Congress, Separation of Powers, and Standing

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Plaintiffs must satisfy certain standing requirements before they may bring a civil action in federal court. Typically a plaintiff must have been injured in particular way, the injury must have been caused by the defendant’s conduct, and it must be capable of being redressed by the relief granted by the court. This Article, a contribution to a symposium on “Access to the Courts in the Roberts Era,” revisits these requirements in light of (1) several cases decided in the early years of the Roberts Court, (2) the new members of the Court, and (3) the considerable and continuing scholarly debate over the role of Congress in statutorily providing for standing. Part II of the Article briefly sets out the standing requirements. Part III addresses the views on standing of the most recent additions to the Court, Chief Justice John Roberts and Associate Justice Samuel Alito, before they joined the Court. Part IV addresses, in three sections, the standing decisions of the initial Terms of the Roberts Court. The first section of that part discusses and dismisses the utility of a purely originalist approach to determining
standing. The second section discusses recent cases that have addressed the limitations separation of powers concerns place on standing sought by taxpayers, or by states as plaintiffs. The third section considers from various perspectives Congress's role in providing for standing by statute, and the appropriate response of federal courts in applying those statutes. The article concludes in Part V by addressing the likely future of standing in the Roberts Court and in the Obama Presidency.

CONTENTS

I. INTRODUCTION............................................................ 1024
II. STANDING, IN BRIEF .................................................. 1026
III. JOHN ROBERTS AND SAMUEL ALITO ON STANDING, BEFORE THE ROBERTS COURT ................................................................. 1031
IV. ORIGINALISM, SEPARATION OF POWERS, AND JUDICIAL DEFERENCE TO CONGRESSIONAL STANDING JUDGMENTS ..... 1035
   A. Originalism and Standing ........................................ 1036
   B. Beyond Originalism: Taxpayers, States, and Standing ..... 1041
   C. Congress, the Courts, and the Future of Standing .......... 1049
CONCLUSION: THE FUTURE OF STANDING IN THE ROBERTS COURT .............................................................................. 1056

I. INTRODUCTION

The word "standing" appears nowhere in Article III of the U.S. Constitution, but the Supreme Court has held, in too many cases to cite, that parties (particularly plaintiffs) must satisfy standing requirements in order for their cases to be justiciable in federal court. As then-Professor and later Judge William Fletcher has remarked, the requirements have been the subject of so many cases, not to mention so much academic commentary, that they are "numbingly familiar."¹ The conventional three-part test is that to satisfy the case or controversy requirement of Article III,² the plaintiff must have suffered an "injury in fact," one that is "fairly traceable" to the actions of the defendant, and one that can be redressed by the relief requested from the court.³

² U.S. CONST. art. III, § 2.
³ E.g., Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009); see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 128 S. Ct. 2531, 2535 (2008); Lujan v. Defenders of
In light of the flood of cases explicating and applying these requirements, and an avalanche of academic commentary addressing their provenance and desirability, what more can be said? Rather than exhaustively address those cases and scholarship, this Article’s goal is more modest. It will revisit the standing requirements in their doctrinal and institutional context. The focus will be on three factors: the ascension in 2005 of Chief Justice John Roberts, and in 2006 of Associate Justice Samuel Alito, to the Supreme Court; several standing decisions of the early Terms of the Roberts Court, and the continuing and ongoing scholarly debate over the role of Congress in statutorily providing for standing. The Article begins in Part II by briefly summarizing the evolution and current status of standing requirements. Part III then examines the record of Justices Roberts and Alito on standing before 2005, as revealed in their scholarly writing, their votes as lower court judges, and their testimony in confirmation hearings before Congress.

Part IV of the Article focuses on standing cases in the Roberts Court. The first section considers those requirements in light of the revival of interest in originalist modes of constitutional interpretation in the academy, and on the Court itself. That section concludes that the Court, in light of recent cases, is unlikely to adopt originalism as an exclusive, much less consistent or coherent, guide to applying standing requirements. The second section of Part IV turns to nonoriginalist modes of developing and applying standing requirements. Both in the Rehnquist and now Roberts Courts, the Justices have often emphasized that separation of powers concerns, regarding the limited role of federal courts, have animated standing requirements. This has been manifested by the Court’s hostility towards taxpayer standing, though the Roberts Court has also expanded the ability of states to satisfy standing. Separation of powers also implicates the application of “citizen suit” provisions in federal statutes. Those provisions on their face often seem to empower citizens or persons to bring suit in federal court, notwithstanding standing requirements. However, the Court has usually required that Article III standing must be satisfied, despite the presence of a broadly worded citizen-suit provision. But the Court’s position on that point has not been a model of clarity, seeming to create space for Congress to be more assertive in facilitating standing through carefully drafted statutes. That possibility is the subject of the third section of Part IV, which revisits how often and under what

circumstances Congress enacts citizen-suit provisions, and what that portends for judicial application of those provisions.

The article concludes in Part V, by briefly addressing the likely development of standing requirements in the Roberts Court, and Congress’s statutory attention to those requirements during the Obama presidency.4

II. STANDING, IN BRIEF

Because reams of paper have been printed on standing requirements in federal courts,5 only a short review is necessary here.6

The history of the development of standing is a contested one. A useful way to view that complicated history is through the lens of the models of dispute resolution (or private rights) and law declaration (or public rights).7 Prior to the early decades of the twentieth century,

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4 I am primarily concerned with “understand[ing] standing doctrine [on] its own terms.” LARRY W. YACKLE, FEDERAL COURTS 290 (2d ed. 2003). I agree with Yackle that alternate explanations for Supreme Court decisions on standing are often advanced, such as that they are “disguised judgments on the merits, the justices’ assurances to the contrary notwithstanding.” Id. at 289. I am not entirely dismissive of these alternate explanations, but I think doctrine does matter, and it is a worthwhile scholarly enterprise to take doctrine seriously. While many political scientists have long assumed that virtually all decision-making by life-tenured Supreme Court Justices on standing (and much else) is simply based on their policy preferences, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 230-34 (2002) (discussing standing), a more nuanced critique of Court decision-making has emphasized the importance of how legal institutions and doctrine places bounds on judicial choice, Michael A. Bailey & Forrest Maltzman, Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court, 102 AM. POL. SCI. REV. 369 (2008); Barry Friedman, Taking Law Seriously, 4 PERSP. ON POL. 261 (2006). I will not address alternative critiques of standing doctrine, such as those based on law and economics, e.g., Eugene Kontorovich, What Standing is Good For, 93 VA. L. REV. 1663 (2007), social choice theory, e.g., Maxwell L. Stearns, Standing at the Crossroads: The Roberts Court in Historical Perspective, 83 NOTRE DAME L. REV. 875 (2008), cognition theory, e.g., Eileen Braman, Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making, 68 J. POL. 308 (2006), or political science, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 48–49 (2006); Lee Epstein et al., The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yawn and Liberals Should Not Fear, 43 TULSA L. REV. 651 (2008).


6 For much more extensive summaries and discussions of justiciability and standing requirements, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION 43–172 (5th ed. 2007), and LARRY W. YACKLE, FEDERAL COURTS 303–409 (3d ed. 2009) [hereinafter YACKLE, FEDERAL COURTS].

7 For excellent overviews of these models, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72–76 (6th ed. 2009), and YACKLE, FEDERAL COURTS, supra note 6, at 16–24.
most justiciability issues were resolved by asking whether the plaintiff had suffered an injury that would be recognized at common law. Typically, this would mean that a "defendant’s violation of a legal duty to the plaintiff [must have] caused a distinct and palpable injury to a concrete, legally protected interest." This model came under increasing pressure from the development of the regulatory state and the expansion of substantive constitutional rights, which "created diffuse rights shared by large groups and new legal relationships that are hard to capture in traditional, private law terms." A newer public rights model permitted holders of such rights to have standing to enforce them. Modern standing doctrine reflects aspects of both models, and the grant or denial of standing in a given case can often be conceptualized or justified under either model.

Modern cases hold that Article III requires that plaintiffs demonstrate a concrete injury, one caused by and traceable to the actions of the defendant, and likely to be redressed by relief a court can order. Other justiciability requirements are not said to be drawn directly from the Constitution, but rather are followed as a matter of prudence by federal courts. These include that plaintiffs are usually not permitted to raise the rights of persons not parties to the lawsuit, that cases cannot proceed if they are not ripe for decision or, conversely, have become moot, or that courts are reluctant to decide political questions, because they are better resolved by the other branches of government. Sometimes the line between these requirements is not always clear. A good example is generalized grievances. The Court has held that such grievances may not be the basis of an injury to satisfy standing, but has not been clear what such grievances are, or whether the barrier to bring such cases is a constitutional or prudential one.

During the Warren Court and the early years of the Burger Court, the perception of most observers was that federal judges, for the most

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8 FALLON ET AL., supra note 7, at 73.
9 Id. at 74.
10 Id. at 74–75.
13 FEC v. Akins, 524 U.S. 11, 23 (1998) (discussing prior cases and concluding that generalized grievances are those that are widely shared, and by nature “abstract and indefinite”).
14 Id. ("Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."). For further discussion of this point, see YACKLE, FEDERAL COURTS, supra note 6, at 342–46, and Craig A. Stern, Another Sign From Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?, 12 LEWIS & CLARK L. REV. 1169 (2008).
part, were making it easier for plaintiffs to satisfy standing requirements. The perception has, for the most part, cut the other way in the last quarter-century. \footnote{15 For an overview and some statistical support for the conventional wisdom, see \textcite{Stefanie A. Lindquist & Frank B. Cross, Measuring Judicial Activism 112–15 (2009); Stearns, supra note 4, at 891–917. It seems fair to observe that plaintiffs in some of the iconic cases from the Warren and Burger Courts would either have not satisfied traditional notions of justiciability or benefited from more flexible notions of exceptions to standing. See\textcite{Fallon et al., supra note 7, at 74 (observing that the “widely shared interests” of voters challenging malapportioned districts, or of students challenging school prayer, “differ markedly from the liberty and economic interests recognized at common law”); Richard A. Posner, The Federal Courts: Challenge and Reform 96 (1996) (observing that the plaintiffs in cases challenging abortion restrictions were allowed to proceed despite mootness concerns).}\textcite{Allen, 468 U.S. at 750–52.}} That turn is doctrinally marked by the Court’s more recent emphasis on separation of powers as a way to shape, and limit, standing in federal courts. The most notable exemplar of this trend was \textit{Allen v. Wright} in 1984. There, in the course of holding that plaintiffs lacked standing to challenge certain actions of a federal agency, the majority, in an opinion by Justice Sandra Day O’Connor, emphasized that the case or controversy requirement draws on separation of powers concerns. \footnote{16 \textcite{Allen, 468 U.S. at 750.}} Those concerns are premised, the Court said, on an understanding of the proper and limited role of unelected courts in government. \footnote{17 \textcite{E.g., Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009); Hein v. Freedom from Religion Found., Inc., 551 U. S. 587, 598–99 (2007) (Alito, J., joined by Roberts, C.J., and Kennedy, J.).}} In other cases, the Court has emphasized that standing requirements appropriately channel and narrow the instances when federal courts are called upon to exercise the power of judicial review. \footnote{18 \textcite{E.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) (upholding qui tam statute that offered a bounty to a prevailing plaintiff).}}

A particularly confusing and controversial corollary of these concerns has been the issue of what role Congress may play in statutorily modifying standing requirements. \footnote{19 For a lucid discussion, see \textcite{Yackle, Federal Courts, supra note 6, at 382–97.}} The Court’s pronouncements on this topic have not been a model of clarity. Least controversial, it seems, are statutes that authorize private persons to bring suit, in various ways, on behalf or as an agent of the United States. \footnote{20 \textcite{E.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) (upholding qui tam statute that offered a bounty to a prevailing plaintiff).}} More problematic are “citizen-suit” statutes, which authorize suit by most any citizen or person, seemingly notwithstanding whether that person would otherwise satisfy standing requirements. The Court has strongly suggested that there are limits to Congress’s power to grant standing in that situation. \footnote{21 Whether a statute grants standing should be distinguished from the separate, albeit related, analytical issue of whether Congress has created a private cause of action in federal court. \textcite{Yackle, Federal Courts, supra note 6, at 386.}}
The leading case here is the 1992 decision in Defenders of Wildlife v. Lujan. That case involved a challenge to certain federal agency action (or inaction) concerning the Endangered Species Act (ESA). The Court, in an opinion by Justice Antonin Scalia, first held that the plaintiffs failed to satisfy the traditional standing criteria. The ESA contained a citizen-suit provision, purporting to confer standing to "any person" challenging the agency action. The Court held that Congress could create enforceable "procedural rights," but could not circumvent the injury-in-fact requirement by statutorily granting such rights, "unconnected" to anyone's "own concrete harm." To permit Congress to grant standing to a party without an injury, the Court concluded, would improperly transfer from the executive branch to the judicial branch the President's constitutional duty under Article II to "take Care that the Laws be faithfully executed." The upshot was that, despite the broad congressional grant of standing, a plaintiff still needed to satisfy the injury-in-fact component of the Article III standing requirements. Some commentators suggested that Lujan called into question the ability of Congress to confer standing under any circumstances outside the boundaries of Article III.

But the criticism seems overwrought. In Lujan, Justice Scalia endorsed earlier cases where Congress had statutorily elevated "to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." Justice Anthony Kennedy, in an

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23 The plaintiffs sued to enforce a provision of the ESA that required the Secretary of the Interior to consult with other agencies regarding the environmental effect of certain U.S.-funded construction projects in other countries. The Court held that plaintiffs' vague interest in being exposed to affected animals in the future was not the sort of personal injury that could satisfy standing requirements. Id. at 561-64.
24 Id. at 573 n.8.
25 Id. at 577 (quoting U.S. Const. art. II, § 3).
27 Lujan, 504 U.S. at 578. The most prominent of these cases cited by Justice Scalia was Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972), which involved a citizen-suit provision in the Fair Housing Act of 1968. The Act states that a "person aggrieved" may bring suit in federal court to enforce the anti-discrimination provisions of the Act, and defines such a person as one "who claims to have been injured by a discriminatory housing practice." Id. at 206 n.1 (quoting Civil Rights Act of 1968, Pub. L. No. 90-284, § 810(a), 82 Stat. 85)). The plaintiffs in Trafficante had not been the direct targets of discrimination, but claimed to have lost the benefits of living in an integrated community. Id. at 208. As emphasized by a concurring opinion, it seems difficult to conclude that the plaintiffs, given the generalized nature of their injury, would satisfy standing requirements absent the statute. Id. at 212 (White, J., concurring).
influential concurring opinion, observed that the complexity of
government programs suggested that courts should be "sensitive to
the articulation of new rights of action that do not have clear
analogs in our common-law tradition." In that regard, he continued,
Congress can "define injuries and articulate chains of causation that
will give rise to a case or controversy where none existed before," but
cannot simply authorize "any person" to bring a case. The skeletal
articulation of the citizen-suit provision at issue in Lujan did not meet
this requirement.

After Lujan, the Court in 1998 gave a more generous interpretation
and application to a citizen-suit provision in FEC v. Akins. There,
plaintiffs challenging an action by the Federal Election Commission
relied on a statute that authorized "'[a]ny party aggrieved by'" the
agency decision to seek judicial review in federal court. Over the
dissent of Justice Scalia, the majority (per Justice Stephen Breyer)
found the plaintiffs' injuries—deprivation of political information by
the agency—satisfied the standing requirements of Article III. While
the injury seemed to resemble a non-justiciable generalized grievance,
the majority held that the lack of information was tied to the right to
vote and to participate in the political process, and was of a concrete
and specific nature. The Court unpacked the notion of a generalized
grievance. An interest may be widely shared, but it may also involve
concrete harm, and in those circumstances the injury-in-fact
requirement can be satisfied. The citizen-suit provision, the Court
held, should be interpreted broadly to encompass the suit.

These cases leave muddled the scope of congressional authority to
affect standing. Several readings of the cases are possible. The
narrowest is that a plaintiff must always satisfy all standing
requirements no matter what a statute provides. A broader reading is
that a statute may displace the prudential standing requirements,
though perhaps nothing more (recall that the Court has not been clear
on whether the bar against hearing generalized grievances, however
defined, is a constitutional or prudential one). Broader still, the cases
might suggest that Congress can recognize injuries that would not
have satisfied common law requirements, at least when statutory, as
opposed to constitutional, rights are at issue. Other nuanced views are

28 Lujan, 504 U.S. at 580 (Kennedy, J., joined by Souter, J., concurring).
29 Id.
31 Id. at 19 (quoting 2 U.S.C. § 437g(8)(a)) (brackets in original).
32 Id. at 24–25.
33 Id. at 19 ("History associates the word 'aggrieved' with a congressional intent to cast
the standing net broadly—beyond the common-law interests and substantive statutory rights
upon which 'prudential' standing traditionally rested.").
possible, given whatever vision of the private and public rights models one cares to follows.\footnote{Some scholars have suggested that \textit{Lujan} and \textit{Akins} are inconsistent with respect to the interpretation and application of citizen-suit provisions. See, e.g., Kimberly N. Brown, \textit{What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review}, 55 U. KAN. L. REV. 677, 678–79 (2007) [hereinafter Brown, \textit{FECA Suits}]; Daniel A. Farber, \textit{A Place-Based Theory of Standing}, 55 UCLA L. REV. 1505, 1536 (2008). For extensive discussion of these issues, see \textit{Fallon et al.}, supra note 7, at 140–46 and \textit{Yackle, Federal Courts}, supra note 6, at 391–97.} What the cases seem to reject is the notion that Congress can empower plaintiffs who lack the core Article III standing requirements to sue.

\section*{III. John Roberts and Samuel Alito on Standing, Before the Roberts Court}

Justices Roberts and Alito had, in their public and private capacities, addressed standing issues before being appointed to the Supreme Court. Both also addressed such issues in their confirmation hearings before Congress in 2005 and 2006. An assessment of that record can shed light on their current and likely future views on these issues.

The most substantial and revealing statement is an article by Roberts in the annual administrative law symposium in the Duke Law Journal in 1993.\footnote{John G. Roberts, Jr., \textit{Article III Limits on Statutory Standing}, 42 DUKE L.J. 1219 (1993). The symposium was on \textit{Lujan}, and Roberts’s article was responsive to other articles, critical of the decision, in the same issue. See Nichol, supra note 26; Richard J. Pierce, Jr., \textit{Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power}, 42 DUKE L.J. 1170 (1993).} Much of the article is taken up with a defense of the majority decision in \textit{Lujan}, which was argued on behalf of the government by the Office of the Solicitor General during Roberts’s service as the Principal Deputy Solicitor General.\footnote{Roberts did not argue the case, nor did he sign the brief, see \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555, 557 (1992) (listing counsel), but he may have had some role in overseeing the government’s presentation of the case. He had earlier, and successfully, argued for the government in another standing case. See \textit{Lujan v. Nat’l Wildlife Fed’n}, 497 U.S. 871, 874 (1990) (listing counsel). Roberts was a partner at the law firm of Hogan & Hartson when he wrote the article. Roberts, supra note 35, at 1219 n.\textsuperscript{†}. See also Jeffrey Toobin, \textit{No More Mr. Nice Guy}, \textit{New Yorker}, May 25, 2009, at 42, 49 (further discussing Roberts’ argument in \textit{Lujan v. National Wildlife Federation} and his views on standing).} It is only fourteen pages long, but, as a clearly written, sophisticated, and measured analysis of case law that engages adverse scholarly commentary, it would do any scholar proud, despite (or perhaps because of) its brevity.\footnote{In his confirmation hearings for Chief Justice, Roberts (perhaps mischievously) refers to the article as “that small little Law Review comment.” \textit{Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary}, 109th Cong. 342 (2005) [hereinafter Roberts Confirmation Hearings]. The article has been cited and discussed numerous times by federal courts scholars.}
Much of the article consists of a fairly conventional defense of *Lujan*, describing it as a “sound and straightforward decision,” that “can hardly be regarded as remarkable.” Roberts reiterates the traditional arguments, drawn from separation of powers theory, that standing requirements properly delimit the role and power of an unelected, life-tenured judiciary. While he acknowledges the academic arguments that the injury-in-fact requirement is not, as a matter of history, a constitutional requirement, he argues that the Court has never accepted that position, and thus Congress cannot dismiss the requirement. Responding to criticism that the standing requirements lack precise definitions, Roberts concedes that they “are not objectively verifiable, self-defining terms,” but argues that they are “reasonably precise guidelines of the sort common to the lawyer’s craft.” He wonders how difficult a burden the decision really places on plaintiffs. If there were really many people in the *Lujan* plaintiffs’ interest group, with specific plans to visit the regions affected by U.S. aid, “it is not unreasonable to wonder why the organization relied on such weak affidavits.”

More interesting are those portions of the article that undertake a deeper analysis of congressional statutes that purport to grant standing. The statute in *Lujan*, Roberts says, was no such statute. Its reference to “any person” should have been construed—under usual principles of statutory interpretation—in a manner consistent with the requirement that “only those who suffer actual injury have standing to sue.” Other citizen-suit provisions, he noted, make reference to a citizen being adversely affected, and, in any event, a close look at the statute involved in *Lujan* yields the conclusion that it was not intended to be a vehicle to enforce procedural rights. More

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39 *Id.* at 1220, 1224.

40 *Id.* at 1121–22. Roberts cited the leading articles taking this position. *Id.* at 1222 n.23 (citing articles by Gene Nichol, Raoul Berger, Louis Jaffee, Cass Sunstein, and Steven Winter).

41 *Id.* at 1223.

42 *Id.* at 1225. The affiants referred to an “‘inten[...]’ to return to the places they had visited before . . . without any description of concrete plans.” *Lujan* v. Defenders of Wildlife, 504 U.S. 555, 564 (1992).


44 *Id.* at 1226–28. As an example of a citizen-suit provision that defines a citizen as one who has been adversely affected, Roberts cites the Clean Water Act, 33 U.S.C. § 1365(g) (1988). *Id.* at 1227 n.52. As a matter of statutory interpretation, Roberts agrees (not surprisingly) with the government’s position in *Lujan*, that the suit should have been brought under the Administrative Procedure Act, which limits suits to those who are “‘adversely affected or
generally, Roberts continued, *Lujan* "in no way inhibits Congress from pursuing substantive objectives." Congress can still cut off funding or engage in oversight hearings. Thus, a standing decision "simply means that Congress cannot enlist the federal courts in its enterprise," and indeed it "compels the other branches of government to do a better job in carrying out their [constitutional] responsibilities."

In the last portion of the article, Roberts responds to the long-standing charge that standing decisions mask the political agenda of judges. Standing, he says, "is an apolitical limitation on judicial power," since it restricts conservative and liberal interest groups from challenging liberal or conservative agency action or inaction, respectively. He concludes that to discard virtually all limits on standing, as many critics of *Lujan* argue, would improperly transform courts "into ombudsmen of the administrative bureaucracy, a role for which they are ill-suited both institutionally and as a matter of democratic theory."

Roberts’s article and his overall views on standing were addressed at his confirmation hearings for Chief Justice. Environmental interest groups opposed his nomination in part due to the opinions expressed in that article, and what they considered his crabbed view of citizen-suit provisions. The topic came up several times in the hearings. Several of the Republican senators asked him to review the arguments made in the article. One Democratic senator stated that, in the article, Roberts was "somewhat dismissive regarding these citizen aggrieved" by the agency action. *Id.* at 1127 n.53 (quoting 5 U.S.C. § 702 (1988)). As Roberts notes, the Court in *Lujan* did hold that the citizen-suit provision encompassed the challenge brought by the plaintiffs, though, of course, it held against plaintiffs on standing grounds. *Id.* at 1221.

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43 *Id.* at 1229.
44 *Id.*
45 *Id.* at 1230. Roberts added (and apparently agrees with) the oft-made assertion that standing doctrine was developed to limit conservatives from attacking New Deal government action in federal court. The same standing decisions were later used by "judges with a quite different political orientation." *Id.* at 1230 n.64 (quoting Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1438 (1988)). Both liberals, e.g., Sunstein, *supra*, at 1472–73, and conservatives, e.g., Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458–59 (1996), have agreed with this assessment.
48 *E.g., Roberts Confirmation Hearings, supra* note 37, at 342–43, 381–82 (colloquies with Sens. Mike DeWine and John Cornyn).
suits to protect the environment.\textsuperscript{51} But overall, Roberts's views on standing were not a focal point of the hearings, and it is difficult to believe that any senators voted in favor of or in opposition to his nomination, based on those views alone.

Unlike John Roberts,\textsuperscript{52} Samuel Alito authored a number of judicial opinions that addressed standing requirements prior to his nomination. While serving on the U.S. Court of Appeals for the Third Circuit, Alito authored a number of opinions on standing that do not demonstrate great sympathy with expansive notions of standing but, overall, seem to be fairly uncontroversial applications of existing law.\textsuperscript{53} The partial exception is \textit{Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.} ("PIRG"),\textsuperscript{54} where Judge Alito silently concurred in a decision that held that members of a public interest group lacked standing to pursue claims against a manufacturer for discharging effluents in violation of the Clean Water Act. Despite the presence of a citizen-suit provision,\textsuperscript{55} the court held that standing was not shown when there was no evidence that a river had been harmed by the alleged violations, even though plaintiffs had reduced their use of the river.\textsuperscript{56}

\textsuperscript{51} \textit{Id}. at 155 (colloquy with Sen. Patrick J. Leahy). Roberts responded by noting that in the article, he had supported the use of environmental harms and aesthetic interests to support standing. \textit{Id}. at 156. He did indeed make such statements in the article, though it was in the context of noting that the Court had "not revisited" cases that held that such interests can support standing. \textit{Roberts, supra} note 35, at 1231 (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)). On the same page he added that, even in these situations, a plaintiff must demonstrate some injury. \textit{Id}. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64 (1992)). Chief Justice Roberts recently joined in an opinion of the Court that reaffirmed this understanding of environmental harms and standing. See \textit{Summers v. Earth Island Inst.}, 129 S. Ct. 1142, 1149 (2009) (citing Sierra Club v. Morton, 405 U.S. 727, 734–36 (1972)).

\textsuperscript{52} Prior to his appointment as Chief Justice, Roberts served from 2003 to 2005 on the U.S. Court of Appeals for the District of Columbia. He authored only a handful of opinions that addressed standing at any length, none of them particularly controversial. \textit{See, e.g.}, Hedgepeth \textit{v. Wash. Metro. Area Transit Auth.}, 386 F.3d 1148 (D.C. Cir. 2004) (prospective harm to reputation satisfied standing); Midwest ISO Transmission Owners \textit{v. FERC}, 373 F.3d 1361 (D.C. Cir. 2004) (costs imposed by FERC order supplied injury, even if lost money could be recouped in the future).

\textsuperscript{53} \textit{E.g.}, Khodara Envtl., Inc. \textit{v. Blakey}, 376 F.3d 187, 193–95 (3d Cir. 2004) (declaratory judgment plaintiff satisfied causation prong); ACLU-NJ \textit{v. Township of Wall}, 246 F.3d 258, 263–66 (3d Cir. 2001) (challengers to Christmas display lacked standing as taxpayers or because of a psychological injury, though question was "close"); \textit{Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.}, 165 F.3d 221, 236 (3d Cir. 1998) (plaintiffs did not satisfy standing requirements of the Lanham Act); \textit{Rameur v. Beyer}, 983 F.2d 1215, 1245–46 (3d Cir. 1992) (Alito, J., concurring) (convicted murderer did not have third party standing to raise the rights of grand jurors allegedly excluded from serving on the basis of race).

\textsuperscript{54} 123 F.3d 111 (3d Cir. 1997). Judge Roth authored the majority opinion; Judge Lewis dissented.

\textsuperscript{55} This is the same one Roberts mentioned in his article. \textit{See supra} note 44.

\textsuperscript{56} \textit{Pub. Interest Research Group of N.J., Inc.}, 123 F.3d at 119–25.
The Supreme Court called that holding into doubt three years later in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* That case held that the same citizen-suit provision at issue in *PIRG* should be interpreted only to require that the plaintiffs had suffered injury, not that the environment had been damaged as such. It also held that plaintiffs had standing to seek civil penalties payable to the government, and the claim did not become moot once the company defendant came into compliance with the law. While none of the opinions in *Laidlaw* cited or discussed *PIRG*, and each case presented different facts, the interpretation of the citizen-suit provision overlapped. The former case calls into question the correctness of the latter. Several Democratic senators chastised Judge Alito at his confirmation hearings for joining the majority in *PIRG*. Nonplussed, Alito noted that *Laidlaw* postdated *PIRG*, and, to the extent the latter conflicted with the former, he would follow precedent. With that exception, standing issues seemed to have played even less of a role in Alito's confirmation hearings than they did at Roberts's.

IV. ORIGINALISM, SEPARATION OF POWERS, AND JUDICIAL DEFERENCE TO CONGRESSIONAL STANDING JUDGMENTS

This section considers recent doctrinal and jurisprudential developments that bear on the future of standing at the dawn of the Roberts Court. The first part addresses the revival of interest in originalism as a constitutional interpretation methodology and its import for standing doctrine. The second part addresses recent

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58 Id. at 180–85. The Court also cited the support of the Solicitor General (here, during the Clinton Administration) as amicus curiae in support of plaintiffs. Id. at 188 n.4. Justice Scalia was unimpressed, arguing that "in doubtful cases a long and uninterrupted history of Presidential acquiescence and approval can shed light upon the constitutional understanding," but not when it was only "by a single administration." Id. at 210 n.3 (Scalia, J., joined by Thomas, J., dissenting). The Supreme Court frequently supports the position taken by the Solicitor General as amicus curiae. See Michael A. Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 Am. J. POL. SCI. 72 (2005).

59 Laidlaw, 528 U.S. at 185–94.


62 Id. at 486, 533.
standing decisions of the Roberts Court that turn, in whole or in part, on separation of powers concerns and their impact on congressional statutes that address standing issues. The section concludes with an analysis of the deference the Court does, and ought to, give to citizen-suit provisions in those statutes given separation of powers concerns.

A. Originalism and Standing

In the past two decades there has been a revival of academic interest in originalism—or original public meaning in its most influential manifestation—as an interpretative methodology in constitutional law. That interest has influenced, and in turn been influenced by, Supreme Court decisions that utilize originalist frameworks, with the Court’s recent decision on the Second Amendment in District of Columbia v. Heller as the most recent example. What is less well appreciated is that a vigorous debate over originalism has taken place with regard to standing principles. Some commentators and Justices have argued for decades that the presence or absence of standing in federal courts ought to turn, in whole or in part, on whether the framers of Article III would have considered a particular case to be justiciable.

The Court is fond of tracing its modern standing requirements to the language of Article III stating that federal courts are to only hear “cases” or “controversies.” According to modern opinions, those terms refer to disputes that were “traditionally amenable” to resolution by courts, which in turn usually means those brought by plaintiffs who satisfy the modern three-factor test. But there appears to have been little discussion among the Framers of what these terms meant. A brace of modern commentators have vigorously argued that at the time of the framing of Article III, English practice permitted citizens under some circumstances to challenge official action in court, even when they had not suffered an injury in the

64 128 S. Ct. 2783 (2008).
modern sense of the term. These commentators often argue that standing is a construct of twentieth century jurisprudence, tied to the perceived inadequacies of the private rights model in the modern world.

Not everyone agrees. Several commentators, closely examining cases from the early decades of the Republic, have concluded that the Supreme Court and other federal courts “did see a constitutional dimension to standing doctrine,” even though the word “standing” only came into use in the later half of the twentieth century. This was true, they argue, even when a legislatively created cause of action suggested that the plaintiff would have standing. While these early cases are not models of clarity, these commentators, with equal vigor, argue that modern standing is not a modern invention contradicting history.

These revisionists concede that qui tam statutes Congress passed in the early Republic pose a challenge to their view. Those statutes authorized private citizens, labeled “relators,” to bring actions on behalf of the United States, seeking civil penalties and damages for payments wrongfully made by the government due to false claims of persons providing goods or services to the government. When such an action succeeds, the relator receives a bounty in the form of a percentage of the payments made by the wrongdoer to the government. These statutes (eventually codified in one statute during the Civil War) are examples of Congress statutorily providing for standing when the relator would not independently satisfy standing requirements. Given their pedigree, one might conclude that the Framers thought they were consistent with the requirements of Article III. The revisionists caution against drawing too many conclusions from this history. They observe that the defendants in qui

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68 FALLON ET AL., supra note 7, at 146–47 (citing, inter alia, Sunstein, supra note 26, at 169). Chief Justice Roberts was cognizant of this debate at the time he was writing his article in 1993. See supra note 40 and accompanying text.


70 Id.


72 FALLON ET AL., supra note 7, at 150; Woolhandler & Nelson, supra note 69, at 725–26.
tam actions were (and are) typically private parties, rather than government officials who are the object of many (though of course not all) present day citizen-suit provisions. Moreover, they assert, the qui tam statute can be regarded as a narrow exception to ordinary standing requirements, and one that did not generate any significant litigation until amendments to the statute in 1986. So, they conclude, the qui tam statute should not be regarded as a broad precedent authorizing Congress to statutorily empower plaintiffs who otherwise would not satisfy standing requirements.73

As demonstrated by his article, Chief Justice Roberts was not oblivious to the issues posed by the use of history to inform standing requirements, or the specific issues raised by the qui tam statutes. While disclaiming any attempt to fully respond to the historical arguments, he did argue in a long footnote that reliance on such history “must be tempered with a recognition that the Framers were moving from a unitary system of government to one of separated powers.”74 Thus, he continued, “[p]ractice prior to the framing of the Constitution—and perhaps constitutionally dubious remnants persisting thereafter—[was] not an infallible guide to the scope of judicial power under Article III.”75 With regard to the qui tam statute, he noted that there was litigation challenging its constitutionality at the time, and he cited, though not with explicit approval, an opinion of the Department of Justice’s Office of Legal Counsel that the statute was unconstitutional.76

74 Roberts, supra note 35, at 1222 n.20.
75 Id.
76 Id. Roberts cited a preliminary print of that opinion. For the final version, see Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. Off. Legal Counsel 207 (1989) (authored by William P. Barr, Assistant Attorney General, Office of Legal Counsel (OLC)). The opinion was written in response to the then-pending litigation referenced by Roberts, and because the Solicitor General was prepared to intervene in those cases to support the constitutionality of the statute. Id. at 208. The opinion bluntly concludes that the statute was “patently unconstitutional” because the relator has suffered no injury in fact, and that it was “not even a close question.” Id. at 209. The OLC was unimpressed by the historical pedigree of the statute. Prior to the Civil War, it argued, the “only significant use of qui tam occurred in the Federalist period,” in relatively “arcane areas,” and it appeared “from actual practice that with very few exceptions,” qui tam actions were either brought by government officials, or by persons who had an injury in fact. Id. at 213, 228 n.13. The opinion concluded on the point that “the argument that anything that could go into court in 1787 must be a case or controversy [had] unacceptable consequences.” Id. at 228. Since at common law persons with no injury in fact could challenge public actions through prohibition, mandamus, and other writs, among other things, then today “any person could use these writs to challenge or compel government action wholly unrelated to the person using the writ.” Id. The opinion also argued that qui tam statutes were unconstitutional on the grounds that the designation of relators violated the Appointments and Take Care Clauses of Article II. Id. at 221–24, 228–32. During his confirmation hearings, Roberts stated that he could not recall taking a public position on the constitutionality of the qui tam statute. Roberts Confirmation Hearings, supra note 37, at 323.
The Court reached the issue in 2000 in Vermont Agency of Natural Resources v. United States ex rel. Stevens and, in an opinion by Justice Scalia, unanimously rejected the argument that the qui tam statute violated the Article III standing requirements. The bounty itself, the Court said, could not be considered an injury, since it was simply the "byproduct of the suit itself." However, the government had suffered an injury by being defrauded, and the relator had standing by being assigned the claim. This conclusion was "confirmed . . . by the long tradition of qui tam actions in England and the American Colonies." After reviewing that history, the majority considered it "well nigh conclusive" that such actions were cases and controversies "traditionally amenable to, and resolved by, the judicial process." "When combined with the theoretical justifications for relator standing," the Court concluded, "it [left] no room for doubt that a qui tam relator . . . has Article III standing." Given the Court's close attention to the specific circumstances of the development of the qui tam statute, it seems fair to conclude that Stevens is confined to its peculiar facts, and does not stand as a broad precedent with regard to other statutes that Congress might pass.

In 2008, the Roberts Court revisited the use of originalism in standing cases in Sprint Communications Co., L.P. v. APCC Services, Inc. That case involved a plaintiff who was the assignee of a claim and had promised to remit any proceeds of the litigation to the assignor. The suit was originally brought by payphone operators who argued they were entitled under the Communications Act of 1934 to compensation from certain long-distance carriers. Due to the expense of litigation and the lack of size of individual claims, though, the operators assigned their claims to collection firms, which in turn agreed to remit any proceeds to the operators. The defendant

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77 529 U.S. 765 (2000).
78 Id. at 773.
79 Id. at 774.
80 Id. at 777 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)).
81 Id. at 778. The Court added that it was expressing no view on possible Article II challenges to the statute. Id. at 778 n.8. These were the same challenges that concerned the OLC in 1989. See Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. Off. Legal Counsel 207 passim (1989). The Court made no mention of this opinion in the Stevens case. It was cited in the briefing in the case. E.g., Brief for Petitioner at 44, 46, Stevens, 529 U.S. 765 (No. 98-1828).
82 See Woolhandler & Nelson, supra note 69, at 731; see also Farber, supra note 34, at 1533–35 (arguing that Justice Scalia in Lujan made little effort to defend his conclusions on originalist grounds).
84 Id. at 2533.
85 Id. at 2534.
companies challenged the standing of these collection firms as plaintiffs.\textsuperscript{86}

The Court, splitting five to four, held in an opinion by Justice Breyer that the collection firms had standing. The Court, after citing the familiar three-part test for standing, began by observing that it had “often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.”\textsuperscript{87}

In an exhaustive and exhausting analysis of cases and treatises from England, colonial America, and the early decades of the Republic, the Court found that history and precedent was “‘well nigh conclusive’” that suits by assignees, including those for collection only, fell within the traditional understanding of cases and controversies.\textsuperscript{88} The defendants did not offer “any convincing reason” to depart from this historical practice and, the Court continued, “in any event,” the standing requirements “articulated in more modern decisions of th[e] Court” had been satisfied.\textsuperscript{89} On that front, the Court held that the assignment created enough of an injury to satisfy Article III, and that there were no prudential reasons to find lack of standing.\textsuperscript{90}

Chief Justice Roberts wrote a vigorous dissent.\textsuperscript{91} “We have never,” he said, “approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the court. Never.”\textsuperscript{92} He argued that, properly understood, the cases articulating injury-in-fact principles were not satisfied. Nor was the seemingly similar case of \textit{Stevens}, since the Court, in that case, was careful to note that the assignment involved there vested a legal right in the relator and a personal stake in the recovery.\textsuperscript{93} Nor did history, according to Roberts, support the majority. The historical sources, he argued, only supported the general proposition that assignees could sue on the assigned claims, but were “either nonexistent or equivocal” on the precise issue of assignors who claimed no right to any recovery.\textsuperscript{94} Engaging in a lengthy analysis of those sources, almost matching that of the majority, the dissent echoed concerns mentioned in the Chief Justice’s law review article. The historical tradition on point, he argued, was simply not as clear or as entrenched as, by

\begin{itemize}
\item \textsuperscript{86} \textit{Id.} at 2534–35.
\item \textsuperscript{87} \textit{Id.} at 2535.
\item \textsuperscript{88} \textit{Id.} at 2541–42 (quoting \textit{Vermont Agency of Natural Resources v. United States ex rel. Stevens}, 529 U.S. 765, 777 (2000)).
\item \textsuperscript{89} \textit{Id.} at 2542.
\item \textsuperscript{90} \textit{Id.} at 2543–45.
\item \textsuperscript{91} \textit{Id.} at 2549 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting).
\item \textsuperscript{92} \textit{Id.} at 2551.
\item \textsuperscript{93} \textit{Id.} at 2550.
\item \textsuperscript{94} \textit{Id.} at 2553.
\end{itemize}
comparison, that involving the qui tam statute. He added that while the Court had “sometimes looked to cases postdating the founding era as evidence of common-law traditions,” it had not done so “when the courts self-consciously confronted novel questions arising from a break in the received tradition, or where the practice of later courts was so divergent.”95 Putting the same point another way, the dissent chided the Court for relying “on an equivocal and contradictory tradition to override the clear application of the case-or-controversy requirement that would otherwise bar [the] suit.”96

Despite the lavish attention to history in the opinions in Sprint, it seems unlikely that the case portends a definitive turn toward originalism in standing jurisprudence, for several reasons. In both Stevens and Sprint, the Court did not rely exclusively on originalist analysis, but utilized it only in conjunction with the modern standing principles. The relationship between the two is not clear, and the decisions were not faced, as they saw it, with the stark issue of originalist analysis being in direct conflict with modern standing requirements. Moreover, while the Court’s review and use of history in Stevens seemed uncontroversial, the same cannot be said for its lengthy and inconclusive survey in Sprint.97 Finally, Chief Justice Roberts’ comments in Sprint and his article suggest that he is not enamored of originalism as a method of constitutional interpretation for Article III and, perhaps, other provisions.98

B. Beyond Originalism: Taxpayers, States, and Standing

The early Terms of the Roberts Court saw two controversial standing decisions that turned largely on the application of modern standing principles—with only a limited nod toward history.99

95 Id. at 2557.
96 Id. at 2558.
97 Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 SUP. CT. REV. 183, 189 (arguing that the Sprint opinions undertake “an extremely formal account of the history of assignment of claims”). For example, much of the dueling opinions was taken up in disputing whether a student law review comment published in 1967 correctly characterized the state of the law on an assignee’s interest as of that date. Compare Sprint, 128 S. Ct. at 2540 (majority opinion), with id. at 2556 (Roberts, C.J., dissenting).
98 See Akhil Reed Amar, Heller, HLR, and Holistic Legal Reasoning, 122 HARV. L. REV. 145, 179 (2008) (arguing that Roberts is more a pragmatist and doctrinalist than an originalist); Laura Krugman Ray, The Style of a Skeptic: The Opinions of Chief Justice Roberts, 83 IND. L.J. 997, 998 (2008) (arguing that Roberts is a judicial skeptic “who favors experience over theory”). As his article demonstrates, Roberts is also not oblivious to the historical arguments in favor of a broad application of citizen-suit provisions, and perhaps he feels that a decisive turn towards originalism in standing cases would make it difficult to resist such arguments. See Roberts, supra note 35, at 1220–22.
99 In its early Terms, the Roberts Court has also decided several standing cases not
The first case was *Hein v. Freedom from Religion Foundation, Inc.*,\(^{100}\) which held that federal taxpayers lacked standing to challenge the constitutionality of the President’s efforts to use federal money for his “faith-based initiatives.” The path to *Hein* is well known to students of federal courts doctrine, and need only be briefly canvassed here. The Court first directly addressed the issue in *Frothingham v. Mellon*,\(^{101}\) which unanimously held that a taxpayer lacked standing to challenge a federal statute that provided financial support to states for maternity programs, on the basis that it exceeded Congress’s Article I powers. The Court found that the plaintiffs’ payment of taxes was not enough of an injury for standing purposes, given their minute nature in light of the vast number of taxpayers.\(^{102}\)

If *Frothingham* is a prototypical example of the application of the private rights model, then the Warren Court’s reexamination of the case in *Flast v. Cohen*\(^{103}\) comes close to being a classic case of the public rights model.\(^{104}\) That case held that taxpayers had standing to challenge the constitutionality, on Establishment Clause grounds, of a law Congress passed in 1965 to provide financial support for educational programs in religious schools.\(^{105}\) *Frothingham* was distinguished on several grounds. Chief Justice Earl Warren, writing for the majority, suggested that the bar of *Frothingham* rested on prudential rather than constitutional grounds.\(^{106}\) Revisiting whether taxpayers had standing, the Court held that such plaintiffs must satisfy a two-part nexus test: “a logical link between” taxpayer status and the legislative enactment at issue, and “a nexus between that status and the precise nature of the constitutional infringement alleged.”\(^{107}\) The test was satisfied in *Flast*, since the Establishment Clause was deemed to be a specific limit on Congress’s taxing and spending power, but it had not been in *Frothingham* because there no specific limit was at issue. Justice John Marshall Harlan dissented, arguing

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\(^{100}\)*551 U.S. 587 (2007).

\(^{101}\)*262 U.S. 447 (1923).

\(^{102}\)*Id. at 487–89.

\(^{103}\)*392 U.S. 83 (1968).

\(^{104}\)*See FALLON ET AL., supra note 7, at 121 (making this comparison).

\(^{105}\)*Flast, 392 U.S. at 88.

\(^{106}\)*Id. at 92–94.

\(^{107}\)*Id. at 102.
that (among other things) the taxpayers had no personal interests at stake, and thus were representing the public interest. Such claims should not be justiciable, he concluded, unless Congress had authorized them.108

What is particularly notable and underappreciated about Flast is that Congress had considered authorizing taxpayers to challenge the constitutionality of the Elementary and Secondary Education Act of 1965, the statute at issue in the case. There is clear legislative history that, in both the House and the Senate at the committee level and in debate on the floor, members of Congress considered, but rejected, amendments that would have authorized taxpayers to bring a constitutional challenge in federal court.109 These provisions were part of a larger (though unsuccessful) effort by Senator Sam J. Ervin and others in the 1960s to authorize constitutional challenges to federal statutes that authorized various kinds of aid to religious schools.110 The Flast Court alluded to the rejected provisions.111 Although the modern view of statutory interpretation is highly skeptical of the weight to be given rejected statutory proposals,112 it is still striking

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108 Id. at 131–32 (Harlan, J., dissenting). On the other hand, Justice Harlan also appeared to argue that plaintiffs could “have standing to represent the public interest[,] despite their lack of economic or other personal interests,” if authorized by Congress. Id. at 131. Famed administrative law scholar Kenneth Davis, who was otherwise critical of the majority opinion, was also critical of this aspect of Harlan’s opinion. Kenneth Culp Davis, Standing: Taxpayers and Others, 35 U. CHI. L. REV. 601, 613–17 (1968).

109 This history is discussed in detail in the Brief of Amici Curiae, Flast, 392 U.S. 83 (No. 416), 1967 WL 95616. The amendments were rejected for a number of expressed reasons, including that some members thought that judicial review would have been available anyway, in light of the finding of standing in recent school prayer cases that arose from state courts, and the presence of statutory language that permitted judicial review under specialized circumstances. Id. at 15–18. The amicus brief nonetheless argued that the legislative history demonstrated that Congress passed the 1965 Act on the assumption that there would be a judicial forum open to hear any constitutional challenges. Id. at 15. In contrast, the lower court drew from the rejected amendments the lesson that Congress did not wish to authorize such suits. Flast v. Gardner, 271 F. Supp. 1, 14 n.12 (S.D.N.Y. 1967) (three-judge court), rev’d sub nom. Flast v. Cohen, 392 U.S. 83 (1968).

110 See Flast, 392 U.S. at 113 & n.8 (Douglas, J., concurring); see also id. at 133 & n.23 (Harlan, J., dissenting). The majority did not mention the rejected amendments, but did cite subsequent hearings on other similar bills convened by Senator Ervin, in which legal scholars and others addressed the propriety of such provisions. Id. at 92 n.6, 93 n.7, 94 n.8, 99 n.18 (majority opinion).

111 See William N. Eskridge, Jr. et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 1022–26 (4th ed. 2007) (discussing cases and
that the Court approved of taxpayer standing in the face of expressed congressional resistance.

The taxpayers' doctrinal victory in *Flast* was a temporary one. While the precise *Flast* holding remained intact, the Court in subsequent cases declined to extend the rationale. Most notable in this regard was *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, where the majority (per Justice William Rehnquist) held that *Flast* did not cover a challenge to the sale or lease of federal property to a religious college. Although the challenge was on Establishment Clause grounds, the Court found that the taxpayer plaintiffs lacked standing because an agency action was the source of the complaint—and the agency action was pursuant to a statute authorized under the Property Clause, not Congress's taxing and spending powers. The decision “is difficult to reconcile with *Flast*,” since the majority was noticeably cool toward the public law paradigm of the case and, as Justice William Brennan's dissent argued, the distinctions the majority drew were not especially persuasive.

The curtailment of *Flast* continued in *Hein*. That case involved an Establishment Clause challenge to President George W. Bush's executive orders, which, among other things, authorized the payment of federal funds for faith-based social programs. Splitting five to four, the Court held that federal taxpayers lacked standing to challenge the program. Justice Alito authored the lead opinion, a plurality joined by the Chief Justice and Justice Kennedy. The opinion repeatedly emphasized the “narrow exception” *Flast* made for taxpayer standing, that *Flast* gave insufficient weight to separation of powers concerns, and the limited role that federal courts should have in reviewing the actions of the other branches of government. The plurality found *Flast* inapplicable, since the expenditures here, unlike in *Flast*, were not made by specific

scholarship).


114 Id. at 479–80.

115 FALLON ET AL., supra note 7, at 122.

116 The majority opinion had a lengthy summary of the traditional, modern standing principles, and the underlying separation of powers rationales, before a relatively brief summary of *Flast* and its progeny that referred to the "Flast exception to the Frothingham principle." *Valley Forge*, 454 U.S. at 481.

117 Id. at 505–12 (Brennan, J., joined by Blackmun & Marshall, JJ., dissenting).


119 Id. at 602, 608, 615.

120 Id. at 611.
congressional appropriation, but rather were made from general monies Congress authorized for use by the executive branch.\footnote{Id. at 605-09.} That all said, the plurality declined an explicit call, made by some amici,\footnote{See Brief of the States of Indiana et al. as Amici Curiae in Support of the Petitioners, Hein, 551 U.S. 587 (No. 06-157), 2007 WL 62298; Amicus Brief of the American Center for Law and Justice in Support of Petitioners, Hein, 551 U.S. 587 (No. 06-157), 2007 WL 43247.} to overrule Flast. Acknowledging the debate, the plurality found it unnecessary to overrule the case. It declined to extend Flast and left the case “as [it] found it.”\footnote{Hein, 551 U.S. at 615. Justice Kennedy, in a concurring opinion, emphasized that if these taxpayers were found to have standing, it would lead to “constant intrusion upon the executive realm.” Id. at 617 (Kennedy, J., concurring).}

In contrast, in a characteristically combative concurring opinion, Justice Scalia, joined by Justice Thomas, argued that Flast should be overruled. He argued that either Flast should logically be extended to all challenges to government expenditures, or overruled as “wholly irreconcilable” with the usual standing requirements.\footnote{Id. at 618 (Scalia, J., joined by Thomas, J., concurring).} He argued that Flast unpersuasively distinguished Frothingham and that Valley Forge and later cases unpersuasively distinguished Flast.\footnote{Id. at 620-28.} By the same token, he dismissed Flast as being based on nothing more than a “Psychic Injury,” and that it found no support in precedent “or our Nation’s history.”\footnote{Id. at 632.} For good measure, he added that Flast’s double nexus test failed to take into account and was not moored in separation of powers concerns, and that the bar against taxpayer standing was constitutional, not merely prudential.\footnote{Id. at 635-36, 634 n.5.} Justice David Souter dissented, arguing that it was a logical extension of Flast to apply it to both legislative and executive expenditures, and that, in other cases, the Court had found standing for “esthetic” injuries that were little different “than seeing one’s tax dollars spent on religion.”\footnote{Id. at 642 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting) (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656 (1993) (inability to compete for a contract was injury); United States v. Hays, 515 U.S. 737 (1995) (living in a racially gerrymandered electoral district was injury)).}

Several aspects of Hein are noteworthy. The plurality opinion did not undertake any originalist analysis.\footnote{See Cass R. Sunstein, Second Amendment Minimalism: Heller as Griswold, 122 HARV. L. REV. 246, 249 n.19 (2008) (making this point). It was not for lack of trying by at least one amicus brief. See Brief for Legal and Religious Historians and Law Scholars Paul Finkelman et al. as Amici Curiae in Support of Respondents, Hein, 551 U.S. 587 (No. 06-157), 2007 WL 320997.} Flast itself, and later
opinions in dissent, such as Justice Brennan’s in Valley Forge and Justice Souter’s in Hein, all discuss the history of the Establishment Clause and how it was intended as a barrier to federal funding of religion. This may be true, but such originalism is too general to properly inform the interpretation of Article III. As Justice Scalia remarked in Hein, such history does not specifically address whether the Framers intended taxpayer suits, under that Clause or any other, to fall under Article III. Still, given the body blows Flast has absorbed in the past forty years, perhaps it is surprising that the plurality did not join Justice Scalia in overruling the case. Part of the answer might be that the Justices in the plurality gave greater deference to precedent, especially when the government did not call for Flast to be overruled. Moreover, an empirical study indicates that lower federal courts have generally applied Flast narrowly, and it has not led to the proverbial flood of cases by federal taxpayers.

Still, Hein has hardly settled all of the issues on the fate of Flast. One is whether the practical and oft-criticized limit of Flast to Establishment Clause cases is a stable one. The fractured opinions in Hein suggest that a differently constituted Court might be willing to revisit the issue—even given the benefit of stare decisis—and perhaps overrule Flast in its entirety. (Extending Flast beyond the Establishment Clause context seems extremely unlikely after Valley Forge and Hein.) Justice Alito’s opinion in Hein took pains to limit Flast to explicit statutory authorization of expenditures, but it is not clear how explicit it must be. The frequent, if controversial, use of earmarks by Congress may eventually provide a test case of this problem. Finally, these cases involved the standing of federal taxpayers, and it is not clear how federal courts should deal with plaintiffs who claim standing as state or local taxpayers.

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130 Hein, 551 U.S. at 632 (Scalia, J., concurring).
131 See Nancy C. Staudt, Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine, 52 Emory L.J. 771, 802 (2003) (empirical study of federal court cases from 1982 to 2002 showed relatively few cases by federal taxpayers); cf. Davis, supra note 108, at 634 (arguing that flood argument against taxpayer standing is overblown, because there was no flood of litigation prior to Frothingham, and courts can weed out frivolous cases).
132 For discussion of these issues, see Ira C. Lupu & Robert W. Tuttle, Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication, 2008 BYU. L. Rev. 115, 133–38. For the moment, lower courts consider Justice Alito’s opinion to be controlling. E.g., Laskowski v. Spellings, 546 F.3d 822, 827 (7th Cir. 2008).
133 Lupu & Tuttle, supra note 132, at 138–45. Likewise, the continuation of federal financial support to faith-based social programs in the Obama administration may lead to further legal challenges. See Susan Jacoby, Op-Ed., Keeping the Faith, Ignoring the History, N.Y. Times, Mar. 1, 2009, at 11 (describing the federal constitutional problems with government-aided religious programs).
134 Lupu & Tuttle, supra note 132, at 145–47. Staudt points out that federal courts have
The other controversial case was also decided in 2007. In *Massachusetts v. EPA*, the five to four decision, the Court held that a state had standing to challenge a refusal by the Environmental Protection Agency to issue regulations to govern greenhouse gas emissions by motor vehicles. Massachusetts joined with twelve other states and other plaintiffs to file a challenge in the U.S. Court of Appeals for the District of Columbia pursuant to a statute that vested such challenges exclusively in that court. The statute, however, said nothing about which parties may bring such a challenge. The Court held that, in these circumstances, the state was not required to fully satisfy the ordinary standing requirements. When Congress has "'accorded [a litigant] a procedural right to protect his concrete interests,'" the litigant need not meet "'all the normal standards for redressability and immediacy.'" Moreover, that procedural right and the state's "'stake in protecting its quasi-sovereign interests'" indicated that the state was entitled to "'special solicitude in our standing analysis.'" With those postulates in mind, the majority proceeded to find that Massachusetts met the standing requirements. Massachusetts owns coastal property, and that property could be affected by the rise in ocean levels potentially due to global warming. This was true even though American cars would not be the sole source of the emissions which lead to global warming, and that the relief sought might only reduce "'to some extent'" the posited environmental damage.

Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito. He viewed the case through the lens of the three traditional standing requirements, and he argued they were not satisfied. The alleged injuries to Massachusetts, he asserted, were neither imminent nor particularized, and instead were based largely on computer models. Likewise, the "'fractional amount of global emissions that...
might have been limited” by EPA actions could not be traced to the injuries, and the relief requested could not redress the injuries. Roberts concluded with the familiar argument that the majority’s loosened standing requirements constituted an intrusion upon the policy decisions properly left to the elected branches of government.

Given the high-profile nature of the substantive dispute, it is no shock that Massachusetts received much attention in the popular and scholarly press. The majority opinion does arguably take an ultra-flexible approach to the standing requirements, suggesting that the requirements might be relaxed, or perhaps be subject to inter-factor balancing, given the importance (e.g., potential existential nature) of the underlying substantive issue. Many of the cases discussed in this Article would need to be revisited if the Massachusetts approach were to be applied across the board. But the significance of the case should not be overstated. In his dissent, Chief Justice Roberts suggested that the “diluted standing requirements” the majority applied should be limited to states as plaintiffs, given the majority’s references to the quasi-sovereign status of states. He seems to correctly read the majority opinion, which at several points emphasized the importance to its holding that states were the plaintiffs. To be sure, even as so limited, the decision has importance for emboldening states to be plaintiffs, and should augment the recent activism of state attorney generals who will typically bring such litigation, alone or in combination, on behalf of

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140 Id. at 544.
141 Id. at 544-49 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting). The dissent also argued that the majority did not properly rely on the Tennessee Copper case. Id. at 537–38; see supra note 138. That case, the dissent asserted, had nothing to do with standing, and merely stood for the proposition that a state had parens patriae authority to represent citizens who themselves had to satisfy standing. Massachusetts, 549 U.S. at 537–38 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).
142 Id. at 546–49.
145 Massachusetts, 549 U.S. at 548 (Roberts, C.J., dissenting).
146 See Mank, supra note 144, at 1730, 1756.
Likewise, the decision, taken alone, should not portend an expansion of the interpretation or application of citizen-suit provisions, or of revisiting cases like *Lujan*. The statute referenced in the case was not a classic citizen-suit provision, and the majority, in any event, did not give significant weight to the impact of the statute. In light of these factors, it seems unlikely that *Massachusetts* will be extended beyond the quantitatively limited, though qualitatively important, area of standing for states.

C. Congress, the Courts, and the Future of Standing

As has been suggested already, Supreme Court doctrine on the scope of congressional power to influence standing in federal court is not a model of clarity. No Justice has suggested that Congress lacks any power in this regard, and even cases like *Lujan* suggest that Congress may statutorily bless injuries to provide standing where those injuries would not have been recognized at common law. But beyond those generalities, the level of congressional authority to authorize departures from the private rights model is not clear. Justice Scalia (as demonstrated in his opinions) and Chief Justice Roberts (as demonstrated in his law review article, and as suggested by his opinion in *Massachusetts*) seem to take the most restrictive approach—that Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones.

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147 Id. at 1780–85. Which is not to say that states will now have a free ride when it comes to standing requirements. See, e.g., Oregon v. Legal Servs. Corp., 552 F.3d 965 (9th Cir. 2009) (state lacked standing to challenge regulations issued by the Legal Services Corporation, due to lack of particularized injury, and lack of independent quasi-independent interest that could support parens patriae action).


149 For these reasons, I find unpersuasive Professor Brown’s arguments that the standing analysis of *Massachusetts* should be applied more generally. Brown, *Generalized Grievances*, supra note 144, at 224, 249. Even she concedes the importance of language in the majority opinion stressing the special nature of states as plaintiffs, and that the authorizing statute in the case was not akin to a classic citizen-suit provision. Id. at 249 & n.160, 272 n.265.

150 See id. at 271 (noting the “conflicting signals” the Court has sent on these issues); Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 959–60 (2008) (arguing that standing doctrines represent not a body of law but an ideological struggle).

Other adherents to majority opinions, such as Justice Kennedy in his concurring opinion in *Lujan*, suggest a broader congressional power if embodied in a properly drafted statute. Still other majority opinions, as in *FEC v. Akins*, seem to evince a more generous reading of congressional power to influence standing.

The more restrictive aspects of current doctrine have been the subject of a sustained critique by liberal scholars. We have already seen one strand of that critique, which argued that Congress should be able to statutorily authorize suits by plaintiffs who would otherwise not satisfy the constitutional standing requirements. That argument, at least in its broad form, was rejected in *Lujan*. But the critique goes deeper. These scholars argue that not giving Congress broader power in this regard misconceives the respective roles of the legislative and judicial branches. Congress, the argument runs, has the constitutional authority to define the jurisdiction of the lower federal courts and a greater competence than the federal courts to find facts; thus, Congress should be able to determine if private enforcement of law is necessary, as opposed to leaving it exclusively to the executive branch.\(^1\) With respect to the argument that a broad reading of Article III standing improperly limits executive power under Article II, some scholars contend that it does not give sufficient weight to the balance, as opposed to the separation, of powers.\(^2\) So, it is suggested, Congress creating private enforcement might well limit presidential power, but that is simply part of the ageless tug of war between the two branches, one that the federal courts should play a limited role in mediating.\(^3\)

The more restrictive aspects of current doctrine have also been defended by conservative scholars. These scholars argue that the creation and operation of citizen-suit provisions are driven largely by interest-group politics. These provisions, as has been colorfully argued, are citizen in name only since they are often brought by environmental interest groups.\(^4\) Nor is there much evidence, the

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\(^1\) See *Yacke*, *Reclaiming*, supra note 66, at 78–79 ("Nothing in the general conception of the separation of powers begets the intricate standing rules the Court has developed."); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 *Wis. L. Rev.* 37, 61–62 ("[U]nless Congress attempts to grant standing to a plaintiff who clearly has suffered no injury, separation of powers concerns counsel the Court to defer to Congress' ability to define injuries.").


\(^3\) Brown, *Generalized Grievances*, supra note 144, at 283; Elliott, supra note 153, at 490–92.

argument continues, that such suits improve environmental policy or the environment. The main beneficiaries, financially and otherwise, have been interest groups and their attorneys. In this light, it can hardly be said that these provisions advance the public interest. The litigating interest groups are accountable to no one, while enforcement of federal law (or lack thereof) by the executive "will, at least to some extent," be subject to public control and "reflect public preferences." This public choice critique will resonate with the defenders of Justice Scalia's arguments that litigation brought under citizen-suit provisions encroaches on the executive's Article II powers.

The differences between the liberal and conservative critique of doctrine regarding congressional power over standing can be overstated. At the extremes are the positions that Congress can always, or never, statutorily empower private parties to enforce federal law when those parties do not satisfy constitutional standing requirements. But there is some consensus between those positions. For example, some of the most articulate defenders of the Lujan decision concede that, as a constitutional matter, Congress has wide discretion to empower private parties to enforce federal law, even if that means contesting the President's exercise of discretion. But they don't concede that congressional discretion is boundless, and it must be reconciled with the Article II "interest in unified law


157 Greve, Friends of the Earth, supra note 155, at 177.

158 See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 209–10 (2000) (Scalia, J., dissenting) (citing Greve, Private Enforcement, supra note 155). In his article, then-Judge Scalia analogously argued that it was unnecessary and undesirable to craft standing doctrine to permit less politically powerful groups to challenge executive decisions. Courts are primarily intended, he argued, to protect minorities from majority oppression. If the political branches are ignoring a social problem, then that is desired by the majority, and laws that go unenforced are also so desired by the majority. Scalia, supra note 151, at 897; see also Adler, God, supra note 148, at 195–97 (using this approach to argue that standing might be justified in Hein, since the Court is playing a countermajoritarian role in enforcing the Establishment Clause, while it undermines Massachusetts and other environmental standing cases, since in those cases private litigants are bypassing the political process to counter a perceived widespread harm). Liberals have responded by arguing "that our government is not designed to put the majority's will into operation at every turn," and that the "mere fact of widespread harm does not lead to political mobilization." Elliott, supra note 153, at 489, 491. See generally YACKLE, FEDERAL COURTS, supra note 6, at 332–35 (discussing Scalia's article and reaction to it).
enforcement.” So when structuring the enforcement of federal law, they continue, “Congress must choose the Executive, individuals who are injured distinctively, or some combination of both to enforce compliance with its dictates.” For another example, the defenders of congressional prerogatives sometimes argue that there has not been a flood of citizen-suit cases, and that their impact on agency discretion has been modest. Similarly, a recent empirical study has suggested that the argument that interest groups dominate this litigation has been overstated.

In my view, neither the liberal nor the conservative critique has a monopoly on correctness. Both critiques advance persuasive arguments regarding the appropriate interaction of the first three articles of the Constitution. The liberal critique enhances the power of the judiciary and that of private parties empowered by Congress, at the expense of representative government in general and of the executive branch in particular. The conservative critique enhances the power of the President and in theory encourages Congress to exercise its nondelegable oversight and appropriations functions, at the expense of giving space for the executive branch to underenforce or violate federal law. Reasonable people can reconcile these values in different ways, but it is difficult to denigrate these values in the first instance. In this environment, a victory for one side is both unlikely and inappropriate.

A greater appreciation of the value of a truce is gained by examining in greater detail how Congress has approached standing. In this regard, Congress has rarely acted at the wholesale level. For example, in the late 1970s, some liberal Democratic members of the Senate Judiciary Committee, not oblivious to the more restrictive standing decisions from the first decade of the Burger Court, introduced bills that would have granted broad standing to citizens to enforce federal constitutional and statutory law. The proposed

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159 Krent & Shenkman, supra note 26, at 1795.
160 Id. For somewhat similar views, see Woolhandler & Nelson, supra note 69, at 724–25, who add that one can accept some limits on Congressional authority without necessarily embracing the “more extreme views of the ‘unitary executive.’” Id. at 725 n.171.
161 E.g., Brown, FECA Suits, supra note 34, at 713–15.
163 Cf. Murphy, supra note 150, at 948 (calling for a compromise on the restrictive and expansive views of standing, “[a]s both factions in the fight both serve and undermine important values”).
164 YACKLE, RECLAIMING, supra note 66, at 66 (discussing leadership of Senators Kennedy and Metzenbaum on this issue).
legislation would not have done away with constitutional standing requirements, but would have broadly defined what an "affected citizen" was, and how the causation requirement was to be met. Hearings on the bills drew an impressive list of academics, judges, and interest groups. Officials from the Carter administration gave guarded support for the proposals, while the lobbying arm of the federal judiciary argued against the across-the-board nature of the legislation, suggesting instead that, at best, statutes be incrementally amended. In the end, none of these bills were passed, and congressional interest in such broad-based legislation appears to have seriously waned.

In contrast, Congress has frequently acted on a retail basis. Since the nineteenth century, Congress has enacted scores of statutes that create private causes of action for plaintiffs to enforce federal law against federal or state governmental authorities, or private parties. Most of these statutes do not explicitly or implicitly address standing issues as such. It was only in recent decades that Congress did so in citizen-suit provisions, almost all of which appear in environmental statutes. Some are also in civil rights statutes, and some authorize

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166 See generally The Citizens' Right to Standing in Federal Courts Act of 1978: Joint Hearings Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the S. Comm. on the Judiciary and the S. Comm. on Governmental Affairs, 95th Cong. 5–18 (1978) (statement and testimony of Paul Nejelski, Deputy Assistant Att’y Gen., U.S. Department of Justice).


170 Brown, FECA Suits, supra note 34, at 683 & n.33.

action against private persons or corporations,\textsuperscript{172} in lieu of, or addition

to, those against public entities or public officials. Why has Congress

passed these statutes? The complicated mix of reasons includes

interest group lobbying, the desire to mobilize private litigants in aid

of the advancement of substantive policy goals, and skepticism that

the executive branch would enforce particular federal statutes,

especially at times of mixed party control of the presidency and

Congress.\textsuperscript{173} Other rationales, such as the use of these statutes as a
device to combat agencies being captured by regulated interests, have

been advanced.\textsuperscript{174} In short, there is a rich history of Congress

providing for the private enforcement of federal law, and occasionally

addressing issues of a particular plaintiff’s standing.

This history suggests several conclusions that, for federal judges,

are of prudential, if not constitutional, dimension. It is not an empty

and abstract gesture to argue that federal courts should give some

level of deference to Congress statutorily addressing the standing of

potential plaintiffs in the larger context of deciding how a particular

federal law ought to be enforced. As the liberal critique suggests, the

enactment of these provisions has been in part the product of policy

battles between the legislative and executive branches. Perhaps

an enforcement scheme might be criticized as inefficient,
counterproductive, or the product of “special interest group pressure

or . . . myopia,” but “there is generally no constitutional dimension to

that determination.”\textsuperscript{175} So if Congress seems to be statutorily adopting

\textsuperscript{172} E.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167


\textsuperscript{173} For excellent explorations of these reasons in the context of environmental statutes, see

Elizabeth Magill, Standing for the Public: A Lost History, 95 VA. L. REV. 1131, 1185-95

(2009); Joseph L. Smith, Congress Opens the Courthouse Doors: Statutory Changes to Judicial

Review Under the Clean Air Act, 58 POL. RES. Q. 139 (2005); Joseph L. Smith, Judicial

Procedures as Instruments of Political Control: Congress’s Strategic Use of Citizen Suits, 31

LEGIS. STUD. Q. 283 (2006) [hereinafter Smith, Judicial Procedures]. For further explorations in

the context of civil rights statutes, see Sean Farhang, Congressional Mobilization of Private


The same reasons, and legislative inertia, no doubt explain the rarity of repeal or weakening of

citizen-suit provisions. Smith, Who’s Suing, supra note 162, at 379–80. But see Dawn M.

Chutkow, Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts,

70 J. POL. 1053, 1058 (2008) (study of statutes between 1943 and 2004 found that Congress

“explicitly and regularly removes court jurisdiction . . . designed to prevent court review of

administrative decision making”); Brendon Swedlow, Reason for Hope? The Spotted Owl


Congress amended environmental laws to blunt impact of a particular lawsuit brought by an

interest group under a citizen-suit provision).

\textsuperscript{174} See Elliott, supra note 153, at 500.

\textsuperscript{175} Kent & Shenkman, supra note 26, at 1805-06 (citing Sunstein, supra note 26, at 186–

93); see also RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 134–35 (2004);

Elliott, supra note 153, at 509–10. This position is sometimes suggested in the cases. E.g.,

Laidlaw, 528 U.S. at 186 (deferring to congressional judgment on what remedies will best
the public law model of standing, whether it is wise or foolish to do so, federal courts should give wide ambit to the application of those statutes when confronting questions of constitutionality and application. But a wide ambit does not mean judicial abdication. The doctrinal tools are available to provide some cabining of congressional power. The one most readily available is Justice Kennedy’s concurring opinion in *Lujan*, which suggested that carefully drawn congressional statutes addressing standing should be upheld as constitutional. Such a statute addresses, at least in part, the critique of Chief Justice Roberts that a narrower vision of standing will force Congress not to abdicate its institutional responsibilities to engage in oversight of the enforcement of federal law. How do we know a statute meets Justice Kennedy’s test? Like any other task of statutory interpretation, it will involve close examination of statutory text, structure, and legislative history. The task will not always be easy, but it will be a useful starting point.

achieve deterrence goal).


See Krent & Shenkman, supra note 26, at 1822-23.

See e.g., Logan, supra note 152, at 66 n.123 (observing that in *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972), the Court was forced to focus almost exclusively on the text, as there was little legislative history or debate on the citizen-suit provision). A recent example of a court carefully analyzing a citizen-suit provision is *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009). There, the court considered whether a provision of the Real Estate Settlement Procedures Act (RESPA) of 1974, 12 U.S.C. § 2607 (2006), confers standing on a customer who is the victim of an overcharge in certain real estate transactions. *Carter*, 553 F.3d at 982. The RESPA states in part that parties that violate the Act shall be liable “to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.” 12 U.S.C. § 2607(d)(2). The court examined at length the text, legislative history, statutory purpose, and accompanying regulations of the provision. *Carter*, 553 F.3d at 986-88. Then, the court concluded that plaintiffs empowered by the provision possessed Article III standing, as Congress has authority to create statutory rights, and the injury here was akin to the informational injury recognized by the Supreme Court in similar contexts. *Id.* at 989 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982)). Thus, the plaintiffs had standing, even though they did not allege an above-market rate charge for services, i.e. an ‘overcharge.’” *Id.* at 982.

I am not arguing in favor of a purely positivist approach to standing, which by some accounts would rely, apparently exclusively, on whether the statute explicitly provides that a citizen (or any other plaintiff, like a state) can sue. See e.g., Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 616-17 (1999) (“The question of standing is for congressional rather than judicial resolution.”); Welti,
On this account, some of the previously discussed cases fare better than others, where Congress has statutorily addressed standing, and where standing is otherwise problematic. For example, 

Lujan and Akins seem more reconcilable than thought by some scholars, given that the citizen-suit statute in the latter case had different language and a richer jurisprudential meaning giving context to the operative language. On the other hand, Flast and Massachusetts are more problematic. As indicated above, in the statute under attack in Flast, Congress declined the opportunity to grant taxpayer standing. That alone calls the correctness of the decision into serious question, on a view that gives serious (though not dispositive) weight to congressional judgments on the propriety of standing. Likewise, the failure of the statute in Massachusetts to specifically mention standing issues, much less the standing of states, makes the decision more difficult to defend.

CONCLUSION: THE FUTURE OF STANDING IN THE ROBERTS COURT

Writing in 1993, John Roberts seemed sanguine about the state of standing in the post-Lujan world. For example, he argued that standing is an “apolitical limitation on judicial power,” and its restrictions will affect both liberal and conservative interest groups. This showed admirable evenhandedness on his own part, since the conventional wisdom holds that usually Congress has drafted citizen-suit provisions, at least in part, to aid pro-regulatory, typically liberal interest groups, and that such groups, for the most part, have

supra note 148, at 1783–84 (presenting this view in context of critical analysis of Massachusetts).

See supra note 33 and accompanying text. It also cannot go unnoticed that Justice Kennedy concurred in both cases, and even Justice Scalia, dissenting in Akins, did not argue that the majority was overruling Lujan. In the Court’s recent decision in Summers v. Earth Island Institute, 129 S. Ct. 1142 (2009), the five-Justice majority (per Scalia, J.) held that environmental organizations and their members lacked standing to challenge certain Forest Service regulations, given the lack of an imminent injury. In a brief concurring opinion, Justice Kennedy noted that the statute did not indicate that “Congress intended to identify or confer some interest separate and apart from a procedural right.” Id. at 1153 (Kennedy, J., concurring).


See Steven M. Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law 53 (2008) (discussing how a more liberal Congress, with subcommittees staffed by young liberal lawyers, began to loosen standing rules after the breakdown of conservative power in Congress in the early 1970s); Smith, Judicial Procedures, supra note 173, at 299 (using statistical analysis to examine the correlation between the likelihood of a citizen-suit provision emerging from a committee and that committee’s ideology). But see Farhang, Public Regulation, supra note 168, at 830 (documenting instances of Republican-controlled Congresses enacting private causes of action in favor of businesses and conservative groups).
been the principal, though not exclusive, beneficiaries of such provisions. Roberts also suggested that Congress is capable of carefully drafting such provisions, in ways that would satisfy a Lujan-like inquiry, and further wondered how difficult it really was for interest groups to submit affidavits with specific indication of how they were or would be affected by government action.

Much has occurred in the standing arena since 1993, and the advent of the Obama presidency may present new challenges on that front to the Roberts Court. At the time of this writing, it is widely assumed that President Barack Obama, with Democratic majorities in Congress, will embark on new regulatory efforts on various fronts. If so, it might seem that private litigants, through citizen-suit provisions, might be mobilized to support such new regulation. On the other hand, a unified government might find it less necessary or even suboptimal to engage in such mobilization. In any event, on the near horizon are likely further challenges to the qui tam statute, and to the use of generalized grievances in climate change and other environmental cases. Congress could statutorily address and

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186 Conservative interest groups have of course also challenged federal and state action in a variety of contexts. See generally Teles, supra note 185; Ann Southworth, Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law,” 52 UCLA L. REV. 1223 (2005). Such lawsuits can take advantage of flexible standing doctrines, like their liberal counterparts. For one recent example, see Murray v. Geithner, 624 F. Supp. 2d 667 (E.D. Mich. 2009) (holding that federal taxpayer and Iraq War veteran, represented by Thomas More Law Center, had standing as a taxpayer to challenge on Establishment Clause grounds purported spending under the Emergency Stabilization Act of 2008 for Islamic religious activities).

187 Roberts, supra note 35, at 1227 & n.52 (observing that, in contrast to the citizen-suit provision at issue in Lujan, the provision in the Clean Water Act defines “citizen” as limited to “persons having an interest which is or may be adversely affected” (quoting 33 U.S.C. § 1365(g) (1988))).

188 See supra note 42 and accompanying text.

189 See Farhang, Public Regulation, supra note 168, at 834–36 (study of creation of private rights of action from 1887 to 2004 showed, among other things, that such enactments were more likely with Democratic majorities in Congress, but also more likely when there was divided government).

190 The Court in Stevens rejected an Article III challenge to the statute, but left open future consideration of Article II challenges. See supra note 81 and accompanying text. It is not entirely clear that the latter challenge could be divorced entirely from the Article III question, though Stevens seemed to do that. The possibility of executive intervention in private actions under the qui tam statute arguably informs the resolution of both the Article II and Article III issues. Yackle, Federal Courts, supra note 6, at 335 n.174; Krent & Shenkman, supra note 26, at 1820–21 (“In the absence of executive supervision, private relators may readily manipulate qui tam suits to benefit themselves financially at the public’s expense.”).

191 For discussions of the standing issues in cases percolating in the lower federal courts raising this issue, see generally Brown, Generalized Grievances, supra note 144; Elliott, supra note 153; Amanda Letter, Substance or Illusion? The Dangers of Imposing a Standing Threshold, 97 GEO. L.J. 391 (2009); Bradford C. Mank, Standing and Statistical Persons: A Risk-Based Approach to Standing, 36 Ecology L.Q. 665 (2009); see also Richard J. Lazarus, Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future, 94 CORNELL L. REV. 1153, 1231 (2009) (“Citizen-suit provisions will likely need to play a
potentially shape or moot the judicial resolution of some of these issues.  

simply important function in climate change legislation to guard against anticipated Executive Branch resistance."). The Court has begun to address these issues. See Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009) (rejecting argument that organizational standing can be based on a “statistical probability that some of those members are threatened with concrete injury”).

For provocative suggestions, see Preston Carter, Note, "If an (Endangered) Tree Falls in the Forest, and No One is Around….": Resolving the Divergence Between Standing Requirements and Congressional intent In Environmental Legislation, 84 NOTRE DAME L. REV. 2191 (2009) (discussing whether Congress should create Article I forums to hear citizen suits under environmental laws, or grant environmental groups the right to enforce such laws); Timothy C. Hodits, Note, The Fatal Flaw of Standing: A Proposal for an Article I Tribunal for Environmental Claims, 84 WASH. U. L. REV. 1907 (2006) (arguing for the use of Article I tribunals to resolve environmental claims). Congress sometimes addresses standing issues outside the regulatory arena as such. For example, Congress sometimes provides for special procedures for anticipated legal challenges when passing substantive legislation. See Michael E. Solimine, Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court, 68 OHIO ST. L.J. 767, 772–73 (2007) (discussing provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that provided that members of Congress had standing to challenge the law on constitutional grounds).

In a more recent example, Congress passed legislation late in 2008 that retroactively lowered a previously enacted salary increase for the Secretary of State. Act of Dec. 19, 2008, Pub. L. No. 110-455, 122 Stat. 5036. The legislation was intended to permit Senator Hillary Clinton to serve as the Secretary of State in the Obama administration. Opinion of Office of Legal Counsel, Validity of Statutory Rollbacks As a Means of Complying with the Ineligibility Clause 13 (2009) (authored by David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel), available at www.justice.gov/olc/2009/ineligibility-clause.pdf. She had previously voted as a Senator to increase the salary of the Secretary, and her subsequent service in that position would arguably be a violation of the Emoluments Clause, U.S. CONST. art. I, § 6, cl. 2, absent the subsequent salary diminution. For discussion of the substantive issue, see John F. O’Connor, The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution, 24 HOFSTRA L. REV. 89 (1995). The 2008 legislation states that "[a]ny person aggrieved by an action of the Secretary of State may bring a civil action" before a three-judge district court in the District of Columbia to challenge her appointment. Act of Dec. 19, 2008, § 1(b)(1)-(2). This citizen-suit provision likely passes constitutional muster under the opinions in Lujan and Akins, since it does define the sort of person who can bring suit and links it to an injury of some sort inflicted by the Secretary of State. Absent that provision, it would seem any potential challenger to Clinton’s appointment would be denied standing on the grounds that it would be nothing more than a mere generalized grievance. See Michael Stokes Paulsen, Is Lloyd Bentsen Unconstitutional?, 46 STAN. L. REV. 907, 916–17 (1994) (discussing standing issues raised by similar legislation passed when Senator Lloyd Bentsen was nominated to be Secretary of the Treasury). Perhaps more interesting is why the provision was included at all. Some legislators may have felt that there were genuine constitutional issues raised, and wished to pass them off to the judicial branch. They may have wanted to route the inevitable suit or suits into one forum. Or, perhaps it was due to an explicit or implicit legislative deal that enabled the legislation to pass. A suit filed under this provision was dismissed as this article went to press: Rodearmel v. Clinton, No. 1:09-cv-00171, 2009 WL 3486634 (D.D.C. Oct. 29, 2009) (three-judge district court) (per curiam). The plaintiff was a Foreign Service Officer of the State Department, who argued that Secretary Clinton’s allegedly unconstitutional appointment injured him by making him violate his oath of office. Id. at *4–5. The court dismissed the case on standing grounds. It found that the plaintiff was not an “aggrieved person” under the statute, since he had not alleged that Clinton had taken action that had aggrieved him, and, hence, he lacked “prudential standing.” Id. at *3. Nor did the alleged violation of his oath supply standing under Art. III. Id. at *4–6.
Whether or not Congress so acts in the coming years, I do not foresee sharp departures from current standing doctrine on the current Supreme Court. *Hein* is the paradigmatic case. When faced with the opportunity to drastically change the law of standing, a majority of the Justices demurred, but the result was to further narrow the application of an old precedent that had liberalized standing requirements. This sort of incremental move, intellectually dissatisfying to academics (and others) to be sure, will probably characterize the standing jurisprudence of the Roberts Court, whether rulings are in favor of plaintiffs or defendants. An alternative scenario on standing would view the Justices in conventionally ideological terms, with liberals (usually) voting to grant standing, and conservatives (usually) voting to deny standing. An alternative scenario on standing would view the Justices in conventionally ideological terms, with liberals (usually) voting to grant standing, and conservatives (usually) voting to deny standing. An alternative scenario on standing would view the Justices in conventionally ideological terms, with liberals (usually) voting to grant standing, and conservatives (usually) voting to deny standing. An alternative scenario on standing would view the Justices in conventionally ideological terms, with liberals (usually) voting to grant standing, and conservatives (usually) voting to deny standing. An alternative scenario on standing would view the Justices in conventionally ideological terms, with liberals (usually) voting to grant standing, and conservatives (usually) voting to deny standing.