

Article

The Fragmentation of Standing

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Introduction

Recent years have witnessed the accelerated fragmentation of standing into a multitude of varied, complexly related subdoctrines. Scarcely a Term goes by without the Supreme Court deciding one or more high-profile standing cases.¹ Yet the Court's decisions have done little to enhance

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1. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338, 2343 (2014) (finding that petitioners had standing to challenge an Ohio law criminalizing false statements made in connection with political campaigns based on a “credible threat” of enforcement); *United States v. Windsor*, 133 S. Ct. 2675, 2685–86 (2013) (upholding standing of the United States to seek review of a lower court decision mandating federal recognition of same-sex marriages licensed by states even though the United States agreed with the ruling on the merits); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662–63 (2013) (denying standing to private litigants who argued they were authorized by California law to defend a state ballot initiative barring gay marriage that state officials declined to defend); *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147–50 (2013) (finding that various plaintiff organizations lacked standing to sue to enjoin national security wiretaps because their claims of injury rested on speculative fears and assumptions); *Camreta v. Greene*, 131 S. Ct. 2020, 2029–30 (2011) (upholding standing of government officials who had prevailed in the lower court on grounds of official immunity to challenge the lower court’s ruling that their alleged conduct was nevertheless constitutionally prohibited); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011) (denying taxpayer standing to challenge allegedly unconstitutional tax credits to support religious institutions); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 144, 156 (2010) (upholding standing in a dispute regarding whether a plant entity should be subject to government regulation); *Salazar v. Buono*, 559 U.S. 700, 705–06, 712 (2010) (finding that, “[h]aving obtained a final judgment granting relief on his claims,” petitioner had standing to challenge a transfer of land by the government in a case involving a religious symbol); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493–95 (2009) (denying standing to an organization that failed to demonstrate governmental regulations threatened imminent and concrete harm to identifiable members’ interests); *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285–86 (2008) (holding that assignees had Article III standing to pursue the assignor’s claim for money owed); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 592–93 (2007) (distinguishing an earlier case and denying taxpayer standing to challenge expenditures that benefited religious institutions because the expenditures were made by the federal executive branch out of general rather than special appropriations); *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (finding that the state had a “special position and interest” sufficient to justify Article III standing that private challengers apparently would not possess); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (holding that “state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers”). Although perhaps failing to achieve high profile status, the Court’s 2014 decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377

clarity in this contentious corner of constitutional law. To be sure, the problem of standing's fragmentation did not begin with the Roberts Court. Since the Court began in the 1970s to characterize standing as turning almost entirely on a single, transsubstantive, tripartite test—requiring showings of injury in fact, causation, and redressability²—commentators have complained about inconsistencies and anomalies in application.³ Over time, however, the grounds for objection and occasional befuddlement have grown, not diminished, as more controversial cases upholding standing have taken their places alongside more controversial decisions denying it.

The fragmentation of standing—as I shall presently seek to describe it—has regrettable current consequences, involving complexity and confusion, but it also contains a latent potential for positive development. However opaque or inadequate the Supreme Court's opinions, over time its cases have formed patterns. As I shall explain in considerable detail, those patterns are complex, and the Court has often failed to describe—much less

(2014), may have important implications for the future of prudential standing doctrine. *See infra* notes 267 and accompanying text.

2. *See infra* notes 19–22 and accompanying text.

3. *See, e.g.*, Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1154 (1977) (“[G]eneralized articulations of injury isolated from the claim invite charges of inconsistency, selectivity, and ad hoc decisionmaking; judicial expressions of skepticism about the merits, predictably commonplace in such standing decisions, provide further support for such charges.”); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 59 (1982) (“[U]nder the current formula the decision whether to grant standing necessarily implicates the merits of the case to some degree.”); William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 286–87 (2013) (arguing that recent environmental standing decisions “respond to the Court’s perception of political reality” and find standing for individuals and groups with “increasing political influence”); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380 (1973) (“[T]he criteria [for standing] have become confused and trivialized.”); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68–69 (1984) (“Observers, with just cause, regularly accuse the Supreme Court of applying standing principles in a fashion that is not only erratic, but also eminently frustrating in view of the supposed threshold nature of the standing inquiry.” (footnote omitted)); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999) (“The doctrinal elements of standing are nearly worthless as a basis for predicting whether a judge will grant individuals with differing interests access to the courts.”); Robert J. Pushaw, Jr., *Fortuity and the Article III “Case”: A Critique of Fletcher’s The Structure of Standing*, 65 ALA. L. REV. 289, 290 (2013) (complaining that during the era of the Burger and Rehnquist Courts, “[s]cholars were far better at deconstructing standing doctrine than proposing workable solutions” and “[m]ost often, they accused” the Justices of “manipulating standing rules to achieve the conservative goal” of denying relief to certain types of plaintiffs); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (“[T]he law of standing lacks a rational conceptual framework. . . . Decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim.”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988) (“It is almost de rigueur for articles on standing to quote Professor Freund’s testimony to Congress that the concept of standing is ‘among the most amorphous in the entire domain of public law.’” (quoting *Judicial Review: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 498 (1966) (statement of Paul A. Freund, Professor, Harvard Law School))).

justify—them as such. But there are patterns nonetheless. Once identified, those patterns frequently exhibit an implicit normative logic that not only enables predictions, at least by legal experts, but also gives definition to the law that lower courts are obliged to apply. Although it is increasingly bootless to seek general rules governing standing to sue in federal court—at least beyond the frequently empty standards of injury, causation, and redressability—we can often achieve a good deal of clarity if we ask which rules apply to particular plaintiffs seeking particular forms of relief under particular constitutional or statutory provisions.⁴

Among my central ambitions in this Article is to describe both the negative or confusion-generating and the positive or pattern-reflecting aspects of the fragmentation of standing. But my aims go beyond description. Through its several parts, this Article also pursues analytical, diagnostic, and prescriptive goals. It aims to enhance understanding of standing doctrine and the dynamics that have given it its present shape. The Article also aspires to promote realistic doctrinal reform, tailored in recognition of the sometimes unyielding factors that have occasioned standing's fragmentation.

Part I provides relevant background. It offers a brief sketch of the modern history of standing doctrine, emphasizing the conceptual unity that the Supreme Court promised in the 1970s when it promulgated the apparently simple, tripartite, transsubstantive formula that makes standing invariably depend on injury in fact, causation, and redressability.

Part II—which develops the Article's central descriptive theses—traces the accelerating trend toward doctrinal fragmentation, especially in decisions of the Roberts Court. On the one hand, Part II demonstrates the failure of the Court's three-part formula to explain the results that it often reaches. On the other hand, it identifies complex patterns in the Court's decisions, albeit ones that the Court has not always identified as such. In effect, Part II furnishes a re-mapping of the present law of standing.

Part III advances the argument, which I expect to be uncontroversial, that the mixture of complexity and lack of articulate explanation that characterizes much of current standing doctrine is regrettable from all perspectives. But Part III marks a step along the path of inquiry, not an ultimate pronouncement. It lays the foundation for further diagnostic and prescriptive analysis.

4. Cf. Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 174, 213 (2012) (arguing that the Supreme Court tends to relax standing requirements in cases in which Congress has conferred procedural rights and maintaining more generally that “the most plausible way to reconcile the Court's inconsistent approaches to standing is to admit that . . . there are two tiers of the Case or Controversy Clause—one for procedural rights cases and one for traditional common law review”).

Part IV draws heavily on insights from the social sciences in identifying multiple and overlapping causes for standing's increasing fragmentation. Some of these causes, it suggests, need to be accepted as fixed points that practical reform proposals must acknowledge and accommodate if they aim to be effective in the short term. Part V buttresses the findings of Part IV's diagnostic project by framing and answering the question of what makes standing, in comparison with other doctrines in constitutional law, distinctively prone to unacknowledged and therefore inadequately justified complexity.

Part VI articulates the modest agenda for reform to which prior Parts have pointed. Its suggestions operate along two tracks. Both the Supreme Court and legal scholars, Part VI argues, should embrace the fragmentation of standing law as a fact of life and, having done so, should attempt to identify how generally stated rules or principles apply differently in coherently distinguishable contexts. Building on the analytical model implicit in Part II's mapping of doctrinal categories, Part VI also emphasizes the value of critical perspectives and normative prescription within doctrinally Realist scholarship.

I. A Brief Sketch of History

To take the measure of standing's recently increasing fragmentation requires only a cursory account of the doctrine's contested emergence and evolution. Through most of American legal history, standing doctrine as we know it today—as a doctrine regulating who is a proper party to invoke the jurisdiction of a federal court to assert a legal claim or defense, either at trial or on appeal—did not exist.⁵ Nevertheless, standing is not entirely a twentieth-century invention. In earlier periods, other doctrines—apparently reflecting widely shared understandings of the separation of powers and the limited reach of judicial authority—governed rights to sue in federal court.⁶

5. See, e.g., RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 113–14, 146–48 (6th ed. 2009) [hereinafter *HART & WECHSLER*] (discussing the origins of modern standing doctrine); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–97 (1992) (providing a detailed overview of the development of modern standing doctrine); Winter, *supra* note 3, at 1418–25 (tracing the history of the concept of "standing").

6. See, e.g., Anne Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (noting that although "early American courts did not use the term 'standing' much," they "were well aware of the need for proper parties," they "regularly designated some areas of litigation as being under public control and others as being under private control," and "[w]ithin the area of private control . . . paid close attention to whether the correct private parties were before them").

In crude outline, one set of nineteenth-century doctrines structured actions by public officials to enforce the rights of the public.⁷ Another set applied to actions by private litigants, including cases in which private plaintiffs sought protection against unlawful official action.⁸ The latter doctrines reflected what commentators have called a “private rights” or “dispute resolution” model,⁹ generally limiting judicial intervention to the kinds of disputes that the founding generation likely would have regarded as cases “of a Judiciary nature.”¹⁰ Within this model, the plaintiff typically alleged that the defendant had harmed an interest protected at common law.¹¹ Then, when the defendant answered by claiming that the challenged action had occurred pursuant to legal authority, the plaintiff would reply that any purported authorization violated the Constitution.¹² If so, the official would be liable on the same terms as any other tortfeasor.¹³

During the twentieth century, the private rights model came under strain from several directions. Contributing factors included the vast increase in governmental regulation, which created novel rights that many or even all members of the public shared; an expansion of constitutional rights to embrace liberty interests that had no analogues at common law, including those associated with voting and freedom from discrimination; and an emerging conception of rights as swords with which to make demands on the government, and not merely use as shields against coercive mistreatment.¹⁴ In response, the Supreme Court began to develop doctrines that it expressly denominated as involving standing to govern the eligibility of parties to seek judicial enforcement of constitutional or statutory guarantees.

For current purposes, the signal developments in the law of standing occurred during the 1960s and 1970s. First, the Court purported to distinguish the question of standing from the question of whether a plaintiff

7. *See id.* at 712 (indicating the central concern addressed by standing rules that “control of public rights should remain in the hands of public officials and that individuals should be free from arbitrary enforcement at the hands of private actors”).

8. *See id.* (“Contrary to the critics’ claims, however, the Supreme Court did see some standing issues as constitutional, expressing particular concerns about unwarranted judicial interference with the federal and state political branches.”).

9. *See* HART & WECHSLER, *supra* note 5, at 72–73 (describing the dispute resolution model); Monaghan, *supra* note 3, at 1365–68 (introducing the private rights model as one of two models of judicial competence).

10. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911)) (internal quotation marks omitted).

11. HART & WECHSLER, *supra* note 5, at 113–14; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717, 1723–24 (1975).

12. HART & WECHSLER, *supra* note 5, at 114.

13. *Id.*

14. *See id.* (describing various sources of strain on the concept of standing in the twentieth century).

had a legal right to relief on the merits. It did so most explicitly in *Association of Data Processing Service Organizations, Inc. v. Camp*,¹⁵ in which it denied that standing required a legal authorization to sue.¹⁶ Standing, the Court said, depended entirely on whether the plaintiff had suffered an injury to an interest “within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”¹⁷ In doing so, the Court formulated the dependence of standing on injury as a demand for injury in fact.¹⁸

Before the end of the 1970s, however, the Court’s development of standing doctrine took a more restrictive turn.¹⁹ Emphasizing the function of standing in limiting the judicial role within the separation of powers, the Court increasingly insisted that, in order to support standing, an injury must be concrete and particularized.²⁰ It also began to recite a standing formula that linked the need for injury in fact to a demand that plaintiffs trace a line of causation between an alleged constitutional violation and the injury that they suffered.²¹ The Court’s three-part formula also separately required plaintiffs to demonstrate that a favorable judicial ruling would redress their injuries.²²

15. 397 U.S. 150 (1970).

16. *See id.* at 153 (rejecting a “legal interest” test for standing on the ground that it “goes to the merits” and asserting that “[t]he question of standing is different”).

17. *Id.* at 153. *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014), subsequently characterized the zone of interests question as “an issue that requires [a court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”

18. *See Data Processing*, 397 U.S. at 152 (“The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”).

19. *See, e.g., Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976) (explaining that a federal court that ignores the requirement that a plaintiff must have “some personal interest” in the suit “overstep[s] its assigned role in our system of adjudicating only actual cases and controversies”); *Warth v. Seldin*, 422 U.S. 490, 502 (1975) (“Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.”); *United States v. Richardson*, 418 U.S. 166, 179–80 (1974) (holding that “[t]he acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant” must satisfy the “fundamental tests” of standing).

20. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–23 (1974) (emphasizing concrete injury as an “indispensable element of a dispute” that requires the plaintiff to have suffered a particular harm); *Richardson*, 418 U.S. at 179–80 (demanding more than a generalized grievance to satisfy the standing requirement).

21. *See, e.g., Simon*, 426 U.S. at 41–42 (“Art[icle] III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–18 (1973) (requiring a nexus between the alleged injury and the claim to be adjudicated).

22. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984) (positing that relief must be likely to follow from a favorable decision); *Los Angeles v. Lyons*, 461 U.S. 95, 128 (1983) (determining that standing turns in part upon whether the plaintiff’s injuries are likely to be redressed from a favorable ruling); *Simon*, 426 U.S. at 38 (asserting that to establish a personal stake in the outcome

Since the 1970s, the Court has recited its tripartite demand for injury in fact, causation, and redressability with mind-numbing regularity, as if all, or nearly all, of standing doctrine could be divided into just three parts.²³ The injury-in-fact prong of the test, devised to capture a prelegal conception of injury that did not vary with the merits of a plaintiff's claim,²⁴ bespeaks an especially strong aspiration to conceptual unity.²⁵ In point of fact, conceptual unity never existed. In framing the now familiar three-part test, the Burger Court sought not merely to describe then-existing law but also to rein in expansions of judicial power to oversee the operations of other branches of government that a majority of the Justices found disturbing.²⁶ According to Justice Lewis Powell, who was a leader in the drive to establish limits on standing, an important function of standing doctrine was to remove the judiciary from "amorphous general supervision of the operations of government."²⁷ In Justice Powell's formulation, the courts properly protect "the constitutional rights and liberties of individual citizens and minority groups" who suffer concrete harms from government action but should otherwise avoid "essentially head-on confrontations" with "the representative branches of government" about the wisdom and even the constitutionality of government policies.²⁸

Given their aims, the Justices who initially propounded the three-part standing formula must have known that a number of cases that they apparently did not intend to overrule did not fit comfortably within the conceptual bounds that they laid out. For example, they made little effort to explain why the complaints of voters in one-person, one-vote cases did not constitute "generalized grievance[s]" that were too widely shared to support standing,²⁹ why municipal taxpayers suffered sufficient injury to have

of a case, a plaintiff must be able to show an injury that is "likely to be redressed by a favorable [judicial] decision").

23. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) (explaining that establishing standing requires an injury in fact, a causal link between the injury and the action complained of, and a likelihood that the injury will be redressed by a favorable decision); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (same); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (same).

24. See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1448 (1988) (noting that "the injury-in-fact test . . . suggested that there was a prelegal category of injuries").

25. For an argument that the aspiration to unity is especially problematic insofar as the Court has demanded injury in fact in cases alleging violations of private rights, see generally F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008).

26. *Id.* at 296–97.

27. *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). On the role of Justice Powell in restricting standing doctrine, see generally Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1151 (2009).

28. *Richardson*, 418 U.S. at 188, 192.

29. Compare *Reynolds v. Sims*, 377 U.S. 533, 537 (1964) (implicitly conferring standing to similar voters in Alabama), and *Baker v. Carr*, 369 U.S. 186, 204–06 (1962) (upholding standing of plaintiff voters on behalf of all similarly situated qualified voters in Tennessee), with

standing to sue³⁰ but federal taxpayers did not³¹ (except in a subset of Establishment Clause cases),³² or why and when various governmental officials could sue in their official capacities even when they had suffered no personal hardship.³³ But if a conceptually unified standing doctrine always represented more of an aspiration than a reality, the Court of the 1970s plainly regarded that aspiration as one that it both could and should realize more fully.

II. Standing Under the Roberts Court

In reflecting on the implicit promise of the Supreme Court to subsume all standing analysis under a single, tripartite, transsubstantive formula, one might well begin with Robert Burns's much quoted observation that "[t]he best laid schemes o' *Mice* an' *Men* /Gang aft agley,"³⁴ and, from there, trace the development of standing doctrine from the 1970s through the present day as an illustration of that theme. For reasons that will shortly become apparent, the project of creating a unitary and principled doctrinal structure built around the concepts of injury in fact, causation, and redressability was doomed from the beginning. Here, however, I shall focus nearly exclusively on the handiwork of the Roberts Court. For those who expected the Chief Justice's concern with issues of judicial role and his commitment to high standards of judicial craftsmanship to lead to a more principled integration of standing doctrine, the record of the Roberts Court has occasioned considerable disappointment.

Far from becoming more elegant and unified, standing doctrine has grown more complex and variegated with nearly every recent Supreme Court Term. Part of the complexity arises from the failure of the Court's continuing project of divorcing determinations of injury in fact from substantive judgments concerning the protections that particular provisions

Richardson, 418 U.S. at 176, 179–80 (withholding standing from an individual taxpayer with a generalized grievance about CIA expenditures).

30. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 3 (1947) (permitting appellant to bring suit in state court "in his capacity as a district taxpayer").

31. See, e.g., *Richardson*, 418 U.S. at 175 (denying respondent standing to bring complaint in federal court when standing was based on his status as a taxpayer); *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923) (characterizing a single taxpayer's "interest in the moneys of the Treasury" as "minute and indeterminable" and therefore not a basis for standing).

32. E.g., *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968). For discussion of *Flast*, see *infra* notes 45–61 and accompanying text.

33. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 437 (1939) (determining members of a state legislature had standing to bring suit to determine whether a Lieutenant Governor had authority to cast the deciding vote on a resolution); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236–37 (1907) (permitting the State to bring suit in its capacity as "quasi-sovereign" to protect the State's forests and air).

34. ROBERT BURNS, *To a Mouse*, in *POEMS CHIEFLY IN THE SCOTTISH DIALECT* 138, 140 (Woodstock Books 1991) (1786).

of law confer.³⁵ Additional sources include the myriad of issues that emerge when governments and their officials, as distinguished from private plaintiffs, bring suits or otherwise seek legal redress.³⁶ Nor is this the end. The Roberts Court has also struggled with issues involving congressional authority to confer standing and, separately, with the conundrums presented by relative probability and uncertainty concerning future action and the harms that it might cause.³⁷ The Court has failed to develop a unitary formula for determining how likely it must be that a threat will ripen into a more palpable injury, or that a judicial ruling would redress an injury or threat thereof, in order for a plaintiff to have standing.³⁸

In saying that standing doctrine has grown progressively more fragmented, I should be clear about the nature of my claim. My thesis is not the familiar, reductionist one that the secret to understanding the Supreme Court's standing cases lies more in politics or ideology than in law and that the Justices recurrently manipulate standing doctrine to promote an ideological or political agenda through illicit means.³⁹ To the contrary, while acknowledging that judicial ideology influences standing determinations in some cases in sometimes unavoidable ways, I shall assume throughout that standing doctrine is worth taking seriously. In taking doctrine seriously, however, I shall train my attention as much on what the Court does as on what it says. When I believe that the Court's proffered explanations for particular outcomes are misleading or uninformative, I shall sometimes advance better, more persuasive, and more accurately descriptive grounds for distinctions that the Court recurrently draws. My guiding assumption is that it is the obligation of lower courts and an important function of scholars to develop interpretations of Supreme Court precedents that furnish coherent guidance for deciding future cases as a matter of law. Consistent with this assumption, my thesis holds that the Court's standing decisions form discernible patterns and are often capable

35. See *infra* subpart II(A).

36. See *infra* subpart II(B).

37. See *infra* subpart II(C).

38. See *infra* subpart II(D).

39. See, e.g., Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 326 (2002) (“[M]uch of the rationale for access to the courthouse likely lies in ideology.”); Pierce, *supra* note 3, at 1743 (proclaiming that the votes of Supreme Court Justices on cases involving standing have been predictable and clearly split along ideological lines); Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1015–16 (2011) (“[I]nconsistency [in standing doctrine] leads to suspicion that decisions on standing in close cases may be guided more by the courts’ instincts toward the merits than by an independent determination of the parties’ eligibility to invoke jurisdiction.”); Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 121 (2011) (“[T]he inherent indeterminacy of standing law can be understood as reflecting an unstated desire to protect racial and class privilege, which is accomplished through the dogma of individualism, equal opportunity (liberty), and ‘white innocence.’”).

of determining doctrinally correct answers to future standing cases—but that the lines that need to be drawn to portray standing doctrine as ordered rather than disordered have grown increasingly numerous and complex over time. By “fragmentation,” I mean the division of standing law into multiple compartments, most of which may be intelligible in themselves, but that reflect more conceptual and normative diversity than unity.

In proceeding as I do, I draw inspiration from a strand of Realist legal scholarship that I shall describe as “doctrinal Realism.”⁴⁰ This variety of Realism emphasizes a “distinction between the forms of words that judges use in laying down and describing legal doctrine and the kinds of facts that actually drive judicial decisions” in practice.⁴¹ Realists in this tradition maintain that the law, if rightly understood, typically makes sense in its own terms, but they insist that one should not be mesmerized by the bare words of judicial opinions, abstracted from the facts that evoked them.⁴²

A. *Standing and the Merits*

In a brilliant article published in 1988, then-Professor William Fletcher argued that the question of whether a plaintiff has standing is conceptually inseparable from the question of whether a plaintiff has a right to sue to enforce the duties that a particular statutory or constitutional provision imposes.⁴³ Since then, experience has taught that the concept of injury is

40. For elaboration of this notion, see generally Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105 (2014).

41. *Id.* at 106.

42. See, e.g., Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 447 (1930) (arguing that there are “real ‘rules’ and rights” distinct from “paper rules and rights”); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223 (1931) [hereinafter Llewellyn, *Some Realism About Realism*] (discussing Realists who seek to discern the “tangibles which can be got at beneath the words”); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1928) (“Not the judges’ opinions, but which way they decide cases will be the dominant subject matter of any truly scientific study of law.”); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (noting distinctions “between the rules that purport to govern the relations of man and man and those that in fact govern them”).

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

If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it. If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it. Congress should have some, but not unlimited, power to grant standing to enforce constitutional rights. The nature and extent of that power should vary depending on the duty and constitutional clause in question.

Id. at 223–24. For an earlier development of similar insights, see generally Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

too vague and malleable for the idea of injury in fact to have much analytical bite in many cases. Try as the Supreme Court might to conceptualize standing injury as injury in fact, its decisions reveal that whether a plaintiff has suffered a judicially cognizable injury—and, if so, whether the relief sought is sufficiently likely to redress it to support standing—frequently turns on the provision of law under which a plaintiff seeks relief. As a result, a body of doctrine that aspires to trans-substantivity instead fractures along substantive lines in important, identifiable categories of cases.

1. The Establishment Clause.—The fragmentation of standing doctrine nowhere manifests itself more visibly than in suits to enforce the Establishment Clause. For practical purposes, one rule upholds the standing of taxpayers seeking to enjoin direct congressional expenditures in support of religion; a second denies standing to taxpayers who object to the use of general appropriations and the provision of tax credits to support religion; and a third governs challenges to public displays of religious objects.

To understand the current state of the law, one must recognize that the Roberts Court inherited a seemingly anomalous doctrine of taxpayer standing to enforce the Establishment Clause. Ordinarily, the Court has held, any purported injury that state or federal taxpayers suffer when the government spends tax dollars illegally or even unconstitutionally is too small, uncertain, or generalized to support standing.⁴⁴ But in 1968, in *Flast v. Cohen*,⁴⁵ the Warren Court made an exception for Establishment Clause cases.⁴⁶ Apparently conscious of the novelty of its ruling, and perhaps intending its recognition of taxpayer standing as an experiment, the *Flast* Court predicated taxpayer standing on the satisfaction of a “double nexus” test:

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.⁴⁷

On the facts before it, the *Flast* Court found the first requirement to be met by the link between taxpayer status and exercises by Congress of the taxing and spending power.⁴⁸ The second nexus existed between taxpayer

44. See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347–49 (2006) (acknowledging the existence of a “general prohibition on taxpayer standing”).

45. 392 U.S. 83 (1968).

46. *Id.* at 105–06.

47. *Id.* at 102.

48. *Id.* at 103.

status and the Establishment Clause.⁴⁹ According to the Court, that provision addressed a concern among the founding generation that “the taxing and spending power would be used to favor one religion over another or to support religion in general.”⁵⁰

By a series of divided votes, the Roberts Court has maintained the *Flast* exception to the general rule that pocketbook injuries to federal taxpayers are too small, generalized, and uncertain to support standing, but it has narrowed that exception nearly to its facts. In *Hein v. Freedom from Religion Foundation, Inc.*,⁵¹ which arose from efforts by the Executive Branch to ensure that faith-based community groups were not excluded from federal expenditure programs,⁵² Justice Alito sought to distinguish *Flast* on the tenuous ground that the money involved in the case before the Court came from a general appropriation for the Executive Branch, not a special enactment to support an establishment of religion.⁵³ Concurring in the judgment, two Justices would have overruled *Flast*.⁵⁴ According to Justice Scalia, a principled application of the injury-in-fact requirement required what he characterized as a “Wallet Injury.”⁵⁵ In his view, the plaintiff had alleged only a “Psychic Injury,” which he thought could not suffice.⁵⁶ Four other Justices called for what they regarded as a fair application of *Flast*: if the expenditure in *Flast* injured objecting taxpayers, then so did the outlay of federal money in *Hein*.⁵⁷ The doctrinal line that emerges from *Hein* is serviceably clear. Taxpayers have standing to challenge special appropriations to support religious institutions but not payments to support religion that the government makes out of generally available revenues. Yet six Justices agree that this distinction makes no principled sense—a position with which I agree.

Again purporting to distinguish *Flast*, the Court still further limited its precedential reach in *Arizona Christian School Tuition Organization v. Winn*.⁵⁸ In that case, a 5–4 majority, in an opinion by Justice Kennedy, held that support for religious education effected through tax credits, as distinguished from direct expenditures, did not injure the challengers in their capacity as taxpayers.⁵⁹ In my view, the Court’s distinction between tax levies, which inflict injury, and tax credits, which do not, borders on the

49. *Id.*

50. *Id.*

51. 551 U.S. 587 (2007).

52. *Id.* at 593–94 (plurality opinion).

53. *Id.* at 605.

54. *Id.* at 618, 635–37 (Scalia, J., concurring).

55. *Id.* at 619–20.

56. *Id.* at 619, 633.

57. *Id.* at 637, 639 (Souter, J., dissenting).

58. 131 S. Ct. 1436 (2011).

59. *Id.* at 1439, 1447–49.

logically unsupportable. As Justice Kagan pointed out in dissent, it is nearly impossible to think that the mechanism by which the government provides financial support to religious education should matter to whether an aggrieved taxpayer can assert an Establishment Clause violation:

Suppose a State desires to reward Jews—by, say, \$500 per year—for their religious devotion. Should the nature of taxpayers’ concern vary if the State allows Jews to claim the aid on their tax returns, in lieu of receiving an annual stipend?⁶⁰

Although Justice Kagan’s question seems to me to permit only a negative answer,⁶¹ what matters most for present purposes is the fragmentation within standing doctrine that the Roberts Court’s attempts at line drawing have produced. We have one rule for taxpayer standing to enforce the Establishment Clause in *Flast* and cases that are nearly factually identical to it; another applies to cases in which challengers rely on their status as taxpayers to sue to stop government support of religious institutions effected through general appropriations and tax credits.

Even more puzzling, we apparently also have another set of rules to govern standing in Establishment Clause cases in which aggrieved parties forgo reliance on taxpayer status when challenging government support for religion through, for example, displays of crèches and the Ten Commandments and officially sponsored prayers during sessions of governmental bodies. In the latter category of cases, the Court has historically treated standing as largely unproblematic. More specifically, it proceeded directly to the merits, without pausing to conduct a standing inquiry, in *Lynch v. Donnelly*⁶² and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,⁶³ both of which involved crèches on public property;⁶⁴ in the Ten Commandments cases of *Van Orden v. Perry*⁶⁵ and *McCreary County v. ACLU of Kentucky*;⁶⁶ in *Capitol Square Review & Advisory*

60. *Id.* at 1457 (Kagan, J., dissenting).

61. For the majority, Justice Kennedy reasoned:

[T]ax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are “extracted and spent” knows that he has in some small measure been made to contribute to an establishment in violation of conscience. . . . When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. . . . And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

Id. at 1447 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). For an unsparing critique of *Winn*, see generally William P. Marshall & Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215.

62. 465 U.S. 668, 672–73 (1984).

63. 492 U.S. 573, 589–94 (1989).

64. *Cnty. of Allegheny*, 492 U.S. at 578; *Lynch*, 465 U.S. at 670–71.

65. 545 U.S. 677, 681 (2005) (plurality opinion).

66. 545 U.S. 844, 850 (2005).

Board v. Pinette,⁶⁷ in which the Ku Klux Klan was permitted to maintain a Latin cross on the Ohio Statehouse grounds;⁶⁸ and, most recently, in *Town of Greece v. Galloway*,⁶⁹ in which aggrieved citizens challenged the Town's practice of commencing meetings of its governing board with religious invocations by invited clergy.⁷⁰

To my mind, it is not obvious how to conceptualize the injury that an aggrieved citizen suffers in cases such as these.⁷¹ Nor is it obvious why the injury that a complainant experiences in that kind of case, however conceptualized, does not also exist when a plaintiff sues to stop governmental expenditures of money or provision of tax credits to support religious education.

Questions such as these received extensive briefing in *Salazar v. Buono*,⁷² which originated as a challenge to the maintenance on federal land of a Latin cross erected by the Veterans of Foreign Wars as a tribute to fallen soldiers.⁷³ But the case came before the Roberts Court in a complicated procedural posture. In earlier stages of the litigation, Buono had obtained a lower court injunction requiring removal of the cross, and the lower court's judgment, which included a determination that Buono had standing to sue, became final when the government failed to appeal.⁷⁴ By the time the dispute reached the Supreme Court, the government, pursuant to an Act of Congress, had transferred the property on which the cross stood to private ownership in exchange for another parcel of land.⁷⁵ When Buono challenged that transfer, which left the cross in place, the government argued that he lacked standing because he had suffered no injury personal to him.⁷⁶

Despite the importance of the question whether Buono or anyone else would have standing to challenge an initial display of a cross on public

67. 515 U.S. 753 (1995).

68. *Id.* at 758, 770. For a review of the standing analysis, or lack thereof, in these cases, see generally Ashley C. Robson, *Measuring a "Spiritual Stake": How to Determine Injury-in-Fact in Challenges to Public Displays of Religion*, 81 *FORDHAM L. REV.* 2901, 2925–28 (2013).

69. 134 S. Ct. 1811, 1818 (2014).

70. *Id.* at 1816–17.

71. The lower courts are divided about the standards that plaintiffs must satisfy to have standing to challenge such displays. See Robson, *supra* note 67, at 2932–36 (contrasting a “direct and unwelcome contact” standard employed by the Eighth Circuit with an “altered behavior” standard used by the Seventh Circuit). Some have held that direct and unwelcome contact with a religious display constitutes an actionable injury. *E.g.*, *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024 (8th Cir. 2012); *ACLU of Ohio Found. v. DeWeese*, 633 F.3d 424, 429–30 (6th Cir. 2011). The Seventh Circuit demands a showing of altered behavior. *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1468 (7th Cir. 1988).

72. 559 U.S. 700 (2010).

73. *Id.* at 706–07 (plurality opinion).

74. *Id.* at 708–09.

75. *Id.* at 709–10.

76. *Id.* at 711.

property—or, presumably, the initial display of crèches or reproductions of the Ten Commandments—a splintered Court avoided it. Instead, the plurality and principal dissenting opinions agreed that after the judgment granting Buono an injunction became final, he had standing to enforce it.⁷⁷ Justices Scalia and Thomas would have denied standing, but they, too, avoided the largest question.⁷⁸ “[E]ven assuming that being ‘deeply offended’ by a religious display (and taking steps to avoid seeing it) constitutes a cognizable injury,” Justice Scalia wrote with evident skepticism, “Buono has made clear that *he* will not be offended.”⁷⁹

With a divided Roberts Court having avoided the most fundamental questions about standing to challenge public religious displays in *Salazar*, there can be no doubt that the doctrine governing standing to sue under the Establishment Clause is fragmented. Nor can there be reasonable doubt that the doctrine currently draws distinctions, whether stable or unstable, that are very difficult to rationalize.

2. *The Equal Protection Clause.*—Whatever Justice Scalia may believe to be the correct rule under the Establishment Clause, the Supreme Court does not always demand a redressable “Wallet Injury”⁸⁰ to ground standing—nor does Justice Scalia think that it ought to do so—under the Equal Protection Clause. The most instructive case predates the Roberts Court, but it establishes a precedent to which the Roberts Court would surely adhere. In *Heckler v. Mathews*,⁸¹ Congress had provided higher social security benefits for some retired women than for men who had similar patterns of earnings.⁸² A statutory severability clause mandated that if a court found that the differential violated equal protection principles, affected women would receive the amount paid to men.⁸³ Accordingly, the men who sued to challenge the disparity could not achieve a financial benefit.⁸⁴ In Justice Scalia’s terms, they suffered no wallet injury. Nevertheless, the Court upheld standing.⁸⁵ The plaintiffs’ injury, it reasoned, consisted not in the simple deprivation of benefits but in the deprivation of a right to have benefits “distributed according to classifications which do not without sufficient justification differentiate

77. *Id.* at 711–12; *id.* 738 n.2 (Stevens, J., dissenting).

78. *Id.* at 729–30 (Scalia, J., concurring).

79. *Id.* at 733.

80. *See supra* note 55 and accompanying text.

81. 465 U.S. 728 (1984).

82. *Id.* at 731.

83. *Id.* at 734.

84. *Id.*

85. *Id.* at 738.

... solely on the basis of sex.”⁸⁶ The Court continued: “[D]iscrimination itself, by perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group as ‘innately inferior’ . . . can cause serious noneconomic injuries” that are cognizable and provide a basis for standing under the Equal Protection Clause.⁸⁷

The Court has upheld standing under reasoning that similarly ties judicially cognizable injury to the substantive guarantees of the Equal Protection Clause in cases challenging affirmative action programs. Indeed, the Roberts Court did so by implication in *Fisher v. University of Texas at Austin*,⁸⁸ in which it recited that the plaintiff was a Caucasian who had applied to an institution with a race-based affirmative action policy but made no express mention of standing issues at all.⁸⁹ A standing question had arisen in the earlier case of *Regents of the University of California v. Bakke*.⁹⁰ Emphasizing the requirements of standing doctrine that a plaintiff show both an injury and a high probability that a favorable decision would redress that injury, amici argued that even if the Court held a challenged affirmative action program unconstitutional, the plaintiff Alan Bakke still might not gain admission to the University of California at Davis Medical School.⁹¹ But the Court held that Bakke suffered redressable injury from the university’s denial to him of the opportunity to compete for every slot in its entering class.⁹² A subsequent case made the Court’s rationale even more explicit: “The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of [a barrier that makes it more difficult for the members of a group to obtain a benefit], not the ultimate inability to obtain the benefit.”⁹³

Although this reasoning seems correct to me, it clearly depends on the substantive guarantees of the Equal Protection Clause and, accordingly, requires distinctions within standing doctrine between cases in which the imposition of a barrier to receiving a benefit will, and those in which it will not, support standing. To cite just one recent example, in *Summers v. Earth Island Institute, Inc.*,⁹⁴ the Roberts Court held that members of an environmental organization lacked standing to challenge Forest Service regulations that imposed an obstacle to their achieving environmental

86. *Id.* at 737 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 647 (1975)) (internal quotation marks omitted).

87. *Id.* at 739 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

88. 133 S. Ct. 2411 (2013).

89. *Id.* at 2415, 2417.

90. 438 U.S. 265 (1978).

91. *Id.* at 280 n.14 (opinion of Powell, J.).

92. *Id.* at 281 n.14.

93. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

94. 555 U.S. 488 (2009).

outcomes that they sought.⁹⁵ According to the Court, the Forest Service's challenged policies at most imposed a generalized injury that was insufficiently concrete and personalized to support standing.⁹⁶

3. *National Security Policies.*—The Roberts Court's recent decision in *Clapper v. Amnesty International USA*⁹⁷ suggests that the requirements of standing may vary, not just with the provision of the Constitution under which a plaintiff brings suit, but also with the nature of the governmental action or policy that a plaintiff seeks to challenge. The plaintiffs in *Clapper* were U.S. citizens residing in the United States who sought judicial invalidation of an amendment to the Foreign Intelligence Surveillance Act.⁹⁸ The amendment permitted the Attorney General and Director of National Intelligence, with the authorization of the Foreign Intelligence Surveillance Court, to direct the interception of communications involving non-Americans “reasonably believed to be located outside the United States [in order] to acquire foreign intelligence information.”⁹⁹ The plaintiffs alleged that their personal and professional relationships with parties abroad made it likely that their communications would be intercepted under the revised statute.¹⁰⁰ Writing for the Court, Justice Alito denied standing based on the plaintiffs' failure to establish that an injury in fact was “certainly impending” in light, among other things, of the opacity of the Government's criteria for seeking foreign-security wiretaps.¹⁰¹ He concluded, in addition, that the plaintiffs had not adequately established that any injury they might suffer was or would be causally traceable to the challenged amendment since “[t]he Government has numerous other methods of conducting surveillance, none of which is challenged here.”¹⁰²

As four dissenting Justices pointed out, although some of the Court's past decisions had referred to a need for “certainly impending” injury, future injury is seldom “absolutely certain,” and the “federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely . . . to take place.”¹⁰³ Because the plaintiffs had averred that their

95. *Id.* at 493–97.

96. *Id.* at 496–97.

97. 133 S. Ct. 1138 (2013).

98. *Id.* at 1142.

99. *Id.* at 1144 (quoting 50 U.S.C. § 1881a (2006 & Supp. V 2011)) (internal quotation marks omitted). The amendment required minimization procedures to restrict the collection of information about persons within the United States. *Id.* at 1145.

100. *Id.* at 1145, 1147.

101. *Id.* at 1143 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (internal quotation marks omitted).

102. *Id.* at 1149.

103. *Id.* at 1155, 1160 (Breyer, J., dissenting) (emphasis omitted).

work as lawyers, scholars, and journalists required them to communicate with people abroad whom the government believed to be affiliated with terrorist groups, the dissenters thought the likelihood of injury large enough to permit standing.¹⁰⁴

With the majority and dissenting opinions citing different cases to support their judgments about the appropriate standard—and with even the majority acknowledging in a footnote (which I shall further discuss below) that “[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about”¹⁰⁵—an additional distinction that Justice Alito cited in his majority opinion takes on enhanced significance: “[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.”¹⁰⁶

In light of the supporting authority that the Court cited,¹⁰⁷ among other cases, that assertion seems to me to be unquestionably true. If I am right that it is also material to the Court’s holding, *Clapper* illustrates another line of fragmentation within the Roberts Court’s standing doctrine¹⁰⁸ by making national security concerns relevant to standing inquiries.¹⁰⁹ Corroborating evidence for this hypothesis comes from the Court’s 2014 decision in *Susan B. Anthony List v. Driehaus*,¹¹⁰ which upheld the standing of two advocacy groups to seek an injunction against enforcement of a statute alleged to violate the First Amendment by forbidding knowingly false statements about political candidates.¹¹¹ Anticipating the possibility of enforcement actions in future campaigns, the Court unanimously ruled that

104. *Id.* at 1157–60.

105. *Id.* at 1150 n.5. The majority went on to say that it had sometimes “found standing based on a ‘substantial risk’ that the harm will occur.” *Id.* (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010)). The footnote then continued: “[T]o the extent that the ‘substantial risk’ standard is relevant and is distinct from the ‘clearly impending’ requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here.” *Id.*

106. *Id.* at 1147.

107. *Id.* (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 209–11 (1974); *United States v. Richardson*, 418 U.S. 166, 167–70 (1974); *Laird v. Tatum*, 408 U.S. 1, 11–16 (1972)).

108. For a pre-*Clapper* argument that lower court decisions have created confusion and incoherence by imposing a more restrictive standing standard for plaintiffs in surveillance cases than for other plaintiffs asserting probabilistic injuries, see generally Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. REV. 71 (2009).

109. See also Jonathan Remy Nash, *Standing’s Expected Value*, 111 MICH. L. REV. 1283, 1297–98 (2013) (suggesting that, based on language in the Court’s opinion, “were a case with similar probabilities to arise outside the context of intelligence gathering and foreign affairs, and where the behavior of an independent decisionmaker were not implicated, there might in fact be standing”).

110. 134 S. Ct. 2334 (2014).

111. *Id.* at 2338–40, 2243.

“a plaintiff satisfies the injury-in-fact requirement where he alleges ‘an intention to engage in . . . conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.’”¹¹² When *Susan B. Anthony List* is juxtaposed with *Clapper*, little room for doubt exists that a credible threat of prosecution for violating a federal statute (on which the plaintiff relied for standing in the former) is easier to establish than a credible threat of being subjected to allegedly unconstitutional surveillance related to national security (which the plaintiffs unavailingly claimed to face in the latter). The *Susan B. Anthony List* opinion blandly described *Clapper* as having recognized that “[a]n allegation of future injury may suffice [for standing] if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk’ that the harm will occur.”¹¹³

4. *Standing to Assert Procedural Challenges.*—In many cases, the redressability prong of the standing inquiry requires plaintiffs to demonstrate that the relief they seek would almost certainly alleviate their injuries. As the Roberts Court has acknowledged, however, it makes an exception for cases involving “procedural rights.”¹¹⁴

*Allen v. Wright*¹¹⁵ exemplifies the Supreme Court’s usual, stringent stance with regard to redressability. In *Allen*, the Court acknowledged that plaintiffs seeking to challenge Internal Revenue Service policies involving the award of tax-exempt status to racially discriminatory private schools had asserted a cognizable injury in their children’s “diminished ability to receive an education in a racially integrated school.”¹¹⁶ Nevertheless, the majority denied standing on the ground that it was “entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies.”¹¹⁷

If applied across the board, this exacting interpretation of standing’s redressability requirement would preclude standing in virtually all cases in which a plaintiff complains that the government violated procedural rights when making a decision adverse to the plaintiff’s concrete interests. Consider, for example, cases in which a plaintiff alleges that an

112. *Id.* at 2342 (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)).

113. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1150 n.5 (2013).

114. *Massachusetts v. EPA*, 549 U.S. 497, 517–18 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). For extended discussion of the Court’s differential treatment of procedural rights and an argument that the disparate treatment can best be rationalized by acknowledging that Article III means different things in different contexts, see generally *Lee & Ellis*, *supra* note 4, at 215–28.

115. 468 U.S. 737 (1984).

116. *Id.* at 739, 756.

117. *Id.* at 758 (citation omitted).

administrative agency failed to provide the fair hearing required by applicable statutes, agency regulations, or the Due Process Clause when deciding to impose a burdensome regulation. If a court concludes that a procedural violation occurred, it will typically remand the case to the agency for further action consistent with its opinion. Because the agency, on the remand, will remain free to reinstate its previous substantive decision as long as it follows proper procedures, one might think it “speculative” whether the only remedy that the plaintiff seeks and that the court could award would satisfy the redressability requirement of standing doctrine.

The Court has responded by relaxing the redressability demand in cases involving procedural rights. The Roberts Court’s most direct affirmation came in *Massachusetts v. EPA*,¹¹⁸ in which it upheld a state’s standing to challenge a refusal by the Environmental Protection Agency (EPA) to issue regulations governing greenhouse gas emissions, despite uncertainty about what material effects such regulations might have.¹¹⁹ Writing for the Court, Justice Stevens quoted a prior decision’s recognition that “a litigant to whom Congress has ‘accorded a procedural right to protect his concrete interests’ . . . ‘can assert that right without meeting all the normal standards for redressability and immediacy.’”¹²⁰ He continued: “When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”¹²¹

I have no quarrel with the Roberts Court’s classification of procedural rights as distinctive for purposes of applying standing doctrine’s redressability requirement. Plainly, however, it furnishes a further example of standing’s progressive fragmentation.

B. *Standing of the State and Federal Governments and Their Officials*

The Supreme Court apparently never intended that the injury in fact, causation, and redressability requirements would apply to the federal and state governments in the same way as to private litigants. In perhaps the most obvious illustration, the government need not make a showing of personal injury to itself or anyone else in order to initiate a criminal prosecution.¹²² But this intuitive, historically rooted conclusion has only

118. 549 U.S. 497 (2007).

119. *Id.* at 521, 525.

120. *Id.* at 517–18 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)) (citations omitted).

121. *Id.* at 518.

122. See Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251 (1999) (noting that the United States can prosecute crimes “based on nothing more

limited application. The doctrines that apply to government claims of standing are as complexly variegated as those that regulate the standing of private parties.

I. State Standing.—An old, tangled doctrine (that the Roberts Court has left untouched) holds that states sometimes may bring *parens patriae* actions on behalf of their citizens.¹²³ Although *parens patriae* standing normally requires a state to show some distinctive harm to itself in addition to those suffered by its citizens, the Court has sometimes accepted claims of injuries to states that seem “attenuated” by the standards applied to private litigants.¹²⁴ Moreover, the demand for independent injury developed in suits filed in the Supreme Court’s original jurisdiction, and the Court suggested in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*¹²⁵ that the limitations developed in that context may not apply to suits filed in federal district court.¹²⁶ *Parens patriae* standing has no precise analogue in private litigation, nor are the rules the same as those that govern the standing of private organizations to bring suit to protect their members’ interests.

Even apart from *parens patriae* actions, the Roberts Court has held that special standing rules apply to states when they allege injury to their own real property and to their quasi-sovereign interests “in all the earth and air within [their] domain.”¹²⁷ It did so in *Massachusetts v. EPA*, which arose from a determination by the Environmental Protection Agency that it lacked authority to regulate greenhouse gas emissions that the state alleged were causally responsible for injuries to the state and its coastal lands.¹²⁸ Writing in dissent, Chief Justice Roberts argued that the state had failed to satisfy standing’s ordinary requirements.¹²⁹ Because the global warming caused by greenhouse gases threatens all property owners alike, the Chief Justice thought that Massachusetts had not alleged particularized injury,¹³⁰ and if Massachusetts’s injury lay in the loss of coastal property, the state failed to satisfy the demand that any threatened injury must be imminent, he

than the ‘harm to the common concern for obedience to law,’ and the ‘abstract . . . injury to the interest in seeing that the law is obeyed.’” (quoting *FEC v. Aikins*, 524 U.S. 11, 23–24 (1998)).

123. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 475 (1995).

124. *Id.* at 511–12; see also HART & WECHSLER, *supra* note 5, at 261–66 (reviewing cases involving a state’s standing to assert a claim on behalf of its citizens).

125. 458 U.S. 592 (1982).

126. *Id.* at 603 n.12.

127. *Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007) (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)) (internal quotation marks omitted).

128. *Id.* at 511.

129. *Id.* at 536–37 (Roberts, C.J., dissenting).

130. *Id.* at 541.

argued.¹³¹ It was also far from clear that the distinctive failure of the EPA to regulate greenhouse gases—rather than other contributors to the problem—caused any particular injuries that global warming might inflict on the state, Chief Justice Roberts continued.¹³² Nor, in his view, had Massachusetts established that EPA action would redress any harms that it might suffer, as the responses of other actors on the global stage remained wholly unpredictable.¹³³ In response, Justice Stevens reasoned that “Massachusetts’ stake in protecting its quasi-sovereign interests” set it apart from other litigants and entitled it to “special solicitude in our standing analysis.”¹³⁴ Dissenting, Chief Justice Roberts countered:

The good news is that the Court’s “special solicitude” for Massachusetts limits the future applicability of the diluted standing requirements applied in this case. The bad news is that the Court’s self-professed relaxation of those Article III requirements has caused us to transgress “the proper—and properly limited—role of the courts in a democratic society.”¹³⁵

However much the majority and dissenting opinions disagreed about, they thus concurred with respect to one important point: The Court had either recognized or introduced special standing rules for states suing to protect their property and other quasi-sovereign interests.¹³⁶

2. *Assignments of Governmental Interests.*—When the government or a government official would have standing to represent the government’s interests, the question has occasionally arisen whether the government can assign its interest to, and thereby confer standing on, a third party. In the context of purely private litigation, the Roberts Court has established that when one party assigns its financial interests to another, a suit by the assignee to protect the assigned interests satisfies Article III.¹³⁷ The Rehnquist Court had previously held, moreover, that a federal statute

131. *Id.*

132. *Id.* at 543–45.

133. *Id.* at 545–46.

134. *Id.* at 520 (majority opinion).

135. *Id.* at 548–49 (Roberts, C.J., dissenting) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

136. According to Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008), the *Massachusetts* Court “fail[ed] to define to what extent and under what circumstances federal courts should apply more relaxed standing requirements for states.” *Id.* at 1786. See generally Kathryn A. Watts & Amy J. Wildermuth, Essay, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1046 (2008) (arguing that *Massachusetts v. EPA* leaves states “in a relatively powerful position vis-à-vis federal agencies in terms of their ability both to file suits against agencies and to seek fairly exacting judicial review of the agency’s reasons for declining to regulate”).

137. *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 271 (2008).

authorizing private citizens to bring *qui tam* actions on behalf of the United States against those who have procured payment on false claims against the government passed muster under Article III.¹³⁸

It is a separate question, however, whether a party to whom the government has purported to assign its interest in enforcing or defending laws in which the assignee had no prior financial stake can thereby acquire Article III standing. In *Hollingsworth v. Perry*,¹³⁹ the Court confronted a version of that question and, by a 5–4 vote, gave a negative answer.¹⁴⁰ California law authorizes the proponents of ballot initiatives that are approved by California voters to defend the constitutionality of those initiatives in court when state officials decline to do so.¹⁴¹ *Hollingsworth* arose after California voters enacted Proposition 8, which limited marriage to opposite-sex couples. After the district court ruled Proposition 8 unconstitutional under the Equal Protection Clause, state officials declined to defend it any further.¹⁴² When proponents of the initiative then intervened, the Ninth Circuit upheld their standing to appeal.¹⁴³

The Supreme Court reversed on the standing issue. According to Chief Justice Roberts’s majority opinion, the “petitioners had no ‘direct stake’ in the outcome of their appeal.”¹⁴⁴ “Their only interest” was a generalized one, shared by myriad other California citizens, in “vindicat[ing] the constitutional validity of a generally applicable California law.”¹⁴⁵ Having so concluded, the Chief Justice acknowledged that the state could have protected its undoubted interest in defending Proposition 8 by entrusting litigation responsibility to state officials or by “designat[ing] agents to represent it in federal court.”¹⁴⁶ But the interveners were not California officials, nor, according to Chief Justice Roberts, did they qualify as state agents.¹⁴⁷ Among other difficulties, the state retained no authority to control or remove them.¹⁴⁸

In a forceful dissenting opinion, Justice Kennedy mocked the majority for holding that a state’s authority to secure the constitutional defense of state ballot initiatives that the state executive declined to defend should

138. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777–78 (2000).

139. 133 S. Ct. 2652 (2013).

140. *Id.* at 2658–61, 2668.

141. *Id.* at 2660.

142. *Id.*

143. *Id.*

144. *Id.* at 2662.

145. *Id.*

146. *Id.* at 2664.

147. *Id.* at 2666.

148. *Id.* at 2666–67.

depend on compliance with the *Restatement of the Law of Agency*.¹⁴⁹ By any fair appraisal, moreover, the narrow Court opinion needed to distinguish more cases than it found to rely on, including cases in which states had authorized officials outside the executive branch to represent state interests when executive officers refused.¹⁵⁰

For present purposes, however, there is no need to judge the merits of the contending positions. Whether *Hollingsworth* was right or wrong, and whether it is read narrowly or broadly, it introduced an element of complexity into standing doctrine—involving permissible assignees of states' interests in defending their laws against constitutional challenge—that had not existed previously. Moreover, whatever may be the case with state officials and state agents, *Hollingsworth* strongly suggests that there are general limits to governments' capacity to assign their interests in litigation to private parties, at least absent financial damages.

3. *Federal Governmental Standing to Appeal: The Windsor Case.*—Just as there is ordinarily no question about the standing of the executive branch to initiate criminal and civil actions on behalf of the federal government, no issue typically arises concerning the standing of the executive branch to appeal adverse judgments, including those that hold federal statutes unconstitutional. But an issue of standing to appeal emerged in *United States v. Windsor*,¹⁵¹ after the President and Attorney General concluded that the provision of the Defense of Marriage Act (DOMA) that denied federal recognition to same-sex marriages that are valid under state law violated the federal Constitution.¹⁵² Based on this determination, the executive branch could have ceased to enforce the provision at issue. Instead, with the aim of framing the constitutional question for judicial resolution, the Administration, though not defending DOMA, continued to enforce it by denying Windsor an estate tax exemption that she would have received if federal law recognized her deceased partner—to whom she was lawfully married as a matter of New York law—as her spouse.¹⁵³ The Attorney General also notified both houses of Congress of the Administration's position.¹⁵⁴ The House of

149. *Id.* at 2671–72 (Kennedy, J., dissenting).

150. *See id.* at 2664–68 (holding that the Court had “never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to” after distinguishing *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Gollust v. Mendell*, 501 U.S. 115 (1991); *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *United States v. Providence Journal Co.*, 485 U.S. 693 (1988); *Karcher v. May*, 484 U.S. 72 (1987); and *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)).

151. 133 S. Ct. 2675 (2013).

152. *Id.* at 2683.

153. *Id.* at 2683–84.

154. *Id.* at 2683.

Representatives responded by authorizing its Bipartisan Legal Advisory Group (BLAG) to intervene to defend DOMA.¹⁵⁵ When the district court and the court of appeals both held DOMA unconstitutional in pertinent part, the United States sought certiorari, as did BLAG.¹⁵⁶ The Court granted the petition but also appointed Harvard Law Professor Vicki Jackson as an amica curiae to argue that the United States lacked standing to appeal because the government agreed with Windsor that the relevant part of DOMA violated the Constitution.¹⁵⁷

If a private party who supported the judgment of the court of appeals had nevertheless sought certiorari, the Supreme Court would undoubtedly have held that that party lacked standing to appeal or otherwise failed to present a justiciable controversy. In *Windsor*, the Roberts Court upheld standing.¹⁵⁸ In reaching its decision, the Court, in an opinion by Justice Kennedy, began with common ground: all agreed that the district court had jurisdiction over Windsor's suit to recover money she had lost due to the government's refusal to classify her as the "spouse" of her deceased partner.¹⁵⁹ Nor did the government's material interest in the outcome end with the district court's ruling in favor of Windsor, Justice Kennedy reasoned: "[T]he United States retain[ed] a stake sufficient to support Article III jurisdiction on appeal . . . [because the judgment] order[ed] the United States to pay Windsor [a tax] refund"¹⁶⁰ "It would be a different case if the Executive had taken the further step of paying Windsor the refund," Justice Kennedy wrote.¹⁶¹

Having concluded that the United States satisfied the Article III requisites for standing, Justice Kennedy noted that the Court's jurisdiction also depended on "prudential considerations."¹⁶² He determined, however, that the presence of BLAG as an intervenor, and its "sharp adversarial presentation of the issues[,] satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."¹⁶³ So concluding, Justice Kennedy found it

155. *Id.* at 2684.

156. Petition for Writ of Certiorari Before Judgment, *Windsor*, 133 S.Ct. 2675 (12-307); Supplemental Brief for the United States, *Windsor*, 133 S. Ct. 2675 (12-307); Petition for Writ of Certiorari, *Windsor*, 133 S. Ct. 2675 (12-785).

157. *Id.*

158. *Id.* at 2686.

159. *Id.* at 2684–85.

160. *Id.* at 2686.

161. *Id.*

162. *Id.* at 2687.

163. *Id.* at 2688.

unnecessary to decide whether BLAG might have had standing to appeal in its own right.¹⁶⁴

Writing in dissent, Justice Scalia argued that the question in *Windsor* was not one of standing at all but rather involved the requirement of sufficiently adverse parties to support federal appellate jurisdiction:

Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint. . . . The question here is not whether, as the majority puts it, “the United States retains a stake sufficient to support Article III jurisdiction,” the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor. There is not.¹⁶⁵

However one judges that contention, *Windsor* will enter the United States Reports as a decision about the standing of the United States, in contrast with most if not all other litigants, to appeal from judgments with which it agrees on the merits.¹⁶⁶

4. *The Standing of Government Officials.*—*Windsor* and *Hollingsworth* both presuppose that duly authorized officials of the executive branch have standing to sue on behalf of the government whenever the government itself could claim standing. *Hollingsworth* goes further in affirming by implication the holding of the Rehnquist Court in *Karcher v. May*¹⁶⁷ that a state may designate its speaker of the house or president of the senate to defend a state statute that state executive officials will not defend.¹⁶⁸ A host of further standing issues can come up, however, when government officials claim injuries to interests either of their own or of the particular institutions of government in which they serve.

In *Windsor*, as I have noted, Justice Kennedy’s majority opinion chose not to resolve the standing issue BLAG presented.¹⁶⁹ Four other Justices

164. *Id.* For a thoughtful pre-*Windsor* examination of the standing of intervenor defendants, see generally Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 *FORDHAM L. REV.* 1539 (2012).

165. *Windsor*, 133 S. Ct. at 2701 (Scalia, J., dissenting) (citation omitted).

166. In upholding standing, the Court relied on its earlier decisions in *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007); *INS v. Chadha*, 462 U.S. 919 (1983); and *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326 (1980). *Windsor*, 133 S. Ct. at 2686–87. For the argument that *Windsor* is not a case about the standing of the United States, but about the standing of the Executive Branch, and that claims of the standing Congress and the President should depend on considerations emanating from Articles I and II, as well as from Article III, see generally Tara Leigh Grove, *Standing Outside of Article III*, 162 *U. PA. L. REV.* 1311 (2014).

167. 484 U.S. 72 (1987).

168. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664–65 (2013) (emphasizing that *Karcher* created a precedent of standing for government officials in their official capacity, but concluding that *Karcher* offered no support for a finding of standing for private individuals acting in an unofficial capacity).

169. 133 S. Ct. at 2688.

did reach that issue. In reasoning based on a mixture of precedent and constitutional first principles, Justice Scalia's dissent—which was joined by Justice Thomas and in pertinent part by Chief Justice Roberts—concluded that BLAG lacked standing.¹⁷⁰ By contrast, Justice Alito thought that the threatened, de facto nullification of House votes in favor of DOMA constituted an institutional injury in fact.¹⁷¹

In some ways analogous to *Windsor, Camreta v. Greene*¹⁷² presented a question involving standing to appeal by defendants who had prevailed in the lower courts.¹⁷³ In the lower courts, child welfare officials defeated a claim for damages against them for allegedly violating a child's Fourth Amendment rights when they interviewed her at her elementary school, without either a warrant or parental consent, in response to third-party allegations of parental abuse.¹⁷⁴ But the court of appeals rested its decision on official immunity doctrine, not the Fourth Amendment. It found that the petitioners had in fact violated the Constitution but dismissed the damages claim on the ground that the right in question was not “clearly established” at the time of the violation, as it must be for plaintiffs to recover damages in constitutional tort actions against most officials.¹⁷⁵

Alleging that the court of appeals's constitutional ruling would diminish their capacity to respond effectively in future cases of suspected child abuse, the prevailing defendants sought Supreme Court review, and the Court upheld their standing.¹⁷⁶ Justice Kagan's majority opinion credited the petitioners' allegations that the effective discharge of their official responsibilities required them to conduct unconsented interrogations of minors.¹⁷⁷ In light of the court of appeals's ruling, she reasoned, an affected official had to “change the way he performs his duties or risk a meritorious damages action.”¹⁷⁸ In either case, she held, he had suffered “injury caused by the adverse constitutional ruling.”¹⁷⁹

By creating an exception to the rule that prevailing parties lack standing to appeal judgments in their favor,¹⁸⁰ the Roberts Court quite transparently sought to accommodate a small corner of standing doctrine to

170. *Windsor*, 133 S. Ct. at 2697, 2700 (Scalia, J., dissenting).

171. *Id.* at 2712–14 (Alito, J., dissenting).

172. 131 S. Ct. 2020 (2011).

173. *Id.* at 2027–28.

174. *Id.* at 2027.

175. *Id.*

176. *Id.* at 2028–29, 2032.

177. *Id.* at 2027.

178. *Id.* at 2029.

179. *Id.*

180. The Court pointed to two other cases in which it had recognized exceptions. *Id.*

the comparably complex doctrine of qualified immunity.¹⁸¹ With officials normally liable in damages for constitutional violations only if they violate “clearly established” rights,¹⁸² the Court has erected a framework that encourages courts of appeals to issue constitutional rulings that clarify the law even when they could bypass the merits altogether—as the doctrine of “constitutional avoidance” would normally counsel¹⁸³—by upholding qualified immunity defenses.¹⁸⁴ *Camreta* facilitates the Court’s law-clarifying aim by creating a rule of appellate standing distinctively available to governmental officials who want to claim that judicial opinions purporting to create clearly established law have instead committed constitutional error.

Reasonable minds differ about the wisdom of this accommodation. Reasonable minds do not dispute that *Camreta* introduces new complexity into standing doctrine in order to hasten the creation of clearly established law.

C. *Congressionally Authorized Standing*

The Supreme Court has unmistakably affirmed that standing doctrine’s demands for injury in fact, causation, and redressability apply equally to cases in which Congress has specifically purported to authorize standing and to cases in which it has not.¹⁸⁵ But the Court has never suggested that congressional authorization makes no difference to standing analysis, even if it has never made wholly plain exactly what difference congressional authorization can make. *Massachusetts v. EPA* maintained, and possibly deepened, the uncertainty. In that case, as noted already, Justice Stevens emphasized the “special solicitude” due to state claims of standing, but he also placed weight on Congress’s authorization of the state’s suit.¹⁸⁶ *Massachusetts* thus appears to ratify an otherwise largely opaque doctrinal state of affairs in which the demands for injury in fact, causation, and

181. Writing in dissent, Justice Kennedy argued that the Court’s ruling breached the Article III precept that the jurisdiction of an appellate court lies only “to correct wrong judgments, not to revise opinions.” *Id.* at 2037 (Kennedy, J., dissenting) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)) (internal quotation marks omitted).

182. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

183. *See, e.g.*, *Dep’t of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1999) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.” (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944))).

184. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (explaining the benefit of clarifying the law applicable to constitutional issues that are rarely litigated except in suits also presenting qualified immunity claims).

185. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (holding that “there is absolutely no basis for making the Article III inquiry turn on the source of [an] asserted right”).

186. *Massachusetts v. EPA*, 549 U.S. 497, 516, 519–20 (2007).

redressability mean one thing when Congress purported to confer standing and something different when Congress has not.

D. Probabilistic Standing

In my effort to describe the continuing fragmentation of standing doctrine under the Roberts Court, I have necessarily grouped cases into categories, but I have not meant to suggest that alternative categorizations would not prove equally illuminating. One such scheme would differentiate cases involving injuries that have already occurred from cases in which a plaintiff claims standing to sue based on a threat of future injury. Many of the cases that I have discussed, although in other connections, would occupy the latter category.¹⁸⁷ So located, they raise the question: exactly how certain must it be that a threat of injury will ripen into a more tangible harm in order for a plaintiff to possess standing?¹⁸⁸

That question has no unitary answer under Roberts Court standing doctrine. The fragmentation emerged most unmistakably in *Clapper*, in which the plaintiffs sought to challenge national security surveillance policies, and the majority denied standing because the plaintiffs had not shown that injury was “certainly impending.”¹⁸⁹ In response to the majority’s demand, Justice Breyer’s dissenting opinion identified a compendium of cases—some very recent—in which the Court had employed a variety of less demanding formulations.¹⁹⁰

187. See, e.g., *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343 (2014) (finding that the threat of future enforcement may constitute an injury in fact); *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (denying standing based on a claim that communications may be illegally intercepted in the future); *Massachusetts*, 549 U.S. at 526 (finding that a state has standing based, in part, on the possibility of future harm from increasing amounts of greenhouse gasses in the atmosphere).

188. For valuable academic discussions of probabilistic standing, see generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 503–06, 510–11 (2008); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55 (2012); Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009); and Nash, *supra* note 109.

189. 133 S. Ct. at 1150.

190. Justice Breyer wrote:

[R]ecognizing that “‘imminence’ is concededly a somewhat elastic concept,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565, n.2 (1992)], the Court has referred to, or used (sometimes along with “certainly impending”) other phrases such as “reasonable probability” that suggest less than absolute, or literal certainty [that injury will soon occur]. See *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)] (plaintiff “must demonstrate a realistic danger of sustaining a direct injury” (emphasis added)); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 . . . (2000) (“[I]t is the plaintiff’s burden to establish standing by demonstrating that . . . the defendant’s allegedly wrongful behavior will likely occur or continue”). See also *Monsanto Co. v. Geertson Seed Farms*, [561 U.S. 139, 153] . . . (2010) (“‘reasonable probability’” and “substantial risk”); *Davis v. FEC*, 554 U.S. [724], 734 [(2008)] . . . ; *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 . . . (2007) (“genuine threat of enforcement”);

In response, the majority acknowledged, in a footnote, that the Court's cases do not "uniformly require" satisfaction of the "certainly impending" standard that it had identified as applicable.¹⁹¹ "In some instances," Justice Alito continued, "we have found standing based on a 'substantial risk' that harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm."¹⁹² On the facts, the majority then argued, "to the extent that the 'substantial risk' standard is relevant," the plaintiffs failed to meet it.¹⁹³

The varying stringency of the Court's standard in cases involving probable future injuries became clearer when the Court followed *Clapper* with its unanimous decision upholding standing in *Susan B. Anthony List*, discussed above, in which the plaintiffs challenged the constitutionality of a statute that made it a crime to make knowingly false statements about the voting record of a political candidate.¹⁹⁴ Analogizing the case to past decisions in which plaintiffs had sought injunctions against the enforcement of allegedly unconstitutional statutes, the Court recited a formula that it had applied in one such case and upheld standing based on "a credible threat of prosecution."¹⁹⁵

Although I would not pretend to be able to rationalize all of the cases, significant patterns stand out. For example, juxtaposing *Clapper* with *Susan B. Anthony List*, I would reaffirm my earlier appraisal that the Court has demanded elevated showings of likely injury by parties seeking injunctive relief from policies that relate closely to national security.¹⁹⁶ Then, generalizing from *Susan B. Anthony List* and the previous cases on which it relied, I would conclude that the Court tends to accept a significantly lesser showing when plaintiffs sue to enjoin the enforcement of a statute that forbids or penalizes conduct in which they have reason to want to engage; in cases of that kind, a reasonable probability that

Department of Commerce v. United States House of Representatives, 525 U.S. 316, 333, . . . (1999) ("substantially likely" (internal quotation marks omitted)); *Clinton v. City of New York*, 524 U.S. 417, 432 . . . (1998) ("sufficient likelihood of economic injury"); *Pennell v. San Jose*, 485 U.S. 1, 8 . . . (1988) ("realistic danger" (internal quotation marks omitted)); *Blum v. Yaretsky*, 457 U.S. 991, 1001 . . . (1982) ("quite realistic" threat); *Bryant v. Yellen*, 447 U.S. 352, 367–368 . . . (1980) ("[l]ikely"); *Buckley v. Valeo*, 424 U.S. 1, 74 . . . (1976) (per curiam) ("reasonable probability").

Id. at 1160–61 (Breyer, J., dissenting).

191. *Id.* at 1150 & n.5 (majority opinion).

192. *Id.* In support, the Court cited four cases: *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Blum v. Yaretsky*, 457 U.S. 991 (1982); and *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). The majority did not discuss the other cases on which the dissenting opinion relied. *Id.*

193. *Clapper*, 133 S. Ct. at 1150 n.5.

194. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338 (2014).

195. *Id.* at 2342 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

196. See *supra* section II(A)(3).

government officials will bring an enforcement action normally suffices to confer standing.¹⁹⁷ Identifying yet another category, I would further venture to say that the Court quite routinely imposes a heavy burden on plaintiffs who seek to enjoin government officials from engaging in allegedly unlawful actions, other than initiating civil or criminal enforcement proceedings, that no statute or formally promulgated policy requires them to take.¹⁹⁸ To pick out just one more set of cases, I would credit the descriptive accuracy of the observation of the Court's 5–4 majority in *Summers v. Earth Institute* that “[w]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.”¹⁹⁹

These efforts at explanation are, I want to emphasize, tentative and somewhat off-the-cuff. Undoubtedly, the cases would permit multiple categorizations. Again, I do not mean to imply that all could be fitted into an identifiable, defensible pattern. But the cases are not wholly random either. Prediction is not impossible.²⁰⁰

One could expose similar disparities by pressing the question: what standard of probability does the Court employ in determining whether an injury is redressable through the relief that a plaintiff seeks? The Roberts Court requires less certainty in cases in which the plaintiff asserts the violation of a procedural right than it does in ordinary cases²⁰¹ and also less in cases in which Congress has authorized suits by states.²⁰² But we do not

197. See, e.g., *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) (“[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit The plaintiff’s own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.”).

198. For example, in *City of Los Angeles v. Lyons*, the Court held:

That Lyons may have been illegally choked by the police on October 6, 1976 . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

461 U.S. 95, 105 (1983).

199. 555 U.S. 488, 489, 493 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)) (internal quotation marks omitted).

200. If a simple pattern were wanted for normative reasons, there would be force to Professor Jonathan Nash’s proposal that standing doctrine should allow plaintiffs to sue whenever they have suffered a loss of expected value: “A 1-in-10,000 chance of losing \$100,000 is the equivalent of a \$10 loss . . . and a \$10 loss is an injury.” Nash, *supra* note 109, at 1285; see also Hessick, *supra* note 188, at 69 (“[A]ny risk of harm, even a tiny one, should suffice for Article III standing.”).

201. See *supra* section II(A)(4).

202. See *supra* section II(B)(1).

know whether there is a single standard for ordinary cases or whether different kinds of cases—as defined by the provision of law under which they are brought, the invasiveness of the relief that they seek,²⁰³ or other variables—call for the application of different criteria.

In asserting that standing doctrine has grown more fragmented with nearly every Term of the Roberts Court, I do not wish to overstate my case. However prone the Justices may be to fracture in some important cases, the Roberts Court has preserved, rather than upset, what might be thought of as a relatively broad pseudo-equilibrium, predicated on an unvaried formula under which standing requires injury in fact, causation, and redressability.²⁰⁴ And that formula dictates determinate, predictable outcomes in most standing cases. For example, there are many contexts in which virtually all would concur that I could not plausibly claim injury arising from what I believe to be a violation of someone else's rights. Discord persists and fragmentation occurs mostly at the margins—but at margins that are demonstrably expanding and that frequently involve matters of high constitutional and practical importance.

III. A Provisional and Partial Normative Assessment

So far I have argued that standing doctrine is complex and fragmented but not that a more unitary approach—with fewer subcategories and exceptions—would be better. Nor do I propose now to advance a strong normative thesis about the optimal design of standing law, including a specification of its optimal complexity. I shall offer prescriptive suggestions, although less ambitious ones, in Part VI. But a prior question is now ripe: Does the current law contain signals that something is amiss?

The analysis in Part II strongly supports an affirmative answer to that question. In principle, doctrinal complexity such as that described in Part II could promote valid purposes, even if it made knowledge of the law harder to attain. Nearly all rules are over or underinclusive when measured against their background justifications.²⁰⁵ Without wholly eliminating over and underinclusivity, a more complex system of rules might, under some circumstances, produce better outcomes than a simpler, more elegant doctrinal structure. But current standing doctrine seems poorly designed to

203. See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635–36 (2006) (emphasizing the connection between justiciability rulings and concerns about unacceptably intrusive remedies).

204. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) (asserting and citing authority establishing that standing requires injury in fact, causation, and redressability); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (same); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (same).

205. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 31–34 (1991) (“A rule’s factual predicate is a generalization [that is] . . . not necessarily true for *all* cases.”).

achieve the benefits that a complex but coherently integrated rule structure might afford. The Roberts Court has not only failed to bring elegance to standing doctrine, it has also done a poor job of explicating how some elements relate to others. The Court frequently fails to give fully rationalized accounts of the lines of division that its cases actually reflect.²⁰⁶ Perhaps most notably, the Court recurrently but misleadingly suggests that injury in fact is indeed a question of fact,²⁰⁷ even though—as Part II demonstrated—what counts as a cognizable injury sometimes varies with the provision under which a plaintiff brings suit or with the nature of the relief that a plaintiff seeks.

As a result, whatever the benefits that complexity might produce in principle, costs bulk needlessly large in practice, as it becomes increasingly difficult for anyone but a specialist to identify all of the potentially relevant doctrinal categories and the different modes of analysis for which they call. Moreover, given the confusing and misleading rationales for decision that the Court frequently offers, even specialists often and understandably disagree about which rules apply to new cases.²⁰⁸ Competing analogies,

206. Among these lines of division, as I shall explain more fully below, see *infra* subpart VI(A), is the line between cases presenting issues about the standing of governments and their officers and those involving the standing of private parties.

207. See, e.g., *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (holding that petitioners who sought to vindicate the constitutional validity of a state ballot initiative that they had sponsored had suffered no injury “that affects [them] in a ‘personal and individual way,’” had no “‘direct stake in the outcome’ of the case,” and thus had not suffered an injury in fact (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992), and *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997))); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) (asserting that standing to enforce the Establishment Clause depends on “real injury to particular individuals”).

208. For example, the *Clapper*, *Hollingsworth*, and *Windsor* cases all provoked divergent predictions. Compare Steve Vladeck, *Clapper v. Amnesty Int’l: Secret Surveillance, Standing, and the Supreme Court*, LAWFARE (Feb. 20, 2012, 1:23 AM), <http://www.lawfareblog.com/2012/02/clapper-v-amnesty/>, archived at <http://perma.cc/URD7-KJ4L> (hypothesizing that the Court might uphold standing in light of “a specific (and public) statutory authorization for surveillance that necessarily gives some fairly strong clues (to both private parties and the courts) as to how those whom the statute bars the government from targeting could nevertheless end up having their communications intercepted”), with Lyle Denniston, *Argument Preview: Can Global Wiretaps Be Challenged?*, SCOTUSBLOG (Oct. 26, 2012, 12:11 AM), <http://www.scotusblog.com/2012/10/argument-preview-can-global-wiretaps-be-challenged/>, archived at <http://perma.cc/R826-WT74> (“It is difficult to argue that the Court granted review in this case for any reason other than to reverse the Circuit Court’s finding of ‘standing’ for the challengers. . . . [T]his is a Court with a majority that does not have an expansive view of Article III ‘standing’”); compare Vikram Amar, *Revisiting Standing: Proposition 8 in the Ninth Circuit*, JURIST (Feb. 16, 2012, 8:00 AM), <http://jurist.org/forum/2012/02/vikram-amar-marriage-standing.php>, archived at <http://perma.cc/KS3L-ZED9> (“I will not be surprised if the Supreme Court concludes that the requirements of federal standing are not necessarily met by the proponents in the Proposition 8 setting itself.”), and Laurence Tribe & Richard Parker, *Tribe Offers Predictions on Gay Marriage Rulings*, HARVARD L. TODAY (May 8, 2013), <http://today.law.harvard.edu/tribe-offers-predictions-on-gay-marriage-rulings>, archived at <http://perma.cc/H5TQ-QCGK> (“As to *Hollingsworth* . . . I doubt that the Court will conclude that Chuck Cooper and the other private proponents of Prop 8, all

which support different results, often exist. Uncertainty spreads, as does frustration and suspicion of naked, result-oriented manipulation.

In sum, even if complexity is not per se objectionable, modern standing doctrine has sunk into a combined state of complexity and confusion that no one could applaud. What is more, its condition seems to be worsening, not improving, under the Roberts Court.

IV. Possible Explanations

If standing doctrine has descended into under-theorized and poorly explained fragmentation, it is worth asking why. Among other things, identifying the factors that have produced fragmentation will serve a diagnostic function. Those factors help to define the challenge that proponents of doctrinal reform confront. A sophisticated understanding of causal factors will thus help to ground judgments concerning viable reform strategies.

In seeking insight into why standing doctrine has fallen into its currently untidy, fragmented state, I shall highlight four partial explanations. Although all build upon the insights of social scientists, none, I want to emphasize, denies the fundamental proposition that judges and Justices have an obligation, which they normally attempt to satisfy, to decide cases in accordance with applicable law.

Two examples should suffice as reminders of the role of purely legal considerations in standing determinations. First, *stare decisis* plainly influences the Justices to greater or lesser degrees. In one visible, though not necessarily representative example, Chief Justice Roberts and Justices Kennedy and Alito seem deeply reluctant to overrule *Flast v. Cohen*, even though their tenuous efforts to distinguish it strongly suggest that they do not agree with its core reasoning.²⁰⁹ More generally, a commitment to *stare*

lacking a fiduciary duty to California, have Art. III standing to defend it on the merits in the Supreme Court . . .”), with John Bursch, *Reading Tea Leaves: Why the Court Will Uphold Proposition 8*, SCOTUSBLOG (Mar. 28, 2013, 11:59 AM), <http://www.scotusblog.com/2013/03/reading-tea-leaves-why-the-court-will-uphold-proposition-8/>, archived at <http://perma.cc/K6Z7-SY94> (“California undisputedly has standing to defend the constitutionality of its own constitution, and it also has the authority to delegate the authority to mount that defense.”); compare *Tribe & Parker*, *supra* (“[M]y hunch . . . is that the Court will narrowly conclude that the DOMA . . . issue is properly before SCOTUS on the merits notwithstanding the solid reasons to doubt that BLAG . . . is a proper representative of Congress . . .”), with Vikram David Amar, *Does BLAG Have Standing in the Defense of Marriage Act (DOMA) Case in Front of the Supreme Court?*, VERDICT (Feb. 14, 2013), <https://verdict.justia.com/2013/02/14/does-blag-have-standing-in-the-defense-of-marriage-act-doma-case-in-front-of-the-supreme-court> archived at <http://perma.cc/49AQ-CYDT> (“I won’t be surprised if the Court (or a large enough number of individual Justices on the Court) effectively defers these cases and avoids issuing dispositive rulings on the merits using the flexible justiciability doctrine.”).

209. See Gene R. Nichol, Professor, Univ. of N.C., *The Roberts Court and Access to Justice*, Keynote address at the Case Western Reserve Law Review Symposium: Access to the Courts in the Roberts Era (Jan. 30, 2009), in 59 CASE W. RES. L. REV. 821, 827–28 (2009) (characterizing

decisis may explain some of the Justices' unwillingness to reconsider the assumption—which has underlain virtually all of the Court's opinions since the 1970s—that standing depends on prelegal injury in fact. To confess a doctrinally global conceptual error might seem to some Justices to go too far in undermining the interests in legal stability and continuity that the doctrine of stare decisis exists to protect. I shall return to this consideration below when I offer proposals for reform.

Second, Justice Scalia's commitment to an originalist methodology likely influenced his decision upholding standing based on the government's assignment of a financial interest in litigation to a private party in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.²¹⁰ As he emphasized, precedents for qui tam litigation extend to the colonial era and formed part of the backdrop against which Article III was written and ratified.²¹¹

Nonetheless, acknowledgment of the significance of legal or even legalistic considerations does not preclude the possibility of further illumination from the insights and methodologies of social scientists. Those insights are partly overlapping. The first two of the possible explanations that I shall offer for the fragmentation of standing may embody the complementary perspectives of political science and psychology on phenomena that approach extensional equivalence. Nor, in citing possible social-scientific explanations for the fragmentation of standing, do I mean to suggest that any one of the four explanatory themes that I shall advance here could explain all elements of the Roberts Court's standing jurisprudence without help from others. Making sense of the fragmentation of standing doctrine is a multifaceted undertaking.

A. *Insofar as Standing Is Interconnected with the Merits, Ideology Matters*

Because the notion of injury in fact is too plastic to do the analytical work that standing doctrine demands of it, and some determinations of injury therefore require substantive judgments about the protections that various constitutional provisions confer,²¹² the Justices' substantive constitutional views inevitably drive standing decisions in a number of

Justice Alito's majority opinion in *Hein* as adopting the position that "we've been idiotic on this front for forty years and idiotic we'll remain"); *supra* notes 44–61 and accompanying text.

210. 529 U.S. 765 (2000).

211. *Id.* at 774, 776–78.

212. See Fletcher, *supra* note 43, at 234 (arguing that standing analysis requires "paying careful attention to the nature of the substantive right at issue in the particular case"); Sunstein, *supra* note 5, at 186–92 (criticizing the failure of *Data Processing* to explain the legal source of its "unprecedented approach to standing" and the assumption that injury in fact can be a purely factual matter).

important areas.²¹³ Abundant examples confirm this thesis. With the Roberts Court, as with predecessor Courts, it is possible to distinguish judicial conservatives from liberals and to characterize some standing rulings as having either a liberal or a conservative valence. Although these labels carry undoubted risks of imprecision, it will suffice for current purposes to characterize judicial rulings as either conservative or liberal when they produce outcomes that political conservatives or liberals, as those terms are used in common parlance, would respectively applaud.²¹⁴ When the terms are used in this way, nearly everyone agrees that the Roberts Court consists of five conservatives (Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Kennedy) and four liberals (Justices Ginsburg, Breyer, Sotomayor, and Kagan), with Justice Kennedy most often the Justice most nearly in the middle.

To take a plain example of substantively conservative views driving conservative rulings, the Roberts Court's decisions cutting back on taxpayer standing to challenge Establishment Clause violations under *Flast* align almost precisely with political conservatives' views about the Establishment Clause's protective scope.²¹⁵ In conservative eyes, the Establishment Clause does not ordinarily prohibit the government from offering symbolic support for religion nor does it bar the provision of financial benefits to religious and non-religious institutions on a neutral basis.²¹⁶ Liberals tend to hold more "separationist" views with respect to the proper substantive interpretation of the Establishment Clause and

213. Among political scientists, insistence on the pertinence of the Justices' ideologies in predicting their voting patterns comes most stridently from proponents of the so-called "attitudinal model." See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 312–26 (2002) (applying the attitudinal model to Supreme Court voting patterns).

214. See RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE* 32 (2d ed. 2013) (noting political scientists' use of common parlance as a measure of whether judicial action is liberal or conservative).

215. For example, in a *New York Times* article published after the Supreme Court's rulings in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), James C. Dobson of the conservative Focus on the Family Action in Colorado Springs cast the cases in the following terms: "The court has failed to decide whether it will stand up for religious freedom of expression, or if it will allow liberal special interests to banish God from the public square." Ralph Blumenthal, *Split Rulings on Displays Draw Praise and Dismay*, N.Y. TIMES, June 28, 2005, http://www.nytimes.com/2005/06/28/politics/28display.html?_r=1&_archived_at=http://perma.cc/7JXF-Z9GD.

216. The Supreme Court's most conservative Justices regularly take this view in decisions on the merits in Establishment Clause cases. See, e.g., *Van Orden*, 545 U.S. at 681 (upholding Texas's display of the Ten Commandments on the State Capitol grounds); *McCreary Cnty.*, 545 U.S. at 885–89 (Scalia, J., dissenting) (advocating a less rigid separation of church and state); *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality opinion) (holding that an aid program benefiting religious as well as secular schools did not violate the Establishment Clause "because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content").

correspondingly broader assessments of what constitutes actionable injury.²¹⁷

The standing ruling in *Clapper* invites a similarly ideological explanation. The Court's most conservative Justices favor greater deference to the executive branch in national security matters than do its more liberal members.²¹⁸ That division manifested itself in a 5–4 split in *Clapper* about whether the plaintiffs satisfied standing doctrine's injury-in-fact requirement and, even if so, about whether their injury was "fairly traceable" to the statute that they sought to challenge.²¹⁹

Based on *Clapper* and the Establishment Clause cases, one might be tempted to conclude that the Roberts Court's conservative Justices simply have more restrictive understandings of the kind of injury necessary to support Article III standing, and similarly of the requisite assurance of redressability, than do the Court's relative liberals.²²⁰ Even if this were typically so—and I am not sure that it is—there are ideologically driven exceptions. Conservatives who regard affirmative action as deeply suspect if not per se unconstitutional have not demanded wallet injury or even proof that a disappointed white applicant would have received a sought-after benefit in the absence of racial preferences in order to establish standing: the mere interposition of a race-based criterion suffices to create an actionable injury.²²¹ Where procedural rights protect liberty and property interests of a kind protected at common law, conservatives have similarly

217. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1460–63 (2011) (Kagan, J., dissenting) (arguing for strong separation between religion and the state while advocating taxpayer standing to uphold the separation); *Hein v. Freedom from Religion Found. Inc.*, 551 U.S. 587, 642–43 (2007) (Souter, J., dissenting) (arguing for taxpayer standing broad enough to permit judicial enforcement of constitutional norms calling for separation between church and state).

218. In *Boumediene v. Bush*, 553 U.S. 723 (2008), for example, the Court's four liberal Justices joined Justice Kennedy in emphasizing the function of the judicial branch in enforcing constitutional norms in an opinion holding that habeas corpus protections extend to noncitizen prisoners held at Guantanamo Bay, despite the Executive's classification of the prisoners as enemy combatants. *Id.* at 730, 732, 765–66. By contrast, Justice Scalia's dissent in *Boumediene* exemplified the more characteristically conservative position of according great deference to the Executive in wartime. See *id.* at 827–28 (Scalia, J., dissenting).

219. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1142–43 (2013).

220. Cf. Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 946–47 (2008) (characterizing standing disputes as an ideological struggle in which conservatives favor greater restrictions than liberals).

221. In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), Justice Thomas wrote:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

Id. at 666.

supported a relaxation of standing's redressability requirement.²²² With commercial farmers' economic interests at stake, the Roberts Court's most conservative Justices also joined Justice Alito's opinion upholding standing based on a "reasonable probability" or "substantial risk" of injury arising from a decision by the Animal and Plant Health Inspection Service in *Monsanto Co. v. Geertson Seed Farms*²²³—a stark contrast with their insistence in *Clapper* that injury must be "certainly impending."²²⁴

In my view, ideologically rooted divisions of this kind are probably inevitable. Determinations of who is entitled to sue ultimately depend on disputable judgments about the scope of the rights that particular statutory and constitutional provisions confer. It would enhance conceptual clarity and legal transparency, however, if the Court would say so openly. I shall return to this theme in Part VI.

B. *The Importance of "Motivated Reasoning"*

In a marvelous foreword to the *Harvard Law Review*'s 2011 Supreme Court edition, Professor Dan Kahan called attention to modern psychological research that establishes the propensity of human beings to embrace factual claims, as well as arguments, that cohere well with their preexisting normative commitments.²²⁵ Symmetrically, most of us tend to look skeptically on factual assertions as well as arguments that contradict our prior, ideologically suffused set of beliefs. Psychologists refer to this phenomenon as "motivated reasoning."²²⁶ They emphasize, moreover, that the motivation to accept some claims and reject others is frequently unconscious, not conscious.²²⁷ Pushing Professor Kahan's argument slightly further than he expressly takes it, I would suggest that Supreme Court Justices do not differ greatly from the rest of us in their proclivities to appraise the persuasiveness of arguments and factual assertions in light of their ideological congeniality as measured by the Justices' own normative lights.

If one acknowledges the existence of motivated reasoning as a psychological phenomenon, it immediately emerges as a candidate to shape the application of legal concepts as amorphous as those of injury in fact and

222. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557, 572 n.7 (1992) ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

223. 561 U.S. 139, 142, 153 (2010).

224. *Clapper*, 133 S. Ct. at 1150.

225. Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19–20 (2011).

226. *Id.* at 7.

227. *Id.* at 19.

redressability—and, indeed, possibly to explain one of the mechanisms through which Justices’ political ideologies manifest themselves in standing cases. Quasi-realist accounts of the Supreme Court’s standing rulings sometimes suggest that the Justices calculatingly manipulate malleable concepts to advance a nakedly ideological agenda.²²⁸ Thus, when a conservative Justice writes in one case that Article III requires “Wallet Injury” to ground standing,²²⁹ but conservatives hold in another that race-based classifications are inherently injurious even if they occasion no economic cost to the white plaintiffs who challenge them,²³⁰ critics have sometimes responded with attributions of bad faith.²³¹ Motivated reasoning offers an alternative explanation for a similar and possibly extensionally equivalent set of phenomena.

Recognition that the Justices are roughly as prone to motivated reasoning as the rest of us would have at least a modest practical payoff. We might achieve more psychological insight, and thus a better understanding of how judges and Justices are likely to respond to other claims of injury in future cases, if we credited the possibility that a Justice’s ideological predispositions may shape her good-faith views of which distinctions are well justified and which are legally untenable.

In my view, for example, Justice Kagan’s dissenting opinion in *Arizona Christian School Tuition Organization v. Winn* exposed the Court’s denial of standing as flatly insupportable absent an overruling of prior cases.²³² If a plaintiff would have standing to challenge a state’s funding of religious education through financial appropriations, it makes no economic sense to hold that a taxpayer does not suffer the same harm, and thus possess an equal claim to standing, when the state gives an equivalent subsidy in the form of a tax deduction. Nevertheless, Professor Kagan’s

228. Chayes, *supra* note 3, at 56 (“[P]osing the question whether public law litigation[] [is] seemingly an expression of a liberal and reformist ideology in the legal system.”); Pierce, *supra* note 3, at 1743 (“The applicable [standing] doctrines are so malleable, however, that it is impossible to avoid the inference that the Justices manipulated the doctrines to rationalize their politically preferred results.”).

229. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619–20 (2007) (Scalia, J., concurring).

230. *See, e.g.*, *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 658, 666 (1993) (holding that challengers to a race-based affirmative action program need not establish that they would have received material benefits in order to have standing to challenge the imposition of a barrier to their receipt of those benefits).

231. *See, e.g.*, Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1496 (1995) (maintaining that the racial disparities in standing cases brought by whites and those brought by minority plaintiffs “seem to violate the Supreme Court’s own interpretation of the Equal Protection Clause because other evidence of Supreme Court racial attitudes indicates that the Court is engaged in intentional racial discrimination”).

232. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1463, 1450 (2011) (Kagan, J., dissenting) (asserting that the Court’s denial of standing contradicted the Court’s precedents).

thesis shakes my confidence that all of the Justices in the majority must surely so recognize.

C. *The Sometime Relevance of “Strategic Actor” Models*

In my judgment, it is impossible to give a persuasive account of the behavior of American judges and Justices that does not posit their commitment to governance through law and the even-handed enforcement of legal rules.²³³ But one can coherently deny that the Justices routinely cast strategic votes in standing cases while affirming that they cast strategic votes—by which I mean votes that do not reflect principles that they would be prepared to live with in future cases that would be difficult to distinguish on principled grounds from time to time. Although I cannot prove it, I would speculate that the outcomes in some of the Roberts Court’s most controverted standing cases may have involved strategic voting by one or more Justices whose positions controlled the outcome.

An example may come from *Hollingsworth v. Perry*, in which the Court held 5–4 that the sponsors of the California ballot proposition that abolished gay marriage in the state lacked standing to defend it after California officials ceased to do so.²³⁴ For constitutional purposes, the state of California indisputably had an interest in defending Proposition 8. And if California can permissibly make law through an initiative process designed to circumvent the possibly obstructive efforts of elected officials, then one might expect that California should also be able to make special provisions for the defense of ballot initiatives, again to avoid the possibly obstructive stances of state officials. No precedent dictated otherwise. To the contrary, in holding that the defenders of Proposition 8 lacked the injury requisite for standing, Chief Justice Roberts’s majority opinion struggled to distinguish a number of cases in which states had authorized officials or agents to litigate on behalf of the state.²³⁵

In the end, one cannot know for sure, but at least some of the Justices who made up the majority in *Hollingsworth* would appear to have had strategic reasons—albeit different ones—to want to avoid a ruling on the merits of that case.²³⁶ In *United States v. Windsor*, which held 5–4 that a

233. See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 992 (2009) (asserting that judges and Justices are “deeply socialized . . . to believe that there are legal norms independent of personal preference” and that they rarely think of deviating from those norms).

234. 133 S. Ct. 2652, 2658–61, 2668 (2013).

235. *Id.* at 2664–65.

236. See, e.g., Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 146 (2013) (asserting that the Court in *Hollingsworth* likely avoided the constitutional issue because some of the justices “were not yet prepared to impose gay marriage on the states”).

provision of DOMA violated equal protection norms,²³⁷ Justice Scalia's dissenting opinion flatly asserted that although the majority reserved the question whether state prohibitions against same-sex marriage were also unconstitutional, the rationale of the Court's opinion revealed that a majority of "this Court" would so hold.²³⁸ If so, then Chief Justice Roberts, who dissented in *Windsor*, would have had an obvious strategic reason to want to avoid a ruling on the equal protection issue that *Hollingsworth* otherwise would have presented. So, although for quite different reasons, might Justice Ginsburg, who voted with the majority in *Windsor* but found no standing in *Hollingsworth*. Justice Ginsburg has famously and repeatedly argued that the Court went too far, too fast in its decision in *Roe v. Wade*.²³⁹ In comparison, the conjunction of *Windsor*'s invalidation of an important provision of DOMA with *Hollingsworth*'s avoidance of issues concerning the constitutionality of state prohibitions of same-sex marriage may have reflected a step-at-a-time approach more to Justice Ginsburg's liking. Justices Breyer, Sotomayor, and Kagan also might have preferred to advance slowly.

A comparison of the standing issues in *Windsor* with those in *Hollingsworth* supports this speculation. In the view of many observers, *Windsor*—in which the United States trumpeted its agreement with the judgment that it sought to appeal—presented more formidable obstacles to standing than did *Hollingsworth*.²⁴⁰ But five Justices clearly wanted to reach the merits in *Windsor*, with Justice Kennedy's majority opinion frankly acknowledging that there were powerful "prudential" reasons—involving the desirability of clarifying the law to be applied by district courts in ninety-four judicial districts across the United States—for the

237. 133 S. Ct. 2675, 2681, 2696.

238. *Id.* at 2709.

239. See, e.g., Allen Pusey, *Ginsburg: Court Should Have Avoided Broad-Based Decision in Roe v. Wade*, A.B.A. J. (May 13, 2013, 2:20 PM), http://www.abajournal.com/news/article/ginsburg_expands_on_her_disenchantment_with_roe_v_wade_legacy/, archived at <http://perma.cc/76JD-KQZV> (reporting Justice Ginsburg's recent criticism of *Roe*). Justice Ginsburg has long maintained that, in contrast with the Supreme Court's methodical line of "gender classification" cases such as *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), "*Roe v. Wade* sparked public opposition and academic criticism . . . because the Court ventured too far in the change it ordered and presented an incomplete justification for its action." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376 (1985) (footnote omitted); see also Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) ("Measured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable.").

240. See, e.g., Neal Devins & Tara Grove, *Commentary on Marriage Grants: Article III & Same-Sex Marriage*, SCOTUSBLOG (Dec. 8, 2012, 3:44 PM), <http://www.scotusblog.com/2012/12/commentary-on-marriage-grants-article-iii-same-sex-marriage/>, archived at <http://perma.cc/9G2J-JXSM> (considering standing issues in DOMA and Proposition 8 cases and predicting the Proposition 8 proponents in *Hollingsworth* would be able to establish standing).

Court to resolve the equal protection issue.²⁴¹ If the decision to deny standing in *Hollingsworth* required one or more strategic votes, the same may be true of the decision to uphold standing in *Windsor*.²⁴²

Having offered these speculations, I hasten to add qualifications and caveats. First, the phenomenon of motivated reasoning, as discussed above, numbers among my reasons for caution in asserting that particular Justices may have engaged in strategic voting in particular cases. Even absent a self-conscious decision to act strategically, some Justices may find the standing arguments that pull them where they would like to go more powerful than those that would push them in an ideologically or strategically inconvenient direction. Accordingly, to say, for example, that Chief Justice Roberts would have had strategic reasons to want to deny standing in *Hollingsworth v. Perry* is not to say that he made a self-conscious decision to act on those reasons.²⁴³ Motivated reasoning would often propel Justices in the same direction as strategic calculation (that the Justices might truthfully insist that they had never performed).

Second, because standing determinations sometimes necessarily reflect judgments about the substantive guarantees of particular constitutional provisions, I would not categorize decisions that restrict standing to enforce the Establishment Clause, for example, as strategic in the relevant sense. I would reserve that label for a Justice's decisions to deviate from whatever would be her best, conscientious interpretation of standing doctrine in order to achieve an ideologically attractive outcome in a particular case.

Finally, in suggesting that the strategic actor hypothesis has explanatory power with respect to the votes of some Justices in some cases, I mean to affirm my belief that most of the Justices' voting behavior is not strategic in the relevant sense. Rather, my suggestion has affinities with the jurisprudential position that Professor Fred Schauer has labeled "presumptive positivism."²⁴⁴ The defining premise of presumptive positivism holds that although legal rules are "presumptively controlling," a "rule will be set aside when the result it indicates is egregiously at odds with the result that is indicated by [a] larger and more morally acceptable set of values."²⁴⁵ Analogously, I would suggest that some of the Justices of the Roberts Court

241. *Windsor*, 113 S. Ct. at 2676, 2688.

242. Justice Kennedy's dissenting opinion in *Hollingsworth* may have obliquely so hinted. *See id.* at 2674 (Kennedy, J., dissenting) ("Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject.")

243. *But cf.* Klarman, *supra* note 236, at 145–46 (observing that "[i]t is especially difficult to fathom how [an] ordinarily staunch defender[] of the states' constitutional prerogatives such as Chief Justice Roberts . . . could deny states the authority to determine who gets to defend the constitutionality of their laws in federal court" (footnotes omitted)).

244. SCHAUER, *supra* note 205, at 203.

245. *Id.* at 204–05.

may make strategic decisions with respect to standing when, but only when, the stakes seem to them to be extraordinarily large.

D. The Supreme Court as a “They,” Not an “It”

Although there is a natural tendency to refer to the Supreme Court as a unitary body, political scientists emphasize the obvious reality that the Court is “a ‘they,’ not an ‘it.’”²⁴⁶ The nine Justices disagree with one another about numerous matters. What is more, many of the Roberts Court’s most important and controversial standing rulings, like those of prior Courts, have come by 5–4 votes. On an ideologically divided Court, it may frequently be the case that a majority of the Justices would like to clarify the law by pushing it decisively in one direction or the other but that they disagree about the direction in which to move. If so, a swing Justice may cast the decisive vote. And a succession of relatively eccentric swing votes can sow confusion.

With respect to standing as with respect to so much else, Justice Kennedy has most often been the Roberts Court’s swing Justice in important cases.²⁴⁷ With Chief Justice Roberts and Justice Alito, Justice Kennedy has voted to pare taxpayer standing in Establishment Clause cases, but he has resisted overruling *Flast v. Cohen*.²⁴⁸ Above I opined that the most recent decision cutting back on *Flast*, in *Arizona Christian Schools Tuition Organization v. Winn*, is legally and logically indefensible: the Court should either follow *Flast* (as I understand its holding) or overrule it.²⁴⁹ For all I know—for it is impossible to be certain of the Justices’ actual thoughts and motivations—six or even seven Justices may agree that the controlling opinions in recent decisions rest on dubious distinctions. But the swing Justices do not. In any event, their views control.

Massachusetts v. EPA, which holds that states are entitled to “special solicitude” in standing analysis,²⁵⁰ furnishes another example of a case in which the idiosyncratic views of a single Justice may have determined the stated basis for the Court’s decision. In addition to believing that states were not entitled to any special solicitude with respect to standing, four dissenting Justices thought that Massachusetts had no standing under

246. This idea received its most powerful introduction into the legal literature in Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

247. Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1070 (2009).

248. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 616 (2007) (Kennedy, J., concurring); see *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1439, 1446–47 (2011) (relying on *Flast* to reject respondents’ reliance on the exception to the rule against taxpayer standing).

249. See *supra* notes 58–61 and accompanying text.

250. 549 U.S. 497, 520 (2007).

ordinarily applicable principles.²⁵¹ At the other end of the spectrum, the Court's four liberals might well have stood ready to hold that the state satisfied more ordinary principles—though I cannot pretend to be sure. Justice Kennedy, who has recurrently affirmed that the Constitution reserves to the states a number of sovereign and quasi-sovereign prerogatives,²⁵² held the fifth vote that the liberals needed in order to prevail. Unsurprisingly under the circumstances, Justice Stevens's majority opinion not only quoted extensively from prior opinions by Justice Kennedy²⁵³ but also advanced a “special solicitude” rationale that no Justice besides Justice Kennedy may have found either adequate or necessary to support the judgment.²⁵⁴

As others have noted, recognition that the Supreme Court is “a ‘they,’ not an ‘it’” complicates ready dispositions to criticize “the Court” for producing confused or confusing doctrine.²⁵⁵ Norms of individual behavior do not always apply sensibly or even coherently to multimember institutions.²⁵⁶

V. Contrasting Standing with Other Doctrines

In describing standing doctrine as having become increasingly fragmented under the Roberts Court, I have depended at least implicitly on a contrast with other doctrines. If all constitutional doctrines grew more fragmented with each passing Supreme Court Term, then standing doctrine's fragmentation would hardly bear comment. In some areas of the law, however, the Court more comprehensively settles matters, at least for a time.²⁵⁷ A good, multifaceted account of the enforcement, reformation, and fracturing of standing doctrine should therefore identify the specific

251. *Id.* at 535, 540.

252. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2691–92 (2013) (declaring the regulation of marriage to be a state function); *Alden v. Maine*, 527 U.S. 706, 715 (1999) (“[The states] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.”).

253. *See Massachusetts*, 549 U.S. at 516–17 (quoting Justice Kennedy's concurring opinion in *Lujan*); *id.* at 519 (quoting Justice Kennedy's majority opinion in *Alden*).

254. *Id.* at 520.

255. *See, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 814–17 (1982) (noting that voting paradoxes make it difficult or impossible for multimember institutions to render consistent decisions in cases requiring sequential voting on multiple issues); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 102–15 (1986) (discussing the logic and some paradoxes of group decision making in the judiciary).

256. *See* ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 9, 14–37 (2011) (discussing fallacies in attempts to extrapolate from claims about individual behavior to claims about group behavior, including fallacies “of composition” and “of division”).

257. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 111–26 (1997) (discussing ordinary adjudication pursuant to established doctrines).

conditions that have prevented more stable equilibria from emerging with respect to standing, in contrast with what has happened in other areas.

Any effort to develop a general theory about conditions for the emergence of relatively stable doctrinal equilibria would swiftly draw me far beyond my competence. Nevertheless, I shall hazard a few observations about what makes standing law at least partly distinctive.

A first, obvious consideration involves the Roberts Court's composition. The Justices who have sat on the Roberts Court have divided about standing issues in ways that they have not divided about all other issues and, equally crucially, in ways that another set of Justices need not have divided. For example, with a change of just one or two Justices at the Court's center, the resulting majority could decisively resolve currently tangled and controverted issues of standing to enforce the Establishment Clause one way or the other.

Second, as I have emphasized, standing doctrine includes a peculiar mixture of transsubstantive and substantive elements. Despite the Court's pretensions to the contrary, standing inquiries cannot be wholly transsubstantive because, as I have argued, courts cannot give content to the concept of injury, in particular, without reference to the guarantees of particular constitutional provisions.²⁵⁸ This being so, it seems almost inevitable that increasingly varied characterizations of injuries and non-injuries should emerge over time and should spawn increasing doctrinal complexity, as the Justices have appraised more claims of injury under multifarious constitutional provisions.

Third, standing cases are diverse not only in the constitutional and statutory provisions under which they arise but also in the parties who litigate them. The formative cases in the Supreme Court's development of its tripartite standing formula mostly involved private suits against the government and its officials.²⁵⁹ With the Justices' thinking likely focused on such cases, it is understandable that concepts advanced with private challenges to governmental action in mind would apply awkwardly to later cases in which governments and their officials claimed standing as plaintiffs or appellants.²⁶⁰ Further, largely unforeseen challenges that call for complex solutions have also, perhaps predictably, developed from congressional efforts to confer standing and, in particular, from probabilistic injuries, which can take a dizzying variety of forms.

258. See *supra* subpart II(A).

259. See, e.g., *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 28 (1976); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 210–11 (1974); *United States v. Richardson*, 418 U.S. 166, 167 & n.1 (1974).

260. For praise of *Windsor's* result (though not all of its reasoning), on the ground that it permits "the Executive to facilitate judicial review by enforcing but refusing to defend a challenged law," see generally Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67 (2014).

Fourth, standing is a gateway doctrine, and the Justices may feel special, relatively ad hoc pressures either to let particular cases into or to keep them out of court.²⁶¹ Consistent with this hypothesis, the Supreme Court has long claimed that standing has a prudential element.²⁶² Within relatively recent times, the Court invoked prudential considerations as grounds for denying standing in its 2004 decision in *Elk Grove Unified School District v. Newdow*.²⁶³ The Court's majority cited a desire not to interfere with family relations structured by state law as a reason to bar a father from bringing an action, which the mother of his child opposed, to challenge the constitutionality of a school district's policy of daily recitations of the pledge of allegiance.²⁶⁴ Quite likely, the Justices who joined the Court's opinion preferred to avoid deciding the divisive Establishment Clause issue that the case presented on the merits. More recently, Justice Kennedy asserted prudential reasons for the Court to exercise jurisdiction in *United States v. Windsor*, in which he thought it important for the Court to give clear guidance to the lower courts about the constitutionality of Section 3 of the Defense of Marriage Act.²⁶⁵ But the Court rests very few holdings on avowedly prudential grounds, possibly—I would speculate—because the Justices find it psychologically and rhetorically easier to present themselves as disinterested expositors of the law than as personally responsible agents making discretionary decisions. Considerations of doctrinal consistency push in the same direction. As the Court recognized in its recent, unanimous decision in *Lexmark International, Inc. v. Static Control Components, Inc.*,²⁶⁶ the invocation of prudential grounds for declining to adjudicate “a case or controversy that is properly within federal courts’ Article III jurisdiction . . . is in some tension with . . . the principle,” which the Court has frequently avowed in other contexts, “that a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.”²⁶⁷ The important point, however, is that formal invocation of explicitly prudential doctrines is one thing, while

261. For a classic argument that the Supreme Court appropriately relies on standing and other justiciability doctrines to forestall the need to issue merits rulings, especially in order to reconcile the Court's role as the ultimate guarantor of constitutional “principle” with the sometimes competing imperatives of prudence and expediency, see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115–27 (1962).

262. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750–52 (1984) (“Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction . . .”); *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975) (“[T]he source of the plaintiff’s claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III’s minimum requirements, serve to limit the role of the courts in resolving public disputes.”).

263. 542 U.S. 1 (2004).

264. *Id.* at 17.

265. 133 S. Ct. 2675, 2687–89 (2013).

266. 134 S. Ct. 1377 (2014).

267. *Id.* at 1386 (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)) (internal quotation marks omitted).

prudentially driven decision making that eschews such formal reliance may be another. Notwithstanding the Court's evident unease in *Lexmark* with formal recognition of a prudential element in standing doctrine, grounds for suspicion remain that ad hoc pressures to authorize or withhold adjudication on the merits may encourage some of the Justices to draw finer distinctions than they would draw otherwise—including finer distinctions than they might think appropriate in applying other doctrines—in determining whether the injury-in-fact, causation, and redressability requirements are met.

VI. Prescriptions

If I am correct that the fragmentation of standing is likely irreversible, both the Supreme Court and legal scholars ought to acknowledge this reality. Having done so, they should begin to address the frustration and confusion to which unacknowledged or untheorized divisions within the doctrine have given rise. But the Justices, with the aid of scholars whose interests include identifying practicable proposals for reform, should proceed with awareness of what is likely to be achievable in light of the phenomena and jurisprudential commitments—some of which should probably be accepted as fixed, at least for the short run—that I discussed in Part IV and that have produced fragmentation in the first place.

A. *Judicial Correctives*

Beyond acknowledging that standing doctrine is multifaceted and complexly differentiated, the Supreme Court—even if it remains divided about many standing matters—should agree on three significant but far from revolutionary revisions of its current approach. None would occasion distinctive repudiations of prior positions by any identifiable coterie of Justices. None has an ideological charge.

First, even if the Court will not go so far as to acknowledge that standing issues ultimately involve legal rights and legally valid authorizations to sue,²⁶⁸ and even if it continues to insist on the centrality of injury in fact, it ought to recognize that what counts as an injury depends on the provision under which a plaintiff brings suit. This modest, clarifying recognition would bring increased transparency to divisions about standing.

268. In *Lexmark*, the Court recharacterized the question whether a plaintiff falls within the zone of interests that a statute protects, which it had previously termed one of “prudential standing,” as an issue of statutory construction involving whether the plaintiff has a valid cause of action. 134 S. Ct. at 1387. As part of its analysis, the Court noted that it had occasionally referred to the zone-of-interests inquiry as one of “statutory standing” but dismissed that label as “misleading, since ‘the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court’s statutory or constitutional *power* to adjudicate the case.’” *Id.* at 1387 & n.4 (quoting *Verizon Md. Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002)).

Moreover, it should provoke no embarrassment, either to the Court institutionally or to any of the Justices individually. The Court has already acknowledged that injury under the Equal Protection Clause depends partly on the meaning of the equal protection guarantee.²⁶⁹ It has also recognized that some injuries are real, but nevertheless not judicially cognizable, in the absence of a statute conferring authority to sue. For example, in *Lujan v. Defenders of Wildlife*,²⁷⁰ Justice Scalia pointed to two prior cases as having established that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law”²⁷¹ From acknowledgment that injuries vary in nature and degree, it would be a small step to recognize that, although injury of some sort is invariably required, different constitutional and statutory provisions guard against different kinds of injuries, which therefore require contextual characterization and appraisal.

Indeed, in the statutory context, a recognition of this kind arguably inheres in the conjunction of *Lujan* and last Term’s decision in the *Lexmark* case, in which the Justices unanimously characterized the question of whether an injured plaintiff came within the zone of interests that a statute protected as involving the existence of a legislatively conferred cause of action.²⁷² *Lujan* signals that what counts as a judicially cognizable injury can depend on the contents of a statute. *Lexmark* confirms that whether injuries that would be cognizable in some contexts are actionable in others can also turn on the protections and authorizations to sue that particular statutes confer.

Just as the Court should be able to agree that the requirements of injury vary with the provisions under which a plaintiff brings suit, it should acknowledge that the necessary likelihood of redressability of injury is a variable, not a constant. In response to the examples catalogued in Justice Breyer’s dissenting opinion in *Clapper*, the Court recognized that it has articulated different standards in different cases.²⁷³ The Court has also, separately, pointed out that it applies different rules in cases involving procedural injuries than in other kinds of cases.²⁷⁴ With disparities in the requisite likelihood of redressability now flushed into the open, one path to clarifying reform would of course involve the embrace of a uniform, quantitatively formulated standard, specifying a precise likelihood that a judicial remedy would redress an injury that otherwise would have

269. See, e.g., *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (discussing the different meanings of injury in fact in different applications of the equal protection clause).

270. 504 U.S. 555 (1992).

271. *Id.* at 578.

272. 134 S. Ct. at 1383, 1387.

273. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1150 n.5 (2013).

274. E.g., *Lujan*, 504 U.S. at 572 n.7.

occurred. An alternative, and I believe more salutary approach, would be for the Court to begin to articulate qualitative rather than quantitative standards, deeming judicial intervention more important and judicial remedies more appropriate in some kinds of cases than in others. I shall return to this issue below. For now, my principal point is simply that the Court, especially after *Clapper*, should be able to agree that it has advanced apparently inconsistent measures of the necessary likelihood that an injury would be redressable in order for standing to exist. Having done so, it should take on the agenda of sorting cases into categories and of identifying the varying criteria to be applied within them. I took a provisional stab at categorical mapping above.²⁷⁵

Second, the Court should make explicit that in some contexts, the standing requirements that apply to private parties do not extend to the government and its officials, and that in other cases the same formally articulated demands require adjustments in light of the government's special status and role. The example that should render this acknowledgment relatively uncontroversial and easy for all to swallow is governmental standing to enforce the criminal law: no one believes that the government must demonstrate a concrete injury to itself in order to prosecute a criminal case.²⁷⁶ The government has a variety of kinds of interests, some shared with private citizens—such as those in its property and in having its contracts enforced—but some not, including those in vindicating its sovereign authority over people, places, and subject matters. There is no reason to think that rules governing the standing of private parties to protect their private interests should apply to all forms of government litigation.

275. See *supra* notes 196–203 and accompanying text.

276. See Hartnett, *supra* note 122, at 2246–47 (explaining that the government does not need to satisfy ordinary standing requirements in criminal law cases). According to Professors Ann Woolhandler and Caleb Nelson, in the early history of the United States, “criminal prosecutions were conducted in the name and under the authority of the people in their collective capacity, and the legal rights that they vindicated were understood to be those of the public rather than of any private individual.” Woolhandler & Nelson, *supra* note 6, at 697 (footnote omitted). Traditionally, however, a state could not invoke the Supreme Court’s original jurisdiction based on an injury to one of its citizens in the absence of a distinctive injury to itself of a kind that would have grounded standing by a private party. *Id.* at 716–17. This distinction may reflect a further set of distinctions among the kinds of interests that a state may seek to assert in litigation, including (1) interests in enforcing state civil and criminal law; (2) interests “similar to those of private parties,” such as interests in property under contracts; (3) “*parens patriae*” or “quasi sovereign” interests deriving from those of its citizens; and (4) “sovereignty interests” in vindicating authority over a subject matter. Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 213–14 (2014). In an apparent analogue of the last of these kinds of interests, but this time involving the federal government, the Supreme Court recently adjudicated an action by the United States to have certain Arizona laws pertaining to immigration declared preempted by federal law in *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

Other requirements may also apply differentially to cases involving the government. The requirement of concrete adversity that Justice Scalia thought central in the *Windsor* case may furnish a case in point. In a variety of cases, the Supreme Court has upheld standing and found the requirement of concrete adversity to be satisfied when one official or agency of the federal government has sued another official²⁷⁷ or agency.²⁷⁸ Any analogue in litigation involving private parties would be unthinkable.

In asserting that the rules governing standing by private litigants may not apply to the government, or that the same verbal formula may produce different results, I will not venture further into specifics. Particular rules or proposed modifications might understandably provoke controversy. In *Massachusetts v. EPA*, for example, the question of whether particular rules should apply differently to a state government in a particular kind of suit divided the Supreme Court by 5–4.²⁷⁹ Without seeking to resolve understandable disputes, I suggest only that the nature of the remaining debates would be clearer if the Court dropped the pretense that Article III invariably applies to government litigants in the same way as to private parties.

Third, and relatedly, though admittedly more controversially, the Justices should recognize that disputed standing questions are frequently enmeshed with concerns about the propriety of particular kinds of remedies.²⁸⁰ Standing issues rarely emerge in suits for damages.²⁸¹ By contrast, justiciability disputes occur with considerable frequency in suits for injunctive or declaratory relief. In actions for equitable remedies, the Court has occasionally said that the concerns bearing on standing merge along a spectrum with concerns about whether the relief sought would overreach the bounds of judicial competence or enmesh the issuing court in

277. *E.g.*, *United States v. Nixon*, 418 U.S. 683, 697 (1974).

278. *See* *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 431–32 (1949) (finding standing in a suit by the United States as shipper to set aside a reparations order entered by the Interstate Commerce Commission). *See generally* Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991) (discussing how the Supreme Court has allowed federal government officials or agencies to sue another official or agency and has never dismissed a case by characterizing it as the government suing itself).

279. 549 U.S. 497, 501, 518–20 (2007).

280. For an earlier and fuller development of this theme, see generally Fallon, *supra* note 201.

281. *Id.* at 650. Exceptions involve the antitrust laws and class action cases. In antitrust cases, the Supreme Court has attempted to restrict plaintiffs from seeking treble damages under the Sherman Antitrust Act for literal violations of the Act that cause injuries unrelated to anticompetitive behavior. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484–89 (1977); *see also* RUDOLPH CALLMAN, 1 CALLMAN ON UNFAIR COMPETITION, TRADEMARK & MONOPOLY § 4:49 (4th ed. 2013) (observing that “[a]ntitrust standing is distinct from constitutional standing, in which a mere showing of harm in fact will establish the necessary injury,” and depends on further considerations involving proper parties to enforce the antitrust laws). In class action cases, lower courts have split over the question of whether all prospective members of a class must be injured, or if an injury to the named class members is sufficient for standing purposes. *In re Deepwater Horizon*, 739 F.3d 790, 800–02 (5th Cir. 2014).

functions more properly reserved to democratically accountable institutions.²⁸²

The connection that the Supreme Court has noted in these cases deserves more general recognition. Whether self-consciously or not, and whether wisely and consistently or not, cases that state and apply different standards for the likelihood of redressability that is needed for standing almost certainly reflect sensitivity to the propriety of the award of particular remedies under particular circumstances. *Clapper* signaled as much when it cited authority purporting to establish that standing should be particularly difficult to establish when plaintiffs seek to challenge national security policies.²⁸³

A telling analogy in this respect emerges from a comparison between two cases from the 1970s in which plaintiffs sought relief based on alleged misconduct by the Ohio National Guard. In one, the Court allowed a suit for damages to go forward.²⁸⁴ In the other, *Gilligan v. Morgan*,²⁸⁵ it dismissed a suit for injunctive relief on the ground that it presented a nonjusticiable political question.²⁸⁶ With both cases growing out of the same set of events, the principal difference that led the Court to pronounce one justiciable and the other not involved the nature of the relief that the respective plaintiffs requested. In my judgment, there should be little doubt that the anxieties about judicial competence that motivated *Gilligan*—involving a demand for a judicially mandated restructuring of the Ohio National Guard²⁸⁷—closely parallel the concerns that frequently underlie rulings that plaintiffs who seek injunctive remedies against sensitive governmental operations have no standing.

As I have stated before, it would be better if the demands for standing were relaxed and disputes about the propriety of equitable relief were openly debated and resolved within the law of remedies.²⁸⁸ Traditional standards for the award of equitable remedies call for a balancing of public and private interests.²⁸⁹ Looking at variations in the Court's articulation

282. See, e.g., *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146–47 (2013) (stating that the law of standing is “built on separation-of-powers principles” and prevents the judicial branch from “usurp[ing] the power of the political branches”); *O’Shea v. Littleton*, 414 U.S. 488, 499 (1974) (considerations bearing on standing “obviously shade into those determining whether the complaint states a sound basis for equitable relief” and emphasize the importance of judicial restraint when “state officers [are] engaged in the administration of the State’s criminal laws”).

283. 133 S. Ct. at 1147.

284. *Scheuer v. Rhodes*, 416 U.S. 232, 233–35 (1974).

285. 413 U.S. 1 (1973).

286. *Id.* at 3, 11–12.

287. *Id.* at 3–4.

288. See Fallon, *supra* note 203, at 704–05.

289. See, e.g., *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (reciting a four-factor test for the award of permanent injunctions that includes considering the public interest); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982) (emphasizing that “courts of equity

and application of redressability standards that make standing distinctively easier to obtain in some kinds of actions than in others,²⁹⁰ I find it difficult to believe that such a balancing is not being conducted, even though the Court refuses to acknowledge as much. And if what once was called a balancing of public and private interests occurs anyway, it would dispel confusion and enhance clarity of analysis for the Court to frame debates about the propriety of remedies in terms that bring all pertinent considerations clearly into view.

Others may of course disagree, perhaps based on a concern that for courts to rest their decisions in suits for injunctive relief on judgments about competing public and private interests would cast the judiciary in a policy-making role and undermine public respect for the courts as nonpartisan oracles of a determinate body of previously established law. In my judgment, aspirations to conceal the nature of and grounds for official decisions fit uneasily with the premises of liberal democracy.²⁹¹ And among the institutions of liberal democracy, courts have special obligations of candor.²⁹² Nonetheless, I do not mean to be dogmatic in suggesting that standing rules applicable to probabilistic injuries and their redressability should be relaxed and analysis of the propriety of equitable relief correspondingly revitalized. Even if the Court resisted that relatively bold suggestion, it would enhance clarity within the domain of standing law for the Court to acknowledge more consistently that the standing question is one about the justiciability of disputes and that justiciability depends partly on the nature of the remedy that a plaintiff seeks. If progress is ever to be made in making sense of the varied standards that the Court has invoked in gauging the likelihood of future injury and the probability of successful redress that are necessary to support standing, that progress will depend on a recognition that the Court's pattern of decisions reflects a sensitivity to the nature of the relief for which a plaintiff asks. Having acknowledged that pattern, the Court should address the questions to which it gives rise.

B. A Role for Legal Scholarship

In my view, there are many forms of valuable scholarship. It implies no disparagement of any to say that, given the current confusion about standing, both the bench and the bar, as well as law students, would profit from more work by law professors that examined standing doctrine from

should pay particular regard . . . [to] public consequences" when considering the remedy of an injunction); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (weighing both private and public interests in deciding whether *forum non conveniens* is appropriate).

290. *See supra* subpart II(A).

291. *Cf.* JOHN RAWLS, *A THEORY OF JUSTICE* 133 (1971) (discussing the "publicity condition" of liberal society).

292. *See generally* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) (defending the view that judges have an obligation of candor and explicating its content).

what I characterized above as a doctrinal Realist perspective. In the most general terms, doctrinal Realism assumes that although judicial articulations of applicable rules frequently furnish reliable indicators of future judicial decisions, context matters crucially to determinations of whether and how abstract legal concepts apply.²⁹³ To make either good predictions or sound judicial decisions requires “situation sense,”²⁹⁴ which in turn can depend on discriminating insights concerning what is, and what others will perceive as being, reasonable and appropriate under varied circumstances.²⁹⁵

Through much of this Article, and especially in Part II, I have pursued a doctrinal Realist approach, with the goal not only of generating specific insights into the current structure of standing doctrine, but also of illustrating a style of analysis that others might usefully practice. In characterizing myself as having deployed doctrinal Realist assumptions, I make no claim of innovation. I am not even the first to deploy a doctrinal Realist methodology to standing doctrine. Among those who have most notably done so is Judge William Fletcher in his article *The Structure of Standing*,²⁹⁶ which has both shaped my general thinking about standing and inspired some of the specific analysis in this Article. Judge Fletcher made it patently clear that the Supreme Court’s standing determinations vary with the constitutional or statutory provision under which plaintiffs bring suit. I have previously emphasized the pertinence of concerns about appropriate remedies to standing analysis.²⁹⁷ But there is plainly opportunity for much more doctrinal Realist work, perhaps most urgently with regard to the currently vexed topic of probabilistic standing.²⁹⁸ More imaginative

293. See Fletcher, *supra* note 3, at 282 (discussing the need to consider context to understand certain controversial standing opinions); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1215 (2006) (noting that Realists argued for “greater sensitivity to commercial, political, and social context”).

294. Cf. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 60 (1960) (“*Situation-sense* will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with.”).

295. See, e.g., Fletcher, *supra* note 3, at 281–84 (dividing standing cases into statutory and constitutional categories and arguing, among other things, that taxpayer standing cases should be understood based on the constitutional provision at issue rather than the status of the petitioner); Llewellyn, *Some Realism About Realism*, *supra* note 42, at 1240 (“A further line of attack on the apparent conflict and uncertainty among the decisions in appellate courts has been to seek a more understandable statement of them by grouping the facts in new—and typically but not always narrower—categories.”); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 646–47 (1973) (arguing the importance of “distinguish[ing] the different contexts in which an issue of standing is said to arise” in order to “give coherence to the much-criticized doctrine”).

296. Fletcher, *supra* note 43.

297. See *supra* notes 284–90 and accompanying text.

298. See *supra* subpart II(D).

analysis will generate new hypotheses.²⁹⁹ Modern research tools will abet better empirical examination of larger data sets.

299. Professor Richard Re argues interestingly that the Supreme Court's standing cases are best understood as displaying an immanent pattern of upholding standing by "those claimants with the greatest stake in obtaining legal relief in any particular case" and of denying standing to those with lesser stakes based on an implicit recognition that resolving their claims is not "necessary to remedy a violation of law." Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1197 (2014). Although I am much in sympathy with the spirit of Professor Re's inquiry, and admire the imagination with which he pursues it, in my view he offers no adequate explanation of what it means for a litigant to have or not to have "the greatest stake in obtaining relief in any particular case." In some cases, the question appears to turn on a relatively straightforward inquiry involving the rights that a particular constitutional or statutory provision confers. Affirmative action cases furnish a good example. Whether an excluded white applicant with a better academic record has a greater stake in obtaining relief in the form of a judicial invalidation of a challenged admissions policy than an excluded applicant with a weaker academic record apparently depends on the proper definition of the relevant right (if any) that the Equal Protection Clause confers: if there is a right not to have race considered in the review of one's application, then the two candidates have an equal stake. If the purported right is a right not to be denied a place on the basis of race-based considerations, then the candidate with the stronger claim to be admitted under race-neutral criteria would apparently have a greater stake in obtaining legal relief. What I find most telling, however, is that postulation that only the "claimants with the greatest stake in obtaining legal relief" should have standing affords no help in resolving the question on which standing ultimately turns, which involves the scope of the rights that the Equal Protection Clause protects. On the surface, relational issues may look more pertinent in cases in which a central question involves uncertain or possible future action that might violate one or another party's rights. The *Clapper* case, which I discussed earlier, *supra* notes 97–109, 187–93 and accompanying text, and which Professor Re also discusses to illustrate his theory, Re, *supra*, at 1244–47, exemplifies this kind of case. In *Clapper*, he emphasizes, the Court appeared to think it relevant that there might be another party who would have suffered a more indisputable injury than the actual plaintiffs and who would thus be a more appropriate claimant of standing. *Id.* at 1246. But I am unpersuaded that relational considerations—involving whether other plaintiffs would have more palpable or likely injuries—ought to do the work that Professor Re thinks they do. Suppose that, although the Court could not be certain at the outset, the *Clapper* plaintiffs were in fact being subjected to unconstitutional searches or seizures. On this supposition, it seems mysterious to me why they would have a lesser stake in having the violation of their rights enjoined than would other possible plaintiffs. Professor Re's implicit assumption may be that when one party can establish only a probabilistic injury, and another party has suffered a demonstrably realized injury, the former always has a lesser stake than the latter. But from the perspective of one party, another party's rights and injuries will often be virtual irrelevancies. Suppose that the parties held out as potentially better plaintiffs in *Clapper* later choose not to sue for an injunction, accept a plea bargain without litigating their constitutional claim in the context of a criminal prosecution, or bring and settle a suit for damages. As a normative matter, I see no reason why the latter's conduct should bear on whether the former's stake in procuring relief should suffice to confer standing. Noting considerations such as these, Professor Re says that the problem in *Clapper* was more "nuanced" than the Court acknowledged, *see id.* at 1246, and he concludes that "[a] more defensible relativistic analysis would have erred on the side of affording standing." *Id.* at 1247. The deeper problem, in my view, is that a "relativistic analysis" would, more often than not, require "err[ing]" one way or the other without furnishing adequate criteria for defining error. As a descriptive and doctrinal matter, moreover, the Court has explicitly rejected Professor Re's position in cases in which plaintiffs seek injunctive relief by holding that realized injuries that will indisputably ground standing to sue for damages can fail to establish the likelihood of future injury necessary to standing to sue for injunctive relief. *See Los Angeles v. Lyons*, 461 U.S. 95, 101–02, 109, 111–13 (1983) (denying respondent's standing for injunctive relief but acknowledging that he "still has a claim for damages against the City that appears to

In suggesting that doctrinal Realist scholarship could help bring order to a body of law that many experience as subsisting in confusion—largely by identifying categories of cases in which the Supreme Court’s general statements of doctrinal requirements have differing applications—I have called attention to the value of pattern making in predicting the outcome of future cases. But scholarship that begins with doctrinal Realist assumptions can also very usefully extend into the normative realm.

Although persuasively identified patterns of judicial decisions can command recognition as part of the fabric of the law, pattern identification is by no means necessarily a value-free exercise. As Ronald Dworkin persuasively argued, legal theories defining what the law is and prescribing how judges should decide future hard cases are appropriately tested against the sometimes competing criteria of fit and normative attractiveness.³⁰⁰ When both are taken into account, imaginative groupings of cases, and equally imaginative imputations to them of immanent moral and policy-based rationales, can sometimes be justified.

Doctrinal Realist theorizing of this kind can frequently involve law professors in seeking to improve existing law, albeit typically incrementally, by depicting the patterns of cases that they have identified as already reflecting attractive values that judges should strive to realize more fully in the future.³⁰¹ In my view, some patterns of standing cases plainly lend themselves to explanation as embodying attractive principles. For example, I applaud standing cases under the Equal Protection Clause that hold, in effect, that being subjected to unequal treatment in the distribution of benefits or opportunities constitutes an adequate inquiry to support standing, even absent a further showing of material harm. In my judgment, this conclusion flows from the substantive purposes best ascribed to the Equal Protection Clause. If I am correct that the Court frequently upholds standing to sue to enjoin the enforcement of criminal statutes without stringent demands of proof that prosecutors would actually enforce a challenged statute against a particular plaintiff—as I hypothesized

meet all Art. III requirements”). Professor Re thinks *Lyons* was ultimately wrongly decided because no alternative plaintiff had a greater stake, Re, *supra*, at 1241–42, but this stance requires an implicit judgment of the stake that is minimally adequate to support standing, contrary to Professor Re’s stated position that noncomparative inquiries into the adequacy of a stake to ground standing are unworkable. *Id.* at 1204, 1209–12.

300. See RONALD DWORKIN, *LAW’S EMPIRE* 255–58 (1986) (describing the process by which judges resolve hard cases in light of interlocking and sometimes competing considerations of fit and political morality).

301. Dworkin would himself falsify any rigid claim that a practitioner of the Dworkinian method can be only modestly innovative; I offer the claim in text as a generalization, not a categorical rule.

above³⁰²—that pattern also strikes me as a normatively desirable one that good interpretive theorizing could usefully identify and rationalize. Citizens who believe that they have a constitutional right to engage in a course of conduct that they otherwise would engage in should not need to risk a criminal prosecution with an uncertain outcome in order to do so. But these are only examples. My point, once again, is that there is valuable work to be done—not that patterns are obvious or that self-evident legal principles explain why patterns that appear attractive on the surface ought to be continued.

I should emphasize, moreover, that doctrinal Realism should not disable criticism. For example, imaginatively identified patterns of cases might reveal disturbing biases or insensitivities among Justices and judges, possibly embedded in culturally influenced factual judgments. To repeat an example that I offered earlier, some writers have argued that the Supreme Court has recurrently disfavored claims of injury by racial minority groups.³⁰³ If so, good doctrinal Realist scholarship might help to trigger reform by exposing concealed biases. That said, I would expect the most telling insights to be discriminating ones, not global generalizations about—for example—the irreducibly political character of determinations of standing across the entire gamut of cases.

Conclusion

Recent years have witnessed a continuing and possibly accelerated fragmentation of standing doctrine. For reasons that I have canvassed, one need not like this trend in order to predict that the future will hold more of the same. Absent dramatic changes in the doctrine's structure, the Supreme Court's composition, or both, standing's fragmentation seems overdetermined.

If so, it is time for judges and Justices, law professors and law students to come to terms with standing's fragmentation by acknowledging and, within limits, embracing it. In the domain of standing law, we should recognize simplicity and elegance as illusions. We should distrust the large generalizations that have often occupied center stage in judicial opinions.

302. See *supra* note 197 and accompanying text.

303. See, e.g., Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 9 (2013) (“Today, courts reviewing equal protection challenges to facially neutral laws brought by members of minority groups proceed under law that directs judges to defer to representative government, while courts reviewing equal protection claims brought by members of majority groups strictly scrutinize challenges to affirmative action.”); Spann, *supra* note 231, at 1422–25 (“The observation that I wish to offer is that the Supreme Court’s decision in *Northeastern Florida* . . . is one of a series of racially suspicious decisions that the Supreme Court has issued concerning the issue of standing.”); *supra* notes 228–31 and accompanying text.

But we should not throw up our hands or succumb to legal nihilism. Patterns exist, even if the lines that demarcate them are sometimes difficult to identify, as well as more numerous and complex than we might wish. The doctrinal Realist credo affords a note of hope, not despair: We need to discern the “tangibles which can be got at beneath the words.”³⁰⁴

304. Llewellyn, *Some Realism About Realism*, *supra* note 42, at 1223.