It seems very likely that even if Congress clearly meant to cover some of the *Warth* plaintiffs, its intent as to others would be highly ambiguous at best.

None of this is to criticize Judge Fletcher for emphasizing the importance of the underlying merits as part of any standing inquiry. That insight is a useful corrective to the current doctrine's rhetoric, which tends to treat standing as wholly divorced from any merits questions (even if, in practice, that divide is not always rigorously respected). My point is simply that general standing rules are still going to have to do a fair amount of work. In the remainder of this Essay, I argue that this is a good thing.

### B. *Standing's Own Values*

Although Judge Fletcher has eloquently explained why the underlying merits of the plaintiff's claim should matter in standing cases, he has not demonstrated why they are the *only* thing that matters. I want to suggest that standing doctrine serves certain *general* sets of values, and that vindication of those values requires at least some general rules. I highlight three sets of values here: separation of powers, federalism, and the functional requisites of effective adjudication.

The Court often speaks of "the foundational role that Article III standing plays in our separation of powers."<sup>44</sup> Justice Powell warned, for example, that "[r]elaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government."<sup>45</sup>

This sort of reasoning can be traced all the way back to *Marbury v. Madison*,<sup>46</sup> which viewed an injury to "the rights of individuals" as a predicate to judicial action.<sup>47</sup> *Marbury's* argument for the power of judicial

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44. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1443 (2011).

45. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

46. 5 U.S. (1 Cranch) 137 (1803).

47. *Id.* at 163

review is best grounded in the Court's obligation to decide the case before it, an enterprise which necessarily required the resolution of the conflict between a statute purporting to confer jurisdiction on the Court and a constitutional provision seeming to foreclose that jurisdiction.<sup>48</sup> If that is right, then the awesome power of judicial review<sup>49</sup> is cabined first and foremost by the boundaries of the case that brings the constitutional question before the Court in the first place.

Other separation-of-powers arguments for standing can be made.<sup>50</sup> The important point, however, is that the force of such arguments is typically *not* a function of congressional intent with respect to the substantive law that forms the basis of the plaintiff's suit. To the extent that such general considerations undergird standing doctrine, those considerations ought to be brought to bear through general standing principles. Some separation-of-powers aspects of standing may act to constrain Congress rather than the courts; for example, limits on private-party standing limit Congress's ability to circumvent its ordinary dependence on the Executive branch to enforce its laws. In such contexts, making Congress the arbiter of standing would put the fox in charge of the henhouse. But the more basic point is that Congress will not always be mindful of the broad constitutional values associated with standing when it enacts particular statutes, so if those values are to be consistently respected it will need to be done through general rules.

Federalism is less commonly invoked than separation of powers in standing debates, but it remains relevant nonetheless. In *Richardson*, Justice Powell warned of "the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch."<sup>51</sup> When the elected branches being overseen are state governments, broad standing thus raises a question of federalism. Congress may choose, for example, to expand its regulatory leverage vis-à-vis the states by enlisting private attorneys general to enforce federal law, thereby avoiding some of the resource constraints that otherwise limit federal executive action.<sup>52</sup> Similarly, standing doctrine regulates the extent that

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48. See, e.g., HART & WECHSLER, *supra* note 11, at 72 ("Chief Justice Marshall's opinion in *Marbury* treats the law declaration power as incidental to the resolution of a concrete dispute occasioned by *Marbury's* claim to a 'private right' to take possession of the office.")

49. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (asserting that the Court is supreme in the exposition of the Constitution).

50. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

51. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

52. See, e.g., *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (considering whether private *qui tam* suits on behalf of the United States could be brought against state governments under the False Claims Act); Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young,

state and local governments will be subject to federal judicial review under individual rights provisions of the Constitution.<sup>53</sup> And general standing rules have also empowered state governments to bring suit in their own right to vindicate their own vision of the public interest under federal law.<sup>54</sup> In all these instances, the standing inquiry should ask not only whether the underlying statute or constitutional provision confers a right to sue on the plaintiff, but also whether more general values of state autonomy deserve protection as well.

The contributions by Andrew Hessick and Heather Elliott to this Symposium illustrate the complex interplay of standing and federalism. Professor Hessick notes that “[r]ecognizing standing to be a form of substantive law means that state law should control standing in federal court,” at least where the plaintiff’s claim turns on state law.<sup>55</sup> Professor Elliott refocuses attention on Judge Fletcher’s earlier article about standing in *state* court, in which Fletcher argued that state courts should apply *federal* justiciability standards when hearing federal claims.<sup>56</sup> Hessick’s proposal relies explicitly on the rule, derived from *Erie Railroad Co. v. Tompkins*,<sup>57</sup> that state substantive law governs the adjudication of state law claims in diversity cases.<sup>58</sup> Likewise, Fletcher’s argument is analogous to the “reverse-*Erie*” principle that state courts hearing federal claims must apply those aspects of federal law that are bound up with the substance of the federal claim.<sup>59</sup>

Both arguments seem unassailable if we assume that standing is *entirely* a function of the underlying substantive law that forms the basis of the plaintiff’s claim. But they each require qualification to the extent that standing may also reflect more general values. Some of those values relate directly to the forum and apply regardless of the source of the underlying law. Judicial judgments about the sort of controversies that a court can

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*State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)*, 79 TEX. L. REV. 1037, 1121 (2001) (considering the resource constraints that limit actions against states by the executive and the extent to which Congress can employ private attorneys general in this setting).

53. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975).

54. See *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (according “special solicitude” to the states as plaintiffs as part of its standing analysis).

55. F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 418 (2013).

56. Heather Elliott, *Federalism Standing*, 65 ALA. L. REV. 435, 437–42 (2013) (discussing William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 282 (1990)). Professor Elliott does not conclusively endorse Fletcher’s prescription, but rather uses it to shed light on yet another problem of federalism and standing raised by the Court’s recent decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). I discuss that problem in Part III, *infra*.

57. 304 U.S. 64 (1938).

58. See Hessick, *supra* note 55, at 418.

59. See, e.g., *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952); HART & WECHSLER, *supra* note 11, at 422–29.

effectively decide, for example, presumptively pertain to *all* cases in federal court, regardless of whether they rest on state or federal law.<sup>60</sup> And structural values of separation of powers and federalism may not simply disappear when a federal court entertains a state claim (or vice versa). For example, state standing rules may be calibrated to the unique characteristics of state courts, which are often accountable to state electorates in a way that federal diversity courts are not. A federal court's adoption of state standing rules broader than the federal norm might thus undermine the checks and balances existing at the state level. Imposition of federal standing rules on state courts hearing federal claims, on the other hand, may complicate the adjudication of cases involving *both* federal and state claims and create pressure for state courts to conform their justiciability doctrines to federal norms.

I do not mean to suggest that Professor Hessick or Judge Fletcher's proposals should be rejected. My point is simply that if we understand standing to rest both on substantive characteristics of the plaintiff's claim *and* on more general values, then courts in *Erie* and reverse-*Erie* situations will have to try and unpack these considerations. I doubt that will be impossible to do; the answer may turn out to be simply that the basic question of what counts as an "injury" turns on the law that creates the underlying claim, but that certain prudential rules will apply to all cases in the particular forum. But some such hybrid account will be necessary if the doctrine is to account for all the relevant concerns.

Finally, standing doctrine often expresses concern for what Richard Fallon has called "the functional requisites of effective adjudication."<sup>61</sup> These requisites include a concrete factual setting and zealous adversary presentation on both the facts and the law. The first contributes to the distinctively retrospective quality of judicial decisionmaking: by insisting that the plaintiff already be injured by the defendant's conduct, courts are assured of a look at the relevant law in action within a concrete setting. Rather than speculating as legislators might about the effects of new legislation, judges can provide a "sober second thought" once the law is applied in practice.<sup>62</sup> The second requisite, adversary presentation, is necessary to ensure the court access to the most important facts and

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60. Another way of putting this point would be to say that arguments about the concrete factual settings, adversary presentation, and the like are *procedural* in character, but I was taught long ago to be nervous about drawing any sharp line between substance and procedure.

61. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 51 (1984); *see also* HART & WECHSLER, *supra* note 11, at 75.

62. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (1962).

arguments, and it is at least arguably best assured when the plaintiff's ox has actually been gored.

To be sure, standing doctrine does not always ensure the most effective presentation of issues to courts. As Justice Scalia has noted, "Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever"; nonetheless, as he points out, "the doctrine of standing clearly excludes them, unless they can attach themselves to some particular individual who happens to have some personal interest (however minor) at stake."<sup>63</sup> But this form of "attachment" is typically easy; in the classic case of *Sierra Club v. Morton*,<sup>64</sup> for example, no one disputed that the Sierra Club could readily have identified a particular member who had visited the public lands at the center of the litigation and thus manifested the requisite concrete injury in fact.<sup>65</sup> Standing doctrine thus hardly prevents the participation of interest groups, but the required presence of a directly-affected litigant will tend to focus the court's inquiry and render it less legislative in character.<sup>66</sup>

Much of standing doctrine is organized around this need to ensure that questions are teed up for courts in a form best suited for judicial resolution. It is hardly obvious that these general concerns evaporate once we recognize that other important considerations are specific to the underlying merits of each plaintiff's claim. Like the other general values of federalism and separation of powers, then, the functional requisites of adjudication require attention to considerations that transcend the merits of the particular plaintiff's claim.

### C. *Should Standing Be Discarded?*

In claiming that standing questions implicate certain general sets of value alongside the particular values associated with plaintiffs' underlying claims, I am not necessarily claiming that current standing doctrine actually

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63. Scalia, *supra* note 50, at 891–92.

64. 405 U.S. 727 (1972).

65. See, e.g., Elliott, *supra* note 56, at 446 (characterizing the *Morton* rule as "not particularly hard to follow").

66. In support of this point, the *Morton* majority quoted Alexis de Tocqueville's observation that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.

1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102 (Philips Bradley, ed., 1945) (quoted in *Morton*, 405 U.S. at 740 n.16).

vindicates those values in an optimal way. A number of smart people have argued that it does not.<sup>67</sup> My point is simply to say that these general values of separation of powers, federalism, and the functional requisites of effective adjudication are all *relevant* to standing, and that standing doctrine ought to be constructed with these values in mind. That can surely be done without ignoring—as the current cases sometimes purport to do—the underlying merits of a plaintiff’s claims. But taking stock of general values will most likely require at least a limited set of general rules that supplement the more particularistic inquiry that Judge Fletcher advocates. And if we can go that far, then I wonder how different that world would actually look from current doctrine.

Moreover, it seems to me that the widely prescribed flight from general standing principles is unlikely to solve any problems that currently exist in the doctrine. As the preceding discussion illustrates, Judge Fletcher’s forthright directive to focus on the merits of the plaintiff’s claims is unlikely to free us of the need for general standing rules. The same can be said of other proposals, such as Heather Elliott’s suggestion that “[i]nstead of using a constitutional doctrine so plainly flawed, [the Court] should develop a vibrant abstention doctrine that permits it to pursue separation-of-powers goals without the obfuscation caused by standing doctrine.”<sup>68</sup> Far be it from me to prefer “flawed” doctrines to “vibrant” ones, although I will admit to a certain affection for “obfuscation.” But I fear that an approach relying on abstention or something like it would take us out of the frying pan and into the fire.

As Professor Elliott sensibly acknowledges, “[a]bandoning this sort of threshold inquiry altogether seems unwise; while the current doctrine is faulty, the separation-of-powers functions it serves should not be abandoned.”<sup>69</sup> The primary advantage of an abstention inquiry, I take it, is that it allows “the federal courts to explicitly raise the separation-of-powers concerns [undergirding standing] but as a matter of prudence rather than constitutional mandate.”<sup>70</sup> I doubt, however, that the problem with current doctrine is that it is too inflexible. Critics frequently argue that the Court can manipulate standing to hear cases that it doesn’t wish to hear<sup>71</sup> or to

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67. See, e.g., Elliott, *supra* note 33.

68. *Id.* at 464. As Professor Elliott notes, “abstention has been proposed as an alternative to standing since at least Professor Jaffe’s time.” *Id.* at 464 n.19 (citing Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961)).

69. *Id.* at 508.

70. *Id.* at 510. It is not clear, however, that abstention doctrine itself is best viewed as purely prudential. See, e.g., Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811 (arguing that abstention is, in fact, constitutional law).

71. Scholars have debated whether this is a bug or a feature. Compare, e.g., Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), with



pour out plaintiffs it doesn't like.<sup>72</sup> There are many cases in which the Court does find sufficient flexibility to pay attention to factors like Congress's intent in conferring a right to sue<sup>73</sup> or specific separation-of-powers considerations arising from the requested relief.<sup>74</sup> And if the doctrine *is* too inflexible, it is hard to see how that inflexibility can be laid at the door of the constitutional text. Article III's "case or controversy" language, after all, leaves all the interesting questions to be answered by judicial elaboration.

It is hard to see how untethering the doctrine altogether would make it more determinate or less controversial. Abstention doctrine in its natural habitat, after all, is widely criticized on all the same grounds that plague standing doctrine—being indeterminate, being manipulable, and failing to serve its underlying values.<sup>75</sup> Moreover, the traditional abstention doctrines are grounded rather firmly in the courts' equitable discretion not to grant injunctive or declaratory relief.<sup>76</sup> No comparable hook exists upon which to hang a much broader abstention doctrine meant to cover all the purposes currently served by standing. But the primary point is that the problems in standing doctrine arise not from the fact that we call it "standing" rather than "abstention," or that we ground it in Article III rather than prudential discretion. Standing doctrine arouses criticism because the questions it necessarily confronts—who has the right to invoke the jurisdiction of the federal courts, and under what circumstances?—are simply hard questions. But they are inevitable questions. Whatever we call it, standing doctrine is going to be hard.

### III. STANDING TO DEFEND GOVERNMENT ACTION

This last Part extends both Judge Fletcher's analysis and my own to a difficult set of standing problems that took on particular salience in last Term's same-sex marriage cases. *Hollingsworth v. Perry* involved California's Proposition 8, an amendment to the state constitution barring recognition of same-sex marriage, while *United States v. Windsor* was a challenge to the federal Defense of Marriage Act (DOMA), which defines marriage for all purposes of federal law as only existing between a man and

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Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

72. See, e.g., *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (holding that human rights lawyers, journalists, and activists lacked standing to challenge a government surveillance program).

73. See, e.g., *FEC v. Akins*, 524 U.S. 11, 12 (1998).

74. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984).

75. See, e.g., Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

76. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996).

a woman. In both cases, the relevant executive branch authorities—California’s governor and attorney general in *Hollingsworth*, the President and the U.S. Attorney General in *Windsor*—declined to defend the challenged enactments on the ground that they believed the laws to be unconstitutional. Both cases, however, featured other parties—the proponents of the Proposition 8 initiative and the House of Representative’s “Bipartisan Legal Advisory Group” (BLAG), respectively—who sought to defend the enactments in the executive branch’s absence. And *Windsor* featured the additional wrinkle that the Department of Justice appealed the case to the Supreme Court notwithstanding that its preferred view—that DOMA was unconstitutional—had prevailed in the Second Circuit. The result looked like a Federal Courts exam run amok.

I argue that the standing-to-defend conundrum illustrates both the virtues of Judge Fletcher’s central insight and the continuing need for some general standing principles. I first explore the relevance of state law to Article III standing in *Hollingsworth*, then consider the federal separation-of-powers problems raised by the Obama administration’s decision not to defend DOMA in *Windsor*.

#### A. *Hollingsworth and the Power of State Law to Create Standing*

Proposition 8, a ballot initiative passed in 2008, added a provision to the California state constitution stating that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>77</sup> When Kristin Perry and her partner Sandra Stier filed suit to challenge the state’s refusal to issue them a marriage license, there was no doubt that they had standing to challenge that action or Proposition 8 itself. The relevant state officials declined to defend the law in court,<sup>78</sup> however, and the federal district judge allowed the official proponents of the ballot initiative, ProtectMarriage.com (led by then-Senator Dennis Hollingsworth) to intervene in the suit and defend the law. When the plaintiffs prevailed in the district court, the state officials declined to appeal—thus raising the question whether the intervenors had standing to pursue the appeal on their own.<sup>79</sup>

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77. CAL. CONST. art. I, § 7.5.

78. The State did, however, continue to enforce the law throughout the litigation. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013). I suggest in Section B, below, that enforcing but not defending is a highly questionable practice.

79. See *Diamond v. Charles*, 476 U.S. 54 (1986) (holding that intervenors can pursue an appeal on their own if they satisfy the requirements for Article III standing in their own right).

The Ninth Circuit viewed that question as turning on the nature of the interest that state law confers on initiative proponents. In response to a certified question, the California Supreme Court determined that

[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.<sup>80</sup>

That was good enough for the federal court of appeals, but the Supreme Court reversed, emphasizing that “standing in federal court is a question of federal law, not state law.”<sup>81</sup> The majority discounted the California Supreme Court's holding that Hollingsworth's organization could act on the state's behalf. “[N]o matter its reasons,” Chief Justice Roberts wrote, “the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.”<sup>82</sup>

Judge Fletcher's view strongly suggests that standing should remain largely a function of the underlying substantive law, even where that law is the law of a state.<sup>83</sup> Although Article III standing is a question of federal law at the end of the day, standing often rests on interests created by state law. If the federal government takes my property, for example, my standing to sue for compensation arises from the property rights created by state law. If a private plaintiff sues a federal official in tort, the Federal Tort Claims Act adopts state substantive law as the rule of decision,<sup>84</sup> and Fletcher would presumably analyze the plaintiff's standing largely in terms of whether the underlying state tort law confers a right to sue on that particular litigant.

Nor is it incongruous to look to state law in determining standing to *defend* a state law: for example, if a dispute had arisen between the governor's office and the Alameda County Clerk-Registrar (also a defendant in the case) about *which* official had standing to appeal the decision (or not), presumably that question would have been governed by state law. And on all these questions—like any other question of state

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80. Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

81. 133 S. Ct. at 2667.

82. *Id.*

83. That conclusion is strongly implied, for instance, by his view that *federal* standing law should govern federal claims brought in state court. See Fletcher, *supra* note 56.

84. See 28 U.S.C. § 1346(b).

law—the federal courts owe conclusive deference to the California Supreme Court’s authority “to say what the law is.”<sup>85</sup>

At the same time, the Court has long recognized that Article III requires different and often stricter standing requirements than many state constitutions.<sup>86</sup> As the Chief Justice pointed out, federal standing principles “serv[e] vital interests going to the role of the Judiciary in our system of separated powers.”<sup>87</sup> As I have already suggested, those interests are to some extent general, not particular to the underlying substantive law in individual lawsuits. Hence, Article III doctrine should constrain states from “issuing to private parties who otherwise lack standing a ticket to the federal courthouse.”<sup>88</sup> Analogous federal constraints exist even in areas of unquestioned state primacy. Under the Takings and Due Process Clauses, for example, state law generally defines the property and liberty interests that trigger federal protection, but at the outer limits federal law requires recognition of certain property and liberty interests and cuts off federal cognizance of others.<sup>89</sup>

This need for some federal outer limit on the state interests that may create Article III standing made *Hollingsworth* a difficult case—at least in principle. The majority erred, however, to the extent that it simply federalized the question of who could represent California’s interest in the case.<sup>90</sup> In the takings and due process contexts, federal law imposes a floor and a ceiling on the property and liberty interests that trigger federal protection, but within these outer bounds state law retains its primary and ordinarily dispositive role.<sup>91</sup>

Some degree of federal flexibility is necessary, moreover, to allow state law to deal with its own separation-of-powers problem—that is, how to prevent state officials from subverting the popular initiative process by

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85. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see, e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (“This Court . . . repeatedly has held that state courts are the ultimate expositors of state law . . . and that we are bound by their constructions except in extreme circumstances not present here.”) (citing, *inter alia*, *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875)).

86. *See, e.g.*, *Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam); *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429 (1952).

87. *Hollingsworth*, 133 S.h Ct. at 2667.

88. *Id.*

89. *See Webb’s Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155 (1980) (holding that the Takings Clause *required* recognition of certain interests as property notwithstanding contrary state law); *Sandin v. Conner*, 515 U.S. 472 (1995) (refusing to recognize a state-created liberty interest as sufficient to trigger Due Process protections). *See generally* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

90. *See* 133 S. Ct. at 2666–67 (holding that “the most basic features of an agency relationship are missing here” based on the *Restatement (Third) of Agency*).

91. *See generally* HART & WECHSLER, *supra* note 11, at 486–90.

simply refusing to defend the laws that process produces.<sup>92</sup> As Justice Kennedy pointed out in dissent, “[g]iving the Governor and attorney general this *de facto* veto will erode one of the cornerstones of the State’s governmental structure.”<sup>93</sup> I argue in Section B below that Article III rules in standing-to-defend cases should be informed not only by general concerns about judicial competence and restraint but also by the particular separation-of-powers concerns arising when executive officials decline to defend federal legislation. In *Hollingsworth*, those same concerns should have supported deference to the underlying state law. Rather than creating a federal rule of state separation of powers prohibiting delegation of the state’s interest in defending state laws, the Court should have respected the state’s determination so long as it did not radically expand the class of parties entitled to invoke federal jurisdiction.<sup>94</sup>

As a final note, the standing problem in *Hollingsworth* may well have implications beyond the context of popular initiatives. Controversies over same-sex marriage have highlighted a broader phenomenon of state executive decisions not to defend controversial state laws.<sup>95</sup> Whether state law confers an interest on other individuals and entities to step into such cases—outside the distinctive initiative process—will likely be murkier than in *Hollingsworth*. And the non-unitary nature of most state executive branches, which typically feature separate elections for governor, attorney general, and other executive positions, adds an additional complication. When those cases find their way into federal courts, those courts should be sensitive to the underlying state law principles rather than imposing some quasi-federal common-law notion of the requisite governmental interests.

### B. *Windsor and the Relation Between Injury and Adversariness*

*Windsor* lacked the state-law wrinkle of *Hollingsworth* but nonetheless required the Court to unpack elements of the standing inquiry—*injury and adversariness*—that are typically bundled together. And, unlike in

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92. See *Perry v. Brown*, 265 P.3d 1002, 1140 (Cal. 2011) (noting that the initiative’s “primary purpose . . . was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt”).

93. *Hollingsworth*, 133 S. Ct. at 2671 (Kennedy, J., dissenting); see also *id.* (noting that “in light of the frequency with which initiatives’ opponents resort to litigation, the impact of that veto could be substantial.”).

94. See generally Elliott, *supra* note 56, at 451–54 (developing a similar criticism in more depth).

95. See Juliet Eilperin, *State Officials Balk at Defending Laws They Deem Unconstitutional*, WASH. POST (July 18, 2013), [http://www.washingtonpost.com/politics/state-officials-balk-at-defending-laws-they-deem-unconstitutional/2013/07/18/14cf86ce-ee2b-11e2-9008-61e94a7ea20d\\_story.html](http://www.washingtonpost.com/politics/state-officials-balk-at-defending-laws-they-deem-unconstitutional/2013/07/18/14cf86ce-ee2b-11e2-9008-61e94a7ea20d_story.html) (“[I]n a number of high-profile cases around the country, top state officials are balking at defending laws on gay marriage, immigration and other socially divisive issues—saying the statutes are unconstitutional and should not be enforced.”).

*Hollingsworth*, the broader separation-of-powers questions posed by the executive's failure to defend DOMA were federal in nature. As in *Hollingsworth*, these questions illustrate both the importance and limits of Judge Fletcher's substantive approach to standing.

Take the limits first. The executive's power to decline defense of a federal statute poses one of the most difficult conundrums in federal constitutional law. On the one hand, the President and his officers all take oaths to uphold the Constitution, and most observers seem to agree that at least in some circumstances, that responsibility may extend to declining to enforce or defend laws that the President believes to be unconstitutional. On the other, a President may decline to defend a statute simply because he doesn't like it on policy or ideological grounds; as Rick Pildes has noted, "There's always a very strong political temptation for elected officials—whether they're attorneys general, governors or chief executives—not to defend laws they disagree with politically, or whose defense will alienate powerful political constituencies."<sup>96</sup> Rolling over when a disfavored law is challenged offers a convenient way to end-run the political and institutional limitations of the President's veto power. After all, one can decline to defend a statute enacted before the current President even took office; Congress cannot override this form of presidential disapproval; and at least sometimes the refusal to defend may have lower public visibility than an outright veto. It is, in other words, a pretty neat trick for getting rid of statutes that the President may disapprove.

This separation-of-powers dilemma is generally not specific to particular federal statutes. While Justice Scalia did suggest in his *Windsor* dissent that executive decisions not to defend statutes encroaching on the President's own powers were a different (and more legitimate) category,<sup>97</sup> such a rule would still apply to a whole category of cases. Questions of who has standing to *defend* a given law thus necessarily turn on a general set of institutional considerations rather than the intent of Congress in enacting the specific statute. Cases like *Windsor* thus demonstrate the continuing need for at least some more general rules of standing.

That said, however, *Windsor*'s standing dilemma also demonstrates the worth of Judge Fletcher's central insight that standing must reflect underlying substantive values in the case rather than being limited to wholly generic principles concerning, say, the parties' injury or adversariness. For an earlier illustration, consider *Allen v. Wright*,<sup>98</sup> in which private parties sued to enjoin the IRS to more aggressively enforce

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96. Quoted in *id.* Professor Pildes was talking about the temptations facing *state* officials, but it is hard to argue that the same temptations would not apply at the federal level.

97. *United States v. Windsor*, 133 S. Ct. 2675, 2700 n.2 (2013) (Scalia, J., dissenting).

98. 468 U.S. 737 (1984).

laws barring tax-exempt status for private schools practicing racial segregation. *Allen* turned primarily on causation and redressability, but the Court's analysis was informed by general separation-of-powers concerns for preserving the executive's enforcement discretion. Traditional equitable principles drastically restricting injunction requiring government officials to enforce the law "transported into the Article III context," the Court said, "that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought . . . to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties."<sup>99</sup> The Court's argument did not rely on a truly *general* standing principle, and the dissenters complained that any equitable considerations had no place in the standing analysis.<sup>100</sup> But that, I take it, is Judge Fletcher's point—that the merits *should* intrude on standing analysis.

As *Allen* illustrates, those merits include not only the substance of the plaintiffs' claim but also other factors, such as the case's institutional setting. That is particularly true in standing-to-*defend* cases like *Hollingsworth* and *Windsor*. The separation-of-powers values at stake differ among standing to defend cases when, for example, a private third-party beneficiary to a contract seeks to uphold a reading of a contract that the parties have abandoned, or when a public interest group seeks to defend an agency regulation interpreting a federal statute that the agency no longer wishes to pursue. How each of these contexts should play out is beyond the scope of this Essay. It is worth exploring the issue with respect to DOMA a bit further, however, to see how treating standing as a wholly separate question may undermine our ability to resolve the underlying separation-of-powers conundrum.

One limit on presidential abuse is the requirement, codified in 28 U.S.C. § 530D, that the President report to Congress any decision not to enforce or defend a federal law. That requirement obliges the President to articulate a principled justification—a constitutional argument—for the decision. We saw the political limits of that constraint in the same-sex marriage cases this term, however. The Obama administration's § 530D letter explaining why it would not defend the DOMA concluded broadly that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny" and that excluding same-sex couples from

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99. *Id.* at 761.

100. *See, e.g., id.* at 791 (Stevens, J., dissenting) ("[T]he fundamental aspect of standing is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than on the issues he wishes to have adjudicated . . . . The strength of the plaintiff's interest in the outcome has nothing to do with whether the relief it seeks would intrude upon the prerogatives of other branches of government . . . .") (internal quotations and citations omitted).

marriage could not meet that standard.<sup>101</sup> The letter acknowledged that no court had yet applied heightened scrutiny to classifications based on sexual orientation. Worse, in *Hollingsworth*, the Administration asked the Court to decide only that *state* bans are unconstitutional in states that offer same-sex couples some form of recognition as domestic partners.<sup>102</sup> At oral argument, the Solicitor General allowed that “we’re not prepared to close the door to an argument in another [s]tate” that same-sex marriage bans are constitutional.<sup>103</sup> Given that *federal* law does not recognize domestic partnerships, it is hard to see how the argument against DOMA could have been *so clear* that the Administration could not even litigate the question.

I do not mean to argue against the equal protection claims in *Windsor* and *Hollingsworth*.<sup>104</sup> My point is simply that the executive should decline to defend a duly-enacted federal statute only when the argument against it is very clear, and the Obama administration’s behavior seriously undermined its initial contention that the case against DOMA met that standard. Moreover, the administration’s “eight-state solution”—a position rightly shelled by the justices at oral argument<sup>105</sup> and largely without defenders in the academy—raised strong suspicions that the administration’s legal positions were being driven by political considerations.<sup>106</sup> In any event, it seems plain that the § 530D process neither constrains the President’s future litigation options nor enforces any strong commitment to principled decisionmaking.

From the standpoint of separation-of-powers law, the most promising check on executive decisions not to defend federal laws is to allow other persons to take up their defense. Permitting the BLAG or some other

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101. Letter from Eric H. Holder, Jr., Att’y Gen., to Rep. John A. Boehner, Speaker, U.S. H.R. (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-22.html>.

102. See Brief of the United States as Amicus Curiae Supporting Respondents, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (“The Court can resolve this case by focusing on the particular circumstances presented by California law and the recognition it gives to committed same-sex relationships, rather than addressing the equal protection issue under circumstances not present here.”); see also Marcia Coyle, *Government Presses Eight-State Solution for Gay Marriage and More*, THE BLOG OF LEGAL TIMES (March 1, 2013, 8:52 AM), <http://legaltimes.typepad.com/blt/2013/03/government-presses-8-state-solution-for-gay-marriage-and-more.html>.

103. Transcript of Oral Argument at 54, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

104. I do think, as I argue elsewhere, that the Court was right to decide *Windsor* by injecting a heavy dose of federalism. See Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2013 CATO SUP. CT. REV. 117 (2013).

105. See, e.g., Erin Fuchs, *The Supreme Court was Highly Skeptical of Obama’s Weird Gay Marriage Argument*, BUS. INSIDER (Mar. 28, 2013), <http://www.businessinsider.com/justices-dont-like-eight-state-solution-2013-3> (reporting that “not one justice seemed to buy that argument when the high court was hearing arguments Wednesday on California’s gay marriage ban Proposition 8.”).

106. Those considerations could have included the politics of the court itself, but may also have reflected a desire to avoid antagonizing the large majority of states that offer same-sex couples neither marriage nor domestic partnership status.



governmental institution to stand in for the Justice Department in cases like *Windsor* allows the President to keep faith with his own view of constitutional meaning while preventing that option from turning into a *de facto* veto. That reality demonstrates, however, how the “substantive” separation-of-powers question is intimately bound up with the question of standing. If only the executive branch has standing to defend the law, then we are left looking for other checks—with few promising candidates.

The *Windsor* majority avoided the question of BLAG’s standing to defend DOMA by concluding that the executive branch, in effect, was holding up its half of the case or controversy by continuing to *enforce* the statute.<sup>107</sup> After all, the suit was for a refund of estate taxes that the IRS had unconstitutionally required of Edith Windsor by refusing to recognize her marriage to her deceased partner, and that controversy remained active until the IRS paid up.<sup>108</sup> The problem, as Justice Scalia pointed out,<sup>109</sup> was that there was no live controversy between Windsor and the Government over the legal question of DOMA’s constitutionality. Both parties thus retained an *injury*—Windsor had not received her refund, and the IRS was under a court order to pay it out of the Treasury—but they lacked *adversariness* over the dispositive legal question in the suit. Ordinarily we trust in the injury-in-fact requirement to *ensure* adversariness, but *Windsor* was the rare case requiring the Court to disaggregate these two traditional components of standing.

There is a strong argument that the Court should not have had to confront this difficult issue in *Windsor*—and, indeed, that the standing question should never come up in the form that it did in that case. The conflict between injury and adversariness arose because the Government continued to enforce the DOMA, even though it was unwilling to defend that statute in court. Either of the two possible *consistent* positions would have obviated the tension: if DOMA were neither enforced nor defended, then the case would have lacked both injury *and* adversariness.<sup>110</sup> And of

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107. See *United States v. Windsor*, 133 S. Ct. 2675, 2686–87 (2013).

108. The problem would have been presented in a more difficult form if, as in *Hollingsworth*, the Government had declined to *appeal* the Second Circuit’s ruling. In that posture, the Court would have had no choice to resolve whether BLAG would have standing to appeal in its own right.

109. See 133 S. Ct. at 2699–700 (Scalia, J., dissenting).

110. That approach by the Government might have eventually raised difficult questions of ripeness or mootness in cases where same-sex couples sought an injunction against enforcement of DOMA. Cases pending at the time such a decision was taken would arguably be moot, although the United States’ voluntary cessation of enforcement would probably *not* be sufficient to moot the case. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000); HART & WECHSLER, *supra* note 11, at 189. Cases filed after the non-enforcement decision would arguably not be ripe, see, e.g., *Poe v. Ullman*, 367 U.S. 497 (1961) (dismissing challenge to Connecticut’s contraceptive ban in the absence of any specific threat of enforcement), although plaintiffs might be able to argue a continuing stigmatic harm or that the possibility of future enforcement might undermine their ability to plan their long-term futures together, cf. Christopher R. Leslie, *Creating Criminals: The Injuries*

course if the Government defended what it was enforcing, we would have the usual case with no standing issue at all. Nor is the problem simply that the Government was being inconsistent. If the power to decline defense of a federal statute stems from the President's obligation to uphold the Constitution, then how does *enforcing* the statute square with that obligation? It seems unwise to predicate basic rules of standing on a situation that arises only when the Government is arguably violating its legal—and ethical—obligations.

In any event, I think Justice Kennedy's position that BLAG's participation supplied the requisite adversariness as a practical matter<sup>111</sup> derives added force from the need to balance the prerogatives of and constraints on Executive power as a matter of underlying separation-of-powers law. This recognition does not necessarily make the adversariness element prudential, for instance in the sense that Congress could eliminate it by statute. The *constitutional* rules of separation of powers are also flexible and pragmatic, in the interests of maintaining a workable system of checks and balances.<sup>112</sup> There is room, even as a constitutional matter, for standing rules that take into account the need to counterbalance executive prerogatives of non-defence and non-enforcement. The crucial point, as Judge Fletcher told us in his seminal article, is that the underlying concerns of the law in the case cannot be held apart from the rules of standing.

#### CONCLUSION

I have made no attempt here to develop a full-fledged theory of standing, and it seems likely that I have taken Judge Fletcher's theory in directions that he might not endorse. That, however, is why we describe a work like *The Structure of Standing* as "seminal"—it furthers not only the author's particular approach to its subject, but also influences the way that other participants in the field think about a question. I am not quite ready to give up on traditional standing doctrine, with its oft-repeated catchphrases like "injury in fact"; for one thing, I have taught that doctrine to too many people that might want a refund if I disavowed it now. And as a Federal Courts teacher, I have a lot invested in the notion that concepts like "standing" represent a common set of problems that should be addressed by generally applicable rules. But Fletcher's central insight—that those generally applicable rules cannot be understood wholly apart from the

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*Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000) (arguing that even absent enforcement, sodomy laws injured gay persons).

111. See 133 S. Ct. at 2687–88.

112. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988).

underlying law at issue in particular cases—helps a very great deal to make sense of the way those general rules apply in hard cases.