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Justiciable Generalized Grievances

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Justiciable Generalized Grievances

Kimberly N. Brown



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JUSTICIABLE GENERALIZED GRIEVANCES

KIMBERLY N. BROWN*

ABSTRACT

The Supreme Court's prevailing test for Article III standing— injury-in-fact, causation, and redressability—generally restricts suits to remedy injuries affecting broad segments of the public in substantially equal measure. In Massachusetts v. EPA, the Supreme Court appeared to depart from this proposition in holding that the Commonwealth of Massachusetts has standing to sue the EPA to prompt it to slow global warming, a harm that affects everyone on Earth. The dissenting Justices assailed the majority for finding justiciable a so-called “generalized grievance” in contravention of prior standing precedent that is based on the notion that if parties seek to redress public harms, they must do so via the political branches and not the courts.

Scholarly reflections on the case have addressed the Court's idiosyncratic anointing of Massachusetts with something it called “special solicitude” in standing analysis, occasioned by its status as a state. In this Article, I discuss a more subtle aspect of Massachusetts: how the majority wrestled with the controversial injury-in-fact test, which is ill-suited for analyzing standing in public law disputes. Implicit in Massachusetts is a paradigm for resolving statutory enforcement cases brought to vindicate public harms indistinguishably suffered by the masses. It is animated by three characteristics: (1) the plaintiff's invocation of “procedural rights” established by statute; (2) a “concrete” and “personal” stake that distinguishes the plaintiff from the pure ideologue; and (3) a congressional authorization of the suit. I suggest that the Court should draw upon this reconceptualized framework in future statutory enforcement cases, as it offers several advantages for suits brought to remedy commonly-shared public harms. First, it is more attuned to the realities of public law litigation. Next, it is based on premises that a majority of the current Justices—including an architect of modern injury-in-fact, Justice Scalia—already embrace. Moreover, it cabins the muddied generalized grievance bar to its original pur-

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pose—preventing citizens from suing on purely ideological grounds. Furthermore, it gives appropriate weight to congressional judgments about required procedure. Finally, it enforces formal separation of the executive and judicial branches while recognizing that the separation of powers operates to ensure executive accountability through judicial review.

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INTRODUCTION

Al Gore may not have acceded to the Presidency. But he has succeeded in raising awareness about the threat of global warming to the point where it is widely viewed as the environmental crisis of our time, and one of epic proportions. That it took an Academy Award winning film to put this problem on the national radar only underscores the concern that the democratically elected branches of government are not responding quickly enough to the imminent and potentially catastrophic dangers of climate change.

Typically, there is not much that an ordinary citizen can do—other than wage a public relations effort—to speed up the political process. It is often difficult to trigger an environmental response to

global warming from responsible agencies by suing the government in federal court even if Congress authorized such a suit. Why? Because under well-established principles of constitutional standing doctrine, only a plaintiff with impending, individualized injury-in-fact can invoke the power of Article III courts to redress what must be a personalized complaint. The plaintiff must also trace that injury to the challenged government action and demonstrate that, if the court rules against the government, the injury will likely be redressed.

Global warming harms everyone in general, but no one in particular. Nor have its harms been clearly manifested quite yet. And given the myriad theories about the sources of global warming, and the numerous governmental, corporate, and individual actors on the international stage that contribute to it, tracing the harms of global warming to the U.S. government is an exercise in conjecture. A suit against the executive branch for failing to remedy climate change is, therefore, the quintessential case that one might expect to be condemned as a “generalized grievance” that can only be addressed—if at all—by the political branches of our tripartite system of government.

This is one reason why the Supreme Court of the United States’s 5-4 decision in *Massachusetts v. EPA*¹ was a stunner. The Court found that the Commonwealth of Massachusetts had standing to bring a claim against the Environmental Protection Agency (“EPA”) to compel its regulation of greenhouse gas emissions from new automobiles.² Translated, the Court told the Bush Administration to do something about global warming.³ It also found that the judiciary has the power to hear a case brought to remedy a harm affecting the entire world populace: the warming of the planet itself.⁴

Massachusetts has attracted substantial scholarly attention, with some focus on the Court’s striking endowment of states with “special solicitude” in constitutional standing analysis.⁵ Because of this special

1. 127 S. Ct. 1438 (2007).

2. *Id.* at 1458.

3. See Robert Barnes & Juliet Eilperin, *High Court Faults EPA Inaction on Emissions; Critics of Bush Stance on Warming Claim Victory*, WASH. POST, Apr. 3, 2007, at A1 (characterizing the decision as a rebuke of the Bush Administration’s global warming policy).

4. See Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law’s Growing Shadow*, 2007 SUP. CT. REV. 111, 127 (observing that the Court held in *Massachusetts* “that the harm projected from global warming and climate change gives Massachusetts standing to sue even if the harm is widely shared and EPA can do little to alleviate most of it”).

5. 127 S. Ct. at 1454–55. See generally Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. (forthcoming 2009) (positing that states have a quasi-sovereign interest in protecting future citizens); Percival, *supra* note 4, at 128–29 (discussing *Massachusetts*’ application of special solicitude for state standing); Dru Stevenson, *Special Solicitude for State Standing: Mas-*

solicitude caveat, *Massachusetts v. EPA* could be read quite narrowly, as merely enhancing states' ability to sue to vindicate public harms.

In this Article, I suggest that the *Massachusetts* Court's handling of core constitutional standing doctrine—especially its treatment of particularized injury-in-fact and the concomitant ban on generalized grievances—has broad implications for justiciability analysis in the long run.⁶ The *Massachusetts* Court flexibly construed what I call “the adjectives” that clutter the prevailing test, while marking an alternative paradigm for standing in statutory suits brought to vindicate diffuse and undifferentiated public harms.

In Part I, I discuss two competing Supreme Court decisions—*Lujan v. Defenders of Wildlife*⁷ and *FEC v. Akins*⁸—that illustrate the unpredictability and incoherence that the prevailing test produces in public law cases. I then put that conflict in historical context by tracing the evolution of the current test, its private law underpinnings, and the uncertain contours of the Court's constitutional distaste for generalized grievances. Whereas the classic generalized grievance bar forbids ideologues from seeking to enforce the Constitution based solely on their citizen or taxpayer status, the Court has used it as proxy for the constitutional requirement of particularized injury-in-fact. As a result, whether the generalized grievance prohibition is a prudential or constitutional limitation on standing is muddled. At the same time, the Court has both upheld and rejected Congress's authority to legislate standing despite undifferentiated injury on the part of the plaintiff, rendering equivocal the nature of the constitutional standing inquiry itself in public law cases.

In Part II, I discuss the *Massachusetts* Court's handling of the three-part standing inquiry, and suggest that *Akins* informed the Court's analysis of injury-in-fact in a number of important ways. Although a majority of the Court did find that Massachusetts suffered a particularized injury, the Court supported its hotly contested application of the injury-in-fact test by (1) declaring it significant that Congress authorized the action before it, (2) condoning the generic “concrete stake” standard of injury, most prominently articulated in

sachusetts v. EPA, 112 PENN ST. L. REV. 1 (2007) (discussing the concept of special solicitude as recognized in *Massachusetts*); *infra* notes 156–160 and accompanying text.

6. Cf. Percival, *supra* note 4, at 134 (observing that “while the majority's discussion of standing plausibly can be interpreted as relying on a special rule of standing for states, it is better understood as holding that the state would have standing without the need for any special rule”).

7. 504 U.S. 555 (1992).

8. 524 U.S. 11 (1998).

1962 in *Baker v. Carr*,⁹ and (3) highlighting the procedural nature of the injury at issue.

In Part III, I promote a revised paradigm for analyzing standing in statutory enforcement cases that can be derived from the foregoing aspects of the *Massachusetts* decision. I then describe its advantages over the injury-in-fact test. Unlike the injury-in-fact standard, my proposed framework expressly attempts to account for the realities of administrative bureaucracy. Its components are uncontroversial and largely accepted by the sitting Justices. Moreover, it clears up confusion regarding the scope and applicability of the generalized grievance bar in statutory enforcement cases, and brings honesty and coherence to standing issues that are currently shrouded by empty, formalistic nods to a broken standard. The proposed framework gives appropriate deference to legislative procedural requirements and fulfills a purpose of the separation of powers that is distinct from the preservation of executive autonomy, namely, ensuring executive accountability. Standing jurisprudence that enforces formal separation of the executive from the judiciary, while recognizing Congress's occasional adjustment of that relationship to ensure executive adherence to the rule of law, offers a more balanced approach than the leading test provides in public law cases.

I. THE ENDURING CONUNDRUM OF STANDING IN PUBLIC LAW CASES

Under the Supreme Court's current standing formulation, the heart of Article III's case-or-controversy requirement¹⁰ resides in the judicial mandate that "[t]he plaintiff . . . show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'"¹¹ It is fair to say that, in the view of many, the standard is utterly bankrupt. It has enabled the Supreme Court to produce contradictory rulings on competing constitutional and prudential theo-

9. 369 U.S. 186, 204 (1962).

10. Article III delineates the scope of the term "judicial Power," which vests in the lower courts if Congress so determines. That provision states in pertinent part that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States" and to various "Controversies." U.S. CONST. art. III, §§ 1, 2. Article III's references to "cases" and "controversies" have morphed into the judicially created and highly complex doctrine of standing.

11. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (citation omitted).

ries, leaving the standing doctrine hopelessly incoherent and subject to manipulation.¹²

The injury-in-fact test set forth in *Lujan* is especially ill-suited to identifying justiciable cases in the public law context.¹³ Plaintiffs seeking to remedy injuries that are widely inflicted by the government may have a difficult time satisfying “the adjectives,” that is, demonstrating that their injury is (a) particularized, (b) imminent, and (c) likely to be redressed by a favorable ruling. As a result, such claims are susceptible to challenge as non-justiciable “generalized grievances”¹⁴ regarding the generic exercise of federal authority. The leading case in this area, *Lujan v. Defenders of Wildlife*,¹⁵ condemned an environmental claim as a generalized grievance because it did not satisfy the adjectives.¹⁶ As I argued in a prior work, the Court’s unarticulated failure to adhere to *Lujan* in *FEC v. Akins*¹⁷ has caused substantial confusion, despite attempts to confine *Akins* to its facts.¹⁸

In this Part, I again describe these dueling precedents as a prelude to an analysis of whether—and if so, how—*Massachusetts* reconciles them. I also provide a broader historical and theoretical context for public law standing as a backdrop for the revised framework that I later glean from *Massachusetts*. The key difference between *Lujan* and *Akins* centers on the question of whether the harm suffered by a plaintiff must be particularized—that is personalized, unique, or differenti-

12. See, e.g., Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304, 309–22 (2002) (arguing that “as a body of law, the standing doctrine has failed” and detailing the inconsistencies in the law); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1766–67 (1999) (arguing that the Court created standing doctrine out of “whole cloth” and that there is precedent to support “virtually any conceivable version of standing law”); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1450 (1988) [hereinafter Sunstein, *Standing and Privatization*] (characterizing the injury-in-fact test to determine standing as “quite malleable”).

13. By public law, I mean the rights of citizenship as manifested in suits against the government. John Bell explains:

In public law, the core function of law is distinctive from private law. Public law is about defining and controlling the powers and activities of government. This is not the function of private law, which exists to provide frameworks within which individuals can undertake voluntarily, and to provide remedies when they exceed the bounds of the acceptable use of private power.

John Bell, *Comparing Public Law*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 235, 236 (Andrew Harding & Esin Örcü eds., 2002). For a discussion of the differences between the public law case and private litigation, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84, 1302 (1976).

14. *FEC v. Akins*, 524 U.S. 11, 23 (1998).

15. 504 U.S. 555 (1992).

16. *Id.* at 562, 573–74.

17. 524 U.S. 11 (1998).

18. See generally Kimberly N. Brown, *What’s Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 679–94 (2007) (comparing *Lujan* and *Akins*).

ated—in contrast with that of broader segments of the public. While *Lujan* implied an affirmative answer to this question,¹⁹ *Akins* held that harms need not be differentiated so long as they are “concrete” and not “abstract.”²⁰ Because the particularization element of the prevailing injury-in-fact test has been conflated with the generalized grievance bar, the Court has wavered on whether the bar is constitutional or prudential in the first instance.²¹ Moreover, as *Massachusetts* indicates, ambiguity over the scope of the generalized grievance ban has encouraged litigants to invoke it simply because a public law case involves widespread harm.²² As shown below, the Court’s analysis in *Massachusetts* reveals that the existence of generalized harm does not, and should not, automatically bar members of the public from bringing claims against federal agencies based on statutory enforcement regimes.

A. *Dueling Precedents*

The following hypothetical is offered to illustrate public law standing’s state of disarray.²³ Imagine that Bear Friends, an environmental group that studies and disseminates information regarding grizzly bears, sues the Secretary of the Interior under the Endangered Species Act (“ESA”)²⁴ over a decision to increase cattle population on federal grazing lands. The group claims that the Secretary failed to consult the Fish and Wildlife Service (“FWS”) before taking action that might jeopardize grizzlies, and that the FWS failed to prepare a requisite biological opinion in accordance with the ESA.²⁵ The ESA

19. See *Lujan*, 504 U.S. at 573–74.

20. *Akins*, 524 U.S. at 24.

21. See *id.* at 23 (“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.”) (citations omitted).

22. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (rejecting EPA’s claim that “because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle”).

23. The author is indebted to Professors Funk, Shapiro, and Weaver for the contours of this hypothetical. See WILLIAM F. FUNK, SIDNEY A. SHAPIRO, & RUSSELL L. WEAVER, *ADMINISTRATIVE PROCEDURE AND PRACTICE* 435 (3d ed. 2006) and accompanying Teacher’s Manual at 85–87.

24. 16 U.S.C. § 1540(g) (2006).

25. The ESA requires the Secretary of the Interior to promulgate regulations listing species that are “threatened” or “endangered” under certain criteria, and requires each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize” such species. 16 U.S.C. §§ 1533, 1536(a)(2) (2006). If an agency determines that species might be affected, it must formally consult with the FWS in accordance with 50 C.F.R. § 402.14 (2007), which must provide a detailed state-

allows “any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.”²⁶

Lujan poses obstacles to the hypothetical plaintiff’s standing despite the ESA’s broad language enabling suit. In *Lujan*, a six-Justice majority found that environmental groups failed to establish the requisite injury to challenge a Department of the Interior regulation exempting overseas activities from the ESA’s consultation requirement.²⁷ The plaintiffs alleged that the lack of consultation increased endangered species’ extinction rates and injured their aesthetic interests.²⁸ The Court rejected the claim as raising only a generalized grievance, explaining that plaintiffs who allege harm to “every citizen’s interest in proper application of the Constitution and laws” present no case or controversy, as they “seek [] relief that no more directly and tangibly benefits [them] than it does the public at large.”²⁹ The ESA’s expansive citizen-suit provision did not alter the analysis, as the Court declared Congress powerless to legislatively transform a commonly shared harm into an individualized one.³⁰ In all cases, plaintiffs must satisfy the strictures of injury-in-fact, which, under *Lujan*, means personalized or differentiated harm that is distinct from that suffered by the next person.³¹

ment (a biological opinion) setting forth how a proposed agency action is likely to affect a threatened or endangered species and its habitat. 16 U.S.C. § 1536(b)(3)(A) (2006).

26. 16 U.S.C. § 1540(g)(1)(A).

27. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556, 562–63 (1992). Chief Justice Rehnquist and Justices White, Kennedy, Souter, and Thomas joined Justice Scalia’s opinion with respect to the plaintiffs’ failure to show injury-in-fact. *Id.* at 556, 571–78. Justices Kennedy and Souter did not join Justice Scalia’s analysis of redressability. *Id.* at 556, 568–71; *see also id.* at 579–80 (Kennedy, J., concurring). Justice Stevens filed an opinion concurring in the judgment because he was not persuaded that the ESA’s consultation requirement applied to activities in foreign countries, but disagreed “that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not ‘imminent’ [or] ‘redressable’ in this litigation.” *Id.* at 581–82 (Stevens, J., concurring). Justice Blackmun filed a dissenting opinion in which Justice O’Connor joined. *Id.* at 589 (Blackman, J., dissenting).

28. *Id.* at 562–63 (majority opinion).

29. *Id.* at 573–74.

30. *Id.* at 576–77.

31. *Id.* at 573–74. In his concurrence, Justice Kennedy opined that Congress does have the authority “to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,” provided that the relevant statute both identifies “the injury [Congress] seeks to vindicate” and ties that injury “to the class of persons entitled to bring suit.” *Id.* at 580 (Kennedy, J., concurring).

Although it was undisputed that the *Lujan* plaintiffs identified cognizable aesthetic injury,³² the Court rejected the injury as insufficiently particularized because the plaintiffs had no “specific connection” to the affected species that distinguished their interest in, say, animal welfare from the public’s generic interest in the lawsuit.³³ The plaintiffs’ ability to differentiate themselves from the broader population hinged on whether they could show that aesthetic harm was imminent. Whereas group members had visited project sites and asserted “intentions” to return, this did not suffice to show “how damage to the species will produce ‘imminent’ injury to [them].”³⁴ Justice Blackmun complained in his dissent that the majority’s requirement of firmer travel plans was “an empty formality” that could be trivially satisfied “simply [by] purchasing plane tickets.”³⁵

According to a plurality of Justices in *Lujan*, moreover, it was not likely that the injury would be redressed because a favorable ruling would not stop the foreign projects from going forward.³⁶ The Secretary of the Interior (“Secretary”) had no direct role in the projects, and the third party agencies, which would not be bound by a judgment, supplied less than ten percent of the funding.³⁷ It was hence “entirely conjectural” whether endangered species—and the plaintiffs’ aesthetic injuries—would be helped by an order directing the

32. The Court acknowledged that aesthetic interests give rise to standing. *Id.* at 562–63 (majority opinion).

33. *Id.* at 565–68 & n.3; *see also id.* at 563 (stating that the plaintiff must show that she is “directly affected apart from [her] special interest in th[e] subject” (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, 739 (1972) (internal quotations omitted) (second alteration in original)).

34. *Id.* at 564. Although *Lujan* states that the traceability/redressability criteria are relaxed for certain procedural injuries, *see id.* at 572 n.7 and *infra* notes 43–45 and accompanying text, it did not apply that relaxed standard to the facts in *Lujan*. Thus, I read the *Lujan* plurality as requiring a relatively stringent redressability showing, although it must be emphasized that the Court has been inconsistent regarding this prong of the injury-in-fact test, as well. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 169 (1997) (applying a “coercive effect” standard for redressability); *see generally infra* note 60 (discussing *Bennett*). Although this paper focuses primarily on the injury prong of the *Lujan* test, it is my contention that redressability should be relaxed in public law cases more generally. *See Brown, supra* note 18, at 716–24 (arguing that redressability does not meaningfully distinguish justiciable cases in the public law context). Although the *Massachusetts* Court applied a more liberal redressability analysis than did the *Lujan* plurality, *see infra* notes 174–183 and accompanying text, given Justice Scalia’s inability to garner a majority on the issue in *Lujan, Massachusetts* may present less of a doctrinal shift than meets the eye.

35. 504 U.S. at 592 (Blackmun, J., dissenting).

36. *Id.* at 571 (majority opinion).

37. *See id.* at 568–69, 571 (“AID, for example, has provided less than 10% of the funding for the Mahaweli project.”).

Secretary to amend the regulation to require that agencies consult with each other about actions overseas.³⁸

In order to satisfy *Lujan's* injury-in-fact analysis, Bear Friends must produce a member who regularly visits the bear habitat in question and can thereby show that the harm to her aesthetic interests is "individual" or particularized to her³⁹ in that it is more imminent, at least, than that alleged by the *Lujan* plaintiffs. Bear Friends must also show that a biological opinion by the FWS would likely redress that aesthetic harm by, for example, making grizzlies safer.

Although Bear Friends may well have standing under the foregoing scenario, it would have problems if it sought to base its standing on its own study and dissemination of information about grizzly bears. If those activities do not entail physically interacting with grizzlies on a regular basis, the government would argue that under *Lujan* the injury is insufficiently imminent and particularized. Because the particularity requirement has merged with the generalized grievance bar,⁴⁰ the government may further assert that the complaint boils down to an impermissible generalized grievance—shared equally by broad segments of the animal-loving population—that the Secretary violated the ESA's generic requirements. Bear Friends would counter that its members have a stake in preserving grizzlies that does not hinge on imminent proximity to the bears. Justice Blackman argued in *Lujan* that "[i]t cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury."⁴¹ Its members' aesthetic interests would be harmed if increased cattle grazing on public lands brought the bears into greater contact with humans, thus increasing the risk that bears will be killed. Moreover, the organization's own mission of informing the public about grizzlies is hampered by the lack of information about grizzly bears that would otherwise be supplied by the biological opinion. These injuries, however, are neither particularized nor imminent under the analysis of the *Lujan* majority. If imminence turns on ongoing physical proximity to the bear habitat, Bear Friends' standing claim fails. Moreover, the injury is not particularized because the entire populace lacks the information that would be supplied by the biological opinion, and all animal lovers (at least) share the aesthetic injury that occurs when

38. *Id.* at 568, 571.

39. *See id.* at 560 n.1 (defining "particularized" as an injury that affects the plaintiff "in a personal and individual way").

40. *See supra* note 21 and accompanying text.

41. *Lujan*, 504 U.S. at 594 (Blackmun, J., dissenting).

they perceive that grizzlies are jeopardized.⁴² Nor can Bear Friends easily argue under *Lujan* that an order requiring consultation with the FWS or preparation of a biological opinion will redress its aesthetic harms, as the Secretary might approve the increased cattle population even if those procedural steps are taken by the non-party agencies. The future harm alleged may not even occur, and if it does, it may ultimately be caused by something else—such as an unexpected spike in the grizzly population.

To be sure, in its now-famous footnote seven, the *Lujan* Court acknowledged that certain public law cases—those involving “procedural rights”—trigger “special” treatment when it comes to standing analysis.⁴³ In particular, “[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.”⁴⁴ The Court explained:

[O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.⁴⁵

This caveat provides only weak support for Bear Friends’ claim that the Secretary violated the ESA’s procedural requirements, as the *Lujan* Court did not clearly differentiate between an interest in making sure that agencies comply with statutorily prescribed procedures—which it condemned as non-justiciable—and a “procedural right” that enjoys special Article III treatment.⁴⁶ The Court’s recognition of a procedural rights “exception” to the rigors of causation and redressability, moreover, has not gained prominence in subsequent Supreme Court cases analyzing injury-in-fact.⁴⁷

42. There are other issues at play in this hypothetical, including whether the claim is ripe and whether Bear Friends could satisfy the standard for associational standing set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), but they are beside the point I am attempting to make here.

43. *Lujan*, 504 U.S. at 572 n.7 (majority opinion).

44. *Id.*

45. *Id.*

46. *See id.* at 571–73.

47. *See, e.g.*, William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763, 803–04, 811 (1997) (observing that the Court could have resolved *Bennett* based on *Lujan*’s footnotes seven and eight, but instead undertook a detailed analysis of redressability).

Bear Friends, however, could cite to *FEC v. Akins* and argue that its injuries, although not imminent within the meaning of *Lujan* or differentiated from other potential plaintiffs, are not constitutionally barred because they amount to more than a naked claim that the government wrongly failed to comply with the ESA.⁴⁸ *Akins* initially had the potential for greatly disturbing *Lujan*'s grip on standing theory and doctrine in public law cases. As Cass Sunstein remarked, "the Court appears to have held that any citizen has standing to sue under FECA."⁴⁹ A six-Justice majority found that voters had standing to sue the Federal Election Commission ("FEC") for its failure to obtain campaign information from a third party under the Federal Election Commission Act ("FECA").⁵⁰ Like the ESA, the FECA enables "[a]ny party aggrieved by an order of the Commission . . . [to] file a petition" in federal district court seeking review.⁵¹ The Court acknowledged that the FEC's "strongest argument" was "its contention that this lawsuit involves only a 'generalized grievance'" because all voters suffered the informational injury alleged.⁵² The Court rejected the FEC's argument, however, observing that "the fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes."⁵³ The Court also dismissed the contention that "Congress lacks the constitutional power to authorize federal courts to adjudicate this lawsuit."⁵⁴ Nominally adhering to *Lujan* by finding that the lack of information constituted cognizable injury,⁵⁵ the Court held that only those injuries that are "of an abstract and indefinite nature," such as "harm to the 'common concern for obedience to law,'" are barred as generalized grievances.⁵⁶ The harm need not be differentiated, in other words, so long as it is "concrete."⁵⁷

48. See *FEC v. Akins*, 524 U.S. 11, 19–20 (1998) (finding that respondents satisfied standing requirements); see generally ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.3, at 71–73 (5th ed. 2007) (discussing *Lujan* and *Akins*).

49. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 616 (1999) [hereinafter Sunstein, *Informal Regulation*]. See also Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–456 (2006).

50. *Akins*, 524 U.S. at 13–14. Justice Breyer delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, and Ginsburg joined. Justice Scalia filed a dissenting opinion, in which Justices O'Connor and Thomas joined. See *id.* at 29 (Scalia, J., dissenting).

51. 2 U.S.C. § 437g(a)(8)(A).

52. *Akins*, 524 U.S. at 23.

53. *Id.* at 23–24.

54. *Id.* at 20.

55. *Id.* at 24–25.

56. *Id.* at 23 (quoting *Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)).

57. *Id.* at 24.

Akins would thus enable Bear Friends to argue that the ESA's authorization of the suit is meaningful for standing purposes, and that the undifferentiated nature of the harm alleged is irrelevant, so long as the harm is concrete, which the lack of bear-related information that would otherwise be provided in a biological opinion is. Although the *Akins* plaintiffs sought nothing from the FEC directly, attempting instead to prompt regulation of someone else who might later make disclosures, the Court was not troubled by redressability, observing simply that a reviewing court could "set aside the agency's action and remand the case."⁵⁸ Bear Friends would therefore argue that its injuries are redressable under *Akins* even though the FWS is not a party.

Because *Akins* is not easily squared with *Lujan*, it has been largely considered *sui generis*, confined to voter cases involving requests for information, and its irreconcilability with *Lujan* has invited relitigation of the literal *Akins* holding even in cases brought under the FECA.⁵⁹ Bear Friends' merits suit could similarly wind up stalled by an expensive briefing battle over which Supreme Court cases reign supreme.⁶⁰ The Court's standing rulings in statutory enforcement cases, therefore, leave crucial questions unresolved. If *Lujan* is properly con-

58. *Id.* at 25.

59. See Brown, *supra* note 18, at 694–701, for a discussion of the FEC's propensity to relitigate standing issues already decided in *Akins*.

60. Although the Court has struggled to adhere to *Lujan* as the standard-bearer in other public law cases, it has applied Justice Scalia's articulation of the generalized grievance bar and his construction of the adjectives only selectively. The same year that the Court issued *Akins*, Justice Scalia led a majority in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), to find another statute conferring standing on "any person" unconstitutional as applied. *Id.* at 85–87, 109; see also 42 U.S.C. § 11046(a)(1) (2000) (setting forth the citizen-suit provision that was in question in the *Steel* case). But in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), a majority found that the "quantum of deterrence" created by a potential award of civil penalties under the Clean Water Act enabled environmental groups to sue a hazardous waste incinerator facility to enforce the EPA's permits regulating the discharge of pollutants. *Id.* at 171, 186. In dissent, Justice Scalia called the ruling "a lever that will move the world," *id.* at 205 (Scalia, J., dissenting), with "grave implications for democratic governance." *Id.* at 202. Yet in *Bennett v. Spear*, 520 U.S. 154 (1997), he led a unanimous Court to find that commercial plaintiffs had standing to bring a citizen suit under the ESA. *Id.* at 156, 164. The plaintiffs sought review of the FWS's biological opinion that a water reservoir project threatened the existence of certain fish. *Id.* at 157. They claimed that the FWS's recommendation to restrict water delivery reduced the amount of water available to them, thus harming their "competing interest in the water." *Id.* at 160. The Court was unpersuaded that *Lujan* required a showing that the plaintiffs were particularly injured by receiving less water (versus a showing that water would be reduced in the aggregate). *Id.* at 167–68. Nor did it find redressability lacking. *Id.* at 170–71. Conceding that the U.S. Bureau of Reclamation—a non-party—was "free to disregard" the biological opinion in making its final determination regarding water allocation, the Court tolerated the conjectural nature of possible redress, reasoning that "in reality" the FWS's opinion "has a powerful coercive effect on the action agency." *Id.* at 169–70.

strued to require that injury-in-fact be particularized (that is, differentiated) by a showing of imminence or otherwise, and that such injury must be likely—not merely possibly—redressed, are so-called generalized grievances brought to vindicate a commonly shared public harm linked to government conduct constitutionally impermissible? In analyzing this question, how much, if any, weight should the courts give to congressional authorizations of standing presented in these cases? Consideration of these issues requires some historical understanding of the prevailing construction of Article III’s case or controversy requirement.

B. How Did We Get Here? The Evolution of Standing to Vindicate Public Harms

The problems with standing in statutory enforcement cases can be traced to the doctrine’s evolution from a legal system premised on the adjudication of individual rights, prior to the proliferation of public law. In this Subpart, I retrace familiar ground by summarizing the evolution of the standing doctrine from its theoretical roots to its present state of confusion to set the stage for the alternative paradigm that *Massachusetts v. EPA* offers for standing in public law cases.

1. Historical Standing, the Rights-Duty Model, and Injury-in-Fact

While the Supreme Court did not analyze legal standing to sue as a constitutional limitation on jurisdiction until the early part of the twentieth century,⁶¹ English common law courts imposed no threshold standards to identify proper parties to allege a particular violation of the law.⁶² The English system was premised on a set of preordained legal rights that were enforceable even if “a stranger to the official action” satisfied the criteria for a particular form of writ.⁶³ The Supreme Court borrowed this legal-rights standard, and its fledgling articulations of standing doctrine were tied to the identification of

61. See, e.g., *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (dismissing suit challenging executive compliance with the Constitution because it was “not a case within the meaning of . . . Article III”); see also RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 140 (3d ed. 1999) (citing *Stark v. Wickard*, 321 U.S. 288, 302 (1944)).

62. See MICHAEL L. WELLS ET AL., *CASES AND MATERIALS ON FEDERAL COURTS* 275 (2007).

63. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1035 (1968); see also F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 281 (2008) (discussing private versus public right distinction). A petitioner could invoke a writ of quo warranto, for example, to force a public officer to justify certain behavior without demonstrating actual personal harm. WELLS ET AL., *supra* note 62, at 275.

common law rights held by the “Hohfeldian”⁶⁴ plaintiff against a party with a correlative duty—a concept that did not readily accommodate public rights owed to the collective community.⁶⁵

With the New Deal’s advent, the rights-duty model began to falter. A progressive Court supportive of New Deal reforms initially adhered to it as a means of insulating regulatory decisions from judicial interference.⁶⁶ The objects of new regulation—primarily industrial corporations—readily gained access to federal court because their proprietary interests were adversely affected.⁶⁷ Statutory “beneficiaries,” including workers and consumers for whose benefit and protection the laws were designed, had a more difficult time asserting violations of rights or duties analogous to common law interests.⁶⁸

64. Louis Jaffe famously coined a name for the typical common law plaintiff who “seek[s] a determination that he has a right, a privilege, an immunity or a power.” Jaffe, *supra* note 63 at 1033 & n.1 (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913)). Supreme Court Justices utilized the Hohfeldian label and the rights-duty distinction in the Court’s older standing jurisprudence. See *United States v. Richardson*, 418 U.S. 166, 203 (1974) (Stewart, J., dissenting) (characterizing the plaintiff seeking information from the government as “a traditional Hohfeldian plaintiff”); *Flast v. Cohen*, 392 U.S. 83, 119 & n.5, 120 (1968) (Harlan, J., dissenting) (deeming taxpayer plaintiffs “non-Hohfeldian” in that they do not seek to enforce personal or proprietary interests of the traditional plaintiff); see also *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citing Professor Jaffe’s article).

65. See *Tenn. Elec. Power v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939) (denying power companies standing to enjoin a competitor from producing electricity because they did not assert injury to “a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege”). For some private actions, such as actions for trespass, the plaintiff need only prove the invasion of a legally protected interest to obtain redress. See Hessick, *supra* note 63, at 281 (explaining that damage is presumed in trespass actions); see also *id.* at 284–85 (discussing William Blackstone’s principle that “where there is a legal right, there is also a legal remedy . . . whenever that right is invaded” and explaining that, “[b]ased on this rule, early American courts awarded nominal damages for violations of rights that did not result in harm” (citation and internal quotation marks omitted)).

66. Sunstein, *Standing and Privatization*, *supra* note 12, at 1437–38; see also Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 *CORNELL L. REV.* 393, 458–59 (1996) (discussing how Justice Frankfurter “led a rapidly emerging majority of FDR appointees in . . . minimizing judicial interference with the political departments through the justiciability doctrines,” and how this “understandable desire to promote the New Deal (e.g., by protecting agency autonomy and barring substantive due process claims) metamorphosed into a hostility toward any constitutional claims, except in rare cases presenting well-developed complaints of individualized, common law harm”).

67. Sunstein, *Standing and Privatization*, *supra* note 12, at 1436.

68. *Id.* In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), for example, the Court held that corporate stockholders had standing to sue a federal agency to invalidate an allegedly illegal contract entered into with the corporation because they “are not creditors but shareholders . . . and thus they have a proprietary interest in the corporate enterprise which is subject to injury through breaches of trust or duty on the part of the directors.” *Id.* at 321. Justice Brandeis wrote a concurrence, in which he clarified that “[m]ere belief that corporate action . . . is illegal gives the stockholder no greater right to

As courts increasingly construed statutorily created legal interests as cognizable,⁶⁹ however, a concept that Cass Sunstein called “surrogate standing” evolved “by which Congress could allow certain plaintiffs to bring suit to vindicate the claims of the public at large.”⁷⁰ This was done, for example, by granting judicial review to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action” under the Administrative Procedure Act (“APA”).⁷¹

Rather than treating inadequate regulatory action as a “legal wrong” under the rights-duty model, however, the Court attempted to simplify standing by developing an entirely different test.⁷² It moved toward identifying a litigant’s “personal stake” in the case,⁷³ describing standing’s primary aim as ensuring the “concrete adversariness” that facilitates effective judicial decisionmaking.⁷⁴ The oft-cited 1962 opinion in *Baker v. Carr*⁷⁵ married the two concepts: The plaintiff must “allege[] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”⁷⁶ This foundational “concrete adversity” theory justified standing thresholds as a means of promoting

interfere than is possessed by any other citizen,” as “[t]he function of guarding the public against acts deemed illegal rests with the public officials.” *Id.* at 343 (Brandeis, J., concurring).

69. See Sunstein, *Standing and Privatization*, *supra* note 12, at 1439–42 (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940)).

70. *Id.* at 1439.

71. 5 U.S.C. § 702 (2006).

72. See Sunstein, *Standing and Privatization*, *supra* note 12, at 1444–45 (noting that the Court “replaced the legal interest test with a factual inquiry into the existence of harm”).

73. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (stating that to have standing the plaintiff must either have a “personal stake in the outcome of the controversy” or must “rely on [a] specific statute authorizing invocation of the judicial process”).

74. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 387–88 (3d ed. 2000) (observing that the Court’s main standing concern at the time was to avoid the pronouncement of advisory opinions as a result of hearing overly abstract claims).

75. 369 U.S. 186 (1962).

76. *Id.* at 204. Chief Justice Burger explained this precursor to modern standing doctrine in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217–27 (1974). Concrete injury “is that indispensable element of a dispute which serves in part to cast it in a form *traditionally capable of judicial resolution*.” *Id.* at 220–21 (emphasis added). It “enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance.” *Id.* at 221. In *Schlesinger*, the Court rejected the plaintiffs’ claim as a generalized grievance, a concept I discuss below. *Id.* at 217, 220; see generally *infra* Section I.B.2.

better litigation by ensuring that disputes were properly framed, vigorously argued, and go forward only necessarily.⁷⁷

In the 1970s, as a need for greater oversight of administrative agencies was triggered by new legislation aimed at protecting the public (versus the regulated),⁷⁸ the Court firmly cast aside the rights-duty model in favor of a more mature articulation of the personal stake concept: injury-in-fact.⁷⁹ The test conceivably allowed private parties—including regulatory beneficiaries—to seek redress for broadly held, quasi-public interests so long as they could show they were individually injured.

Although designed as a means of achieving transparency and predictability,⁸⁰ the injury-in-fact test has proven structurally infelicitous

77. The idea that standing aims to ensure that a case is adequately adversarial for judicial resolution is rooted in the most basic of the justiciability doctrines: the illusory ban on advisory opinions. Springing from the common law tradition whereby courts resolved disputes between adversaries, the prohibition on advisory opinions serves the methodological purpose of ensuring sound judicial decisionmaking. *WELLS ET AL.*, *supra* note 62, at 246 (noting the common law roots of the prohibition on advisory opinions). The idea is that judges function best if adversaries sharpen the issues by urging different outcomes in a circumscribed dispute. *See Flast v. Cohen*, 392 U.S. 83, 96–97 (1968) (discussing advisory opinion ban). Two criteria enforce the prohibition on advisory opinions. *See generally* CHEMERINSKY, *supra* note 48, § 2.2, at 49–54 (discussing the two requisite criteria for a case to be justiciable and not merely a request for an advisory opinion). Like the standing triad, the criteria are tied to Article III’s definition of the “judicial Power of the United States” as encompassing “cases” or “controversies”: (1) an actual dispute between adverse litigants, *see Muskrat v. United States*, 219 U.S. 346, 356–63 (1911) (holding a claim to be nonjusticiable as the United States possessed no interest adverse to the claimants); and (2) a substantial likelihood that a federal court decision in favor of the claimant will bring about some change or effect. *Cf. Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 (1792) (noting that statutory authority to make nonbinding recommendations was “not of a judicial nature” and would violate the separation of powers because it allowed for revision of court opinions by another governmental branch). Numerous scholars have disputed the notion that standing achieves the concrete adversity goal. *See, e.g.*, Sunstein, *Standing and Privatization*, *supra* note 12, at 1448 (arguing that the “problem of concreteness has nothing to do with the question of standing”).

78. *See* Susan Bandes, *The Idea of a Case*, 42 *STAN. L. REV.* 227, 292 (1990) (noting that “the increasing pervasiveness of the administrative agencies” has had a documented effect on federal jurisdiction).

79. The first opinion to mention what is now known as the injury-in-fact test as a constitutional limit on standing was *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), in which the Court unanimously applied the injury-in-fact test to enable judicial review of a decision by the Comptroller of the Currency to allow banks to provide data processing services to customers. *Id.* at 152–56. Gene Nichol explains that “injury in fact seemed ideal since it ensured a personal stake by hinging itself to harm and separating itself from the claim on the merits because it was not dependent upon interests created or protected by law.” Gene R. Nichol, Jr., *Rethinking Standing*, 72 *CAL. L. REV.* 68, 74 (1984) (describing “the Court’s search in *Data Processing* for an overriding principle . . . to instruct the threshold standing inquiry”); *see also* Nichol, *supra* note 12, at 305–06 (discussing the replacement of the legal rights model with injury-in-fact).

80. Sunstein, *Standing and Privatization*, *supra* note 12, at 1449.

at parsing standing in complex administrative cases implicating numerous third parties or indirect redress. This is partly because, as Cass Sunstein has observed, there has been “a partial return to a private-law model of public law.”⁸¹ In a famous 1983 law review article, then D.C. Circuit Judge Scalia opined that Congress lacks the constitutional authority to empower an individual to enforce a public law provision through the courts because standing doctrine exists, in his view, to circumscribe federal courts’ role to that of vindicating individual—not public—rights.⁸² He later wrote that the case or controversy requirement has “virtually no meaning” except by reference to “the traditional, fundamental limitations upon the powers of common-law courts.”⁸³

Justice Scalia’s article fastened this private law theory of justiciability on a single aspect of the separation of powers: the prevention of “an overjudicialization of the process of self-governance.”⁸⁴ In other words, certain wrongful government action—such as that which “affects ‘all who breathe’”—will get its fair consideration, but only “in the normal political process,” not in the courts.⁸⁵ The source of his conclusion was not Article III, but Article II, which establishes the ex-

81. See *id.* at 1452 (noting that the standing determination has proved particularly difficult in cases in which beneficiaries challenge the government’s regulation of third parties); see also Bades, *supra* note 78, at 279–80 (arguing that the Court’s common law approach to standing constitutes an “unquestioning endorsement of the private rights model”); *id.* at 280 (observing that “[t]he Court’s preference for the adjudication of pecuniary and property rights of individuals [still shapes] its standing doctrine, within which widely shared . . . injuries are devalued unless they can be cast in common law terms”).

82. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 893–94 & n.58 (1983) (arguing that standing “restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority”). Chief Justice Roberts shares this view. See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993) (advocating strict adherence to the injury-in-fact test).

83. *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting).

84. Scalia, *supra* note 82, at 881.

85. *Id.* at 895–96 (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973)). Scholars differ regarding the proper role of the federal courts in enforcing federal law. Compare James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 89 (2001) (arguing that “the Framers most likely conceived of the courts as places where federal law was enforced incidental to the resolution of individual disputes”), with Pushaw, *supra* note 66, at 455 (arguing that “[t]he Court has neglected the Founders’ idea that federal judges represent the People by remedying the unlawful conduct of political branch officials in both private and public judicial actions”).

ecutive's constitutional prerogative to take care that the laws are faithfully executed.⁸⁶

Nearly ten years later, in his landmark opinion in *Lujan v. Defenders of Wildlife*, Justice Scalia employed his private law theory on behalf of the Court to reject standing for plaintiffs suffering an injury "that no more directly and tangibly benefits [them] than it does the public at large."⁸⁷ *Lujan* posited that widely shared harms are justiciable only if plaintiffs can demonstrate that they experienced them in a distinctive way; otherwise, their only remedy is to seek relief from the political branches of government.⁸⁸ Further, the Court pronounced that Congress cannot alter this so-called generalized grievance bar by authorizing "generalized grievance" suits to vindicate harms indistinguishably incurred by multitudes.⁸⁹

2. *The Generalized Grievance Bar Generally*

The generalized grievance bar advanced in *Lujan* first emerged in a line of constitutional cases reaching back to the early twentieth century.⁹⁰ Historically, generalized grievances took one of two forms.⁹¹ The first, unadorned "citizen-standing," involved suits premised only upon "the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted."⁹² For such a plaintiff, there is no identifiable

86. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3).

87. *Id.* at 572–74; see also *id.* at 575 (discussing the holding in *United States v. Richardson*, 418 U.S. 166 (1974), stating that the "suit rested upon an impermissible 'generalized grievance' . . . because 'the impact on [plaintiff] is plainly undifferentiated and common to all members of the public'" (alteration in original)).

88. See *id.* at 574–75 (implying that, if a plaintiff were able to show an injury that was different from the injury to the public in general, the plaintiff would have standing).

89. *Id.* at 576–77 (forbidding Congress from authorizing standing to permit citizens who suffer "no distinctive concrete harm").

90. Although the generalized grievance bar arose in the context of constitutional cases brought by taxpayers, the Court has adopted it by reference in cases involving other allegations of harm. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 497–99 (1975) (recognizing the "generalized grievance" bar in a constitutional challenge to municipal zoning ordinances which derived from numerous theories of injury, such as an inability to build or acquire residential property in the area in question) (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221–27 (1974); *United States v. Richardson*, 418 U.S. 166, 188–97 (1974) (Powell, J., concurring); *Ex parte Lévit*, 302 U.S. 633, 634 (1937)). The Court has also adopted the generalized grievance bar in statutory enforcement actions. See, e.g., *Lujan*, 504 U.S. at 575.

91. See generally CHEMERINSKY, *supra* note 48, § 2.3.5, at 91–97 (noting that the prohibition against generalized grievances "prevents individuals from suing if their only injury is as a citizen or a taxpayer concerned with having the government follow the law").

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

individualized injury; there is merely concern over whether the executive branch is adhering to the law. In *Fairchild v. Hughes*,⁹³ therefore, the Court rejected “a proceeding to have the Nineteenth Amendment declared void.”⁹⁴ Although the Court did not expressly address whether its ruling’s basis was constitutional or prudential, it observed that citizens’ general right “to require that the Government be administered according to law” does not entitle them to challenge the generic validity of a constitutional amendment in court.⁹⁵ Later, in *Ex Parte Lévit*,⁹⁶ the Court linked citizen standing to a requirement that a private individual show “that he has sustained or is immediately in danger of sustaining a direct injury as the result of [executive or legislative] action,” adding that “it is not sufficient that he has merely a general interest common to all members of the public.”⁹⁷ Early cases establishing the bar on citizen standing, therefore, arguably linked the concept to both prudential and constitutional principles.⁹⁸

The second form of generalized grievance was known as “taxpayer standing.” It hinged on the plaintiff’s status as “a taxpayer of the United States” and the argument “that the effect of the appropriations complained of [is] to increase the burden of future taxation.”⁹⁹ Conceptually, taxpayer standing is somewhat different than citizen standing because, for the taxpayer complaining about federal expenditures, there is some financial injury. In *Frothingham v. Mellon*,¹⁰⁰ the Court rejected taxpayer standing because the plaintiff’s “interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and . . . is essentially a mat-

93. *Id.*

94. *Id.* at 129.

95. *Id.* at 129–30.

96. 302 U.S. 633 (1937) (per curiam).

97. *Id.* at 634.

98. I do not attempt to resolve here whether the bar on naked claims of citizen standing is prudential or constitutional, except to note that, if one assumes that injury-in-fact is grounded in Article III, the uninjured citizen plaintiff lacks constitutional standing. This outcome would not necessarily serve the historical purposes behind standing, however, as the concrete adversity rationale could theoretically be satisfied by a well-represented plaintiff with ardently held views about the challenged conduct who is fully capable of apprising the court of the issues. See *supra* note 77 (discussing scholarship that disputes the notion that standing serves a concrete adversity goal). If the case or controversy requirement is properly construed as facilitating the separation of powers, moreover, allowing citizens to sue over any complaint about the administrative bureaucracy would render the judicial branch the ultimate supervisor of executive conduct. On that front, as well, the ban on citizen standing appears to be constitutional, despite the common assumption that the broader “generalized grievance” bar is prudential.

99. *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923).

100. *Id.*

ter of public and not of individual concern.”¹⁰¹ Hence, it appears that the problem with taxpayer standing is that the injury is so “comparatively minute” and unquantifiable that it is essentially no different than the disquiet with government activity that one associates with citizen standing.¹⁰²

Accordingly, the generalized grievance bar to taxpayer standing first emerged as a prudential concern.¹⁰³ It was a way of keeping a flood of citizens from bringing into federal court their kitchen sink complaints about government activity based on generic theories of fiscal responsibility. In *Frothingham*, the Court explained that “[t]he administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern.”¹⁰⁴

Later, in *Flast v. Cohen*,¹⁰⁵ the Court allowed taxpayers to bring a constitutional claim and adopted a “nexus” test for future cases, raising speculation that it had substantially expanded the availability of taxpayer standing.¹⁰⁶ *Flast*, however, has since been confined to its facts,¹⁰⁷ rendering it difficult for citizens to successfully sue the government to prompt compliance with constitutional rights that indistinguishably benefit the broader populace. In the process, the Court has obfuscated the scope and purpose of the generalized grievance bar by utilizing it to justify the rejection of standing in cases involving

101. *Id.* at 487; see also *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433–34 (1952) (rejecting taxpayer standing in constitutional challenge to New Jersey law authorizing public school teachers to read Bible passages).

102. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151 (1951) (Frankfurter, J., concurring) (noting that for “[t]he simplest application of the concept of ‘standing’ . . . the [plaintiff’s] interest must not be wholly negligible, as that of a taxpayer of the Federal Government is considered to be”).

103. See *TRIBE*, *supra* note 74, at 415 (noting that courts often heed the “prudential policy against the assertion of generalized grievances more appropriately addressed by the representative branches”); see also *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (observing that the generalized grievance bar is a prudential principle).

104. *Frothingham*, 262 U.S. at 487.

105. 392 U.S. 83 (1968).

106. *Id.* at 102. In *Flast*, taxpayers challenged federal subsidies to parochial schools on Establishment Clause grounds. *Id.* at 85. The lower court relied upon *Frothingham* to dismiss the plaintiffs’ challenge, *id.* at 88 (citing *Flast v. Gardner*, 271 F. Supp. 1 (1967)), and the Supreme Court reversed. *Id.* The Court enabled taxpayer standing if the plaintiff satisfied a two-pronged “nexus” test: (1) the plaintiff must show a “logical link between [taxpayer] status and the type of legislative enactment attacked,” and (2) the “taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.” *Id.* at 102.

107. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2568–69 (2007).

concrete injuries. In *United States v. Richardson*,¹⁰⁸ for example, Chief Justice Burger wrote an opinion rejecting as too generalized an allegation of injury that was identical to that which the Court later found justiciable in *Akins*—the lack of a document that would be useful in voting.¹⁰⁹ The plaintiff did not raise a bald citizen complaint about the government's compliance with the Constitution or a de minimis financial injury divined from his tax obligations. He alleged an informational injury caused by the Secretary of the Treasury's failure to publish an accounting of receipts and expenditures of the Central Intelligence Agency as required by the Taxing and Spending Clause of Article I.¹¹⁰ Chief Justice Burger wrote for a slim majority that "[t]his is surely the kind of a generalized grievance described in both *Frothingham* and *Flast* since the impact on him is plainly undifferentiated and 'common to all members of the public.'"¹¹¹ The Court thus merged the generalized grievance bar with the constitutional requirement of particularized injury, and extended it to plaintiffs with injuries more substantial than those of the ideological citizen or taxpayer.¹¹²

Importantly, moreover, the majority cited a different rationale for the generalized grievance bar in *Richardson*: separation of powers. It did not matter that no better plaintiff existed for standing purposes or that the question would never be litigated, as "the subject matter is committed to the surveillance of Congress, and ultimately to the political process."¹¹³ In *Hein v. Freedom From Religion Foundation, Inc.*,¹¹⁴—a

108. 418 U.S. 166 (1974).

109. *Id.* at 167–68, 178. The Court distinguished *Flast* in part on the grounds that the *Richardson* plaintiff's challenge did not rest on the taxing and spending power. *Id.* at 175.

110. *Id.* at 168; see also U.S. CONST. art. 1, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.")

111. *Richardson*, 418 U.S. at 176–77 (quoting *Ex parte Lévit*, 302 U.S. 633, 634 (1937)).

112. There has been confusion surrounding this issue for years. See Bades, *supra* note 78, at 263 n.225 (noting commentators' observations that the Court blurs abstract and widely shared injury whereas "the fact that an injury is widely shared does not in itself render it less particularized" (citing Daniel Patrick Condon, Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?*, 70 GEO. L.J. 1157, 1173–74 (1982); Jaffe, *supra* note 63, at 1033–37)). As Heather Elliott recently observed, however, the doctrine's own terms fail to justify the argument that widely shared harms are foreclosed under the injury-in-fact test because if the plaintiff is, in fact, injured, it is irrelevant whether others share that same injury. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. (forthcoming 2009).

113. *Richardson*, 418 U.S. at 179. The Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), later adopted this reasoning in a decision rejecting taxpayer standing in the sole context in which it had been recognized to date: a case raising an Establishment Clause claim. *Id.* at 469, 482. Justice

constitutional challenge to President Bush's executive orders creating faith-based initiatives—a badly fractured Court preserved the holding in *Flast* but refused to apply it,¹¹⁵ commenting that *Flast* “gave too little weight” to separation of powers concerns by framing the question in terms of the original theory behind standing—whether the case is judicially capable of resolution.¹¹⁶ The *Hein* Court thus both suggested that the generalized grievance bar is derived from Article III and associated it with Article II, cautioning that a ruling for the plaintiffs would “enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials,” in contravention of *Flast*'s promise not to “transform federal courts into

Brennan dissented, accusing the majority of using standing rhetoric to deprive persons of the right to vindicate legally protected interests in court. *Id.* at 492–93 (Brennan, J., dissenting). In 2006, in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), the Court extended its rejection of taxpayer standing to state taxpayers. *Id.* at 345.

114. 127 S. Ct. 2553 (2007). In *Hein*, an organization opposed to government endorsement of religion brought an Establishment Clause challenge to the use of federal money to fund President Bush's “faith-based” initiatives designed to encourage cooperation between religious institutions and government. *Id.* at 2560–61 (plurality opinion). Justice Alito, joined by the Chief Justice and Justice Kennedy, wrote the plurality opinion finding no standing. *See id.* at 2559, 2561–72 (holding that the case falls outside the “narrow exception” contained in *Flast* because Congress did not expressly authorize the challenged expenditures). Justice Kennedy wrote a separate concurrence. *See id.* at 2572–73 (Kennedy, J., concurring) (expressing the view that “*Flast* is correct and should not be called into question” but that “[t]o find standing in the circumstances of this case would make the narrow exception boundless” and impermissibly intrude on “the executive realm”). Justices Scalia and Thomas concurred in the judgment, but opined that *Flast* should be overruled. *See id.* at 2573–74 (Scalia, J., concurring) (arguing that “*Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing”). Justice Souter filed a dissenting opinion, in which Justices Stevens, Ginsberg, and Breyer joined. *See id.* at 2584–88 (Souter, J., dissenting) (suggesting that there is no basis for the distinction, made by the plurality, between injuries caused by the Executive Branch and those caused by the Legislative Branch). The Court had recently decided *Lance v. Coffman*, 127 S. Ct. 1194 (2007) (per curiam), in which it found that voters lacked standing to bring an Election Clause challenge to the Colorado Supreme Court's decision invalidating a legislative redistricting plan in a separate case, because “[t]he only injury plaintiffs allege is that the law . . . has not been followed,” which is “precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.” *Id.* at 1196, 1198.

115. *Hein*, 127 S. Ct. at 2566 (plurality opinion) (finding that plaintiffs had failed to challenge any specific congressional action or appropriation, as distinct from the facts of *Flast*).

116. *Id.* at 2569; *see also id.* at 2583 (Scalia, J., concurring) (calling *Flast* “damaged goods,” partly “because its cavalier treatment of the standing requirement . . . was explicitly and erroneously premised on the idea that Article III standing does not perform a crucial separation-of-powers function”).

forums for taxpayers' generalized grievances about the conduct of government."¹¹⁷

The status of the generalized grievance bar as a constitutional or prudential limitation on standing remains vague, at best. Both *Lujan* and *Richardson* obscured the scope and nature of the generalized grievance ban because the plaintiffs were not mere ideologues seeking to influence government behavior based solely on their citizen or taxpayer status; they suffered discernable aesthetic and informational harms, respectively.¹¹⁸ By applying the generalized grievance bar to such injuries, the Court conflated an otherwise prudential concept with the constitutional requirement of injury-in-fact, making it difficult to draw meaningful lines between the political dispute and the justiciable case in the public law context.¹¹⁹ Moreover, because undifferentiated injury is by definition injury shared with others, cases like *Lujan* and *Richardson* created the impression that any harm that is widely shared is subject to attack as a generalized grievance.¹²⁰

Nonetheless, the bar on generalized grievances has proven more porous in public law cases brought to enforce legislation than in the constitutional context. An important distinguishing factor is the existence of citizen-suit statutes, which expressly authorize standing for citizens to sue in federal court as a supplement to the executive's enforcement apparatus. The Court has always acknowledged that Congress plays a role in standing analysis. In its 1940 decision in *FCC v. Sanders*,¹²¹ the Court deferred to a statute authorizing aggrieved parties to appeal from the Commission's orders in rejecting the government's argument that the plaintiff's injury could not trigger judicial review.¹²² Because "[i]t is within the power of Congress to confer such standing to prosecute an appeal," the Court found that the plaintiff had the "requisite standing" to bring the case.¹²³ Later, *Warth v.*

117. *Id.* at 2570 (plurality opinion) (internal quotations omitted).

118. *See supra* notes 27–38, 108–112 and accompanying text.

119. *See* CHEMERINSKY, *supra* note 48, § 2.3, at 97 (“[I]n *Lujan v. Defenders of Wildlife*, the Court treated the bar on citizen standing as constitutional.”).

120. The EPA's arguments in *Massachusetts* demonstrate this. *See infra* Part II.B. (discussing the Court's rejection of EPA's argument that standing is barred where harms are widely shared).

121. 309 U.S. 470 (1940).

122. *Id.* at 471, 476–77. Specifically, the Court referred to statutory language that provided for an appeal by an applicant for a license or permit or “by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.” *Id.* at 476–77 (quoting a provision in the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1093 (codified as amended at 47 U.S.C. § 402(b)(6) (2000))).

123. *Id.* at 477.

*Seldin*¹²⁴ relied on *Sanders* as an example to explain that, although a generalized grievance “normally does not warrant exercise of jurisdiction,”¹²⁵ this “prudential standing rule[]” can be overridden by Congress,¹²⁶ which “may grant an express right of action to persons who otherwise would be barred.”¹²⁷ Plaintiffs still must demonstrate injury, but if Congress grants a right of action, the plaintiffs “may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.”¹²⁸

To the extent that the generalized grievance bar is prudential, it makes perfect sense that Congress can override it. On this theory, Congress could conceivably authorize a taxpayer alleging de minimis financial injury to bring a lawsuit on the assumption that such a person has an injury that qualifies for constitutional standing. In doing so, Congress would not be attempting to adjust the case or controversy requirement of Article III by legislation but rather to foreclose courts from prudentially refusing jurisdiction on the grounds that the harm too closely resembles a generic complaint about the government that is best left for resolution by the political branches. But if the bar is constitutional, the power of Congress to affect standing is murkier. Under *Lujan*, Congress’s inclusion of a broad citizen-suit provision to effectuate legislation is meaningless in cases involving commonly shared injury if the plaintiff cannot show particularized, differentiated harm.

Lujan’s influence on public law standing analysis understandably led Justice Scalia to dissent sharply from the majority opinion in *FEC v. Akins* six years later, relying heavily on *Richardson* to support his analysis.¹²⁹ *Akins* made two major pronouncements about standing in statutory enforcement cases: (1) it rejected the argument that “Congress lacks the constitutional power to authorize federal courts to adjudicate” a claim that looked like a generalized grievance;¹³⁰ and (2) it held that the generalized grievance bar does not require that widely shared injuries be particularized or differentiated among individual

124. 422 U.S. 490, 493, 502 (1975) (rejecting standing to wage a constitutional challenge to municipal zoning practices).

125. *Id.* at 499.

126. *Id.* at 501.

127. *Id.*

128. *Id.*

129. See 524 U.S. 11, 29–37 (1998) (Scalia, J., dissenting) (contending that the injury suffered by the *Akins* plaintiffs was precisely the claim rejected in *Richardson*).

130. See *id.* at 20–22 (majority opinion) (distinguishing *Richardson*, in which the Court denied standing to bring a generalized grievance).

members of the populace, so long as they are concrete—as opposed to abstract, like a “harm to the ‘common concern for obedience to law.’”¹³¹ Despite its professions of fidelity to *Lujan*, the *Akins* Court charted a different course for analyzing public law standing in statutory enforcement cases, a course that a careful reading of *Massachusetts* puts in the spotlight.

II. THE LATEST WORD: *MASSACHUSETTS v. EPA*

*Massachusetts v. EPA*¹³² waded directly into the *Lujan/Akins* muck. It involved a challenge to the EPA’s failure to regulate global warming—an apparent sitting duck for a generalized grievance challenge, as the Commonwealth’s claim resembled the “all who breathe” case depicted by former Judge Scalia to illustrate his belief that only the political process can resolve citizen grievances entailing no individualized harm to the plaintiff.¹³³ Yet despite recent enhancements to the Court’s conservative ranks, Justice Scalia’s theory of separation of powers did not carry the day. The Court refused to apply a generalized grievance bar to standing. It cherry-picked a plaintiff for purposes of finding particularized injury, but fell short in adhering to a *Lujan* analysis of imminence and likely redressability—much to the consternation of the dissenters, including Justice Scalia. Nonetheless, I contend that the opinion did not merely expand the seemingly hopeless morass that Part I.A describes. Nor did it simply define a new outlier for special plaintiffs, as has been the fate of *Akins*. The Court essentially adhered to *Akins* while purporting to apply *Lujan*. In doing so, it erected three signposts for standing in public law cases that, though far from predictive, provide the foundation for a distinct and potentially superior paradigm than injury-in-fact offers.

A. *The Problem: Global Warming and Executive Inaction*

In the fall of 1999, a swath of private organizations with “green-focused” missions (including Friends of the Earth, of *Lujan* fame)¹³⁴

131. *Id.* at 23–24 (quoting *Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)). In *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), a unanimous Court supported the latter principle by rejecting the argument that a suit brought by public interest groups to obtain information relating to potential judicial nominees under the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1–16 (2006), was a generalized grievance because the injury was not “sufficiently discrete” from that of the population. *Public Citizen*, 491 U.S. at 449. Justice Scalia took no part in the decision. *Id.* at 442.

132. 127 S. Ct. 1438 (2007).

133. See *supra* notes 84–86 and accompanying text.

134. They included Alliance for Sustainable Communities; Applied Power Technologies, Inc.; Bio Fuels America; The California Solar Energy Industries Ass’n; Clements Envi-

filed a rulemaking petition requesting that the EPA regulate greenhouse gas emissions from new automobiles pursuant to Section 202 of the Clean Air Act (“CAA”),¹³⁵ which requires the agency to regulate emissions of air pollution from new cars.¹³⁶ The petitioners argued that new car emissions are substantially accelerating global warming, thus harming “human health and the environment,” and that the EPA impermissibly failed to regulate such emissions.¹³⁷

Four years later, the EPA denied the petition,¹³⁸ finding that (1) “the [CAA] does not authorize the EPA to issue mandatory regulations to address global [warming]” because greenhouse gases are not “air pollutants” under the statute; and (2) “even if [it had such] authority,” the EPA could lawfully decide to do nothing, because the CAA conditioned regulation on the EPA’s own “‘judgment’” that an air pollutant “endanger[s] public health or welfare.”¹³⁹ Additionally, in exercising that judgment, the EPA relied on a National Research Council report to the White House which concluded that “a causal link” between “human activities” and global warming “cannot be unequivocally established.”¹⁴⁰

With intervenor States and local governments, the plaintiffs sued under a CAA provision authorizing “review of action of the Administrator in promulgating any [new vehicle] emission[s] standard.”¹⁴¹ The United States Court of Appeals for the District of Columbia Circuit ruled for the EPA, without resolving the EPA’s challenge to the plaintiffs’ standing.¹⁴² Judge Sentelle filed a separate opinion, stating that the plaintiffs lacked standing as “they had alleged that global warming is ‘harmful to humanity at large,’ but could not allege ‘par-

ronmental Corp.; Environmental Advocates; Environmental and Energy Study Institute; Friends of the Earth, Inc.; Full Circle Energy Project, Inc.; The Green Party of Rhode Island; Greenpeace USA; International Center for Technology Assessment; Network for Environmental and Economic Responsibility of the United Church of Christ; New Jersey Environmental Watch; New Mexico Solar Energy Ass’n; Oregon Environmental Council; Public Citizen; Solar Energy Industries Ass’n and The SUN DAY Campaign. *Massachusetts*, 127 S. Ct. at 1449 n.15.

135. *Id.* at 1449.

136. 42 U.S.C. § 7521(a)(1) (2000) (providing that “[t]he [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in his judgment cause, or contribute to, air pollution”).

137. *Massachusetts*, 127 S. Ct. at 1449.

138. *Id.* at 1450.

139. *Id.* at 1450, 1462 (quoting 42 U.S.C. § 7521(a)(1)).

140. *Id.* at 1449–51 (internal quotation marks omitted).

141. *Id.* at 1451; *see also* 42 U.S.C. § 7607(b)(1) (2000).

142. *Massachusetts*, 127 S. Ct. at 1451–52.

ticularized injury' to themselves."¹⁴³ In dissent, Judge Tatel considered the "'substantial probability' . . . that projected rises in sea level would lead to serious loss of coastal property . . . a 'far cry' from the kind of generalized harm insufficient to ground Article III jurisdiction," at least for Massachusetts.¹⁴⁴

A divided Supreme Court reversed in an opinion that resolved the standing question and addressed the merits. Justice Stevens delivered the majority opinion, which Justices Kennedy, Souter, Ginsberg, and Breyer joined.¹⁴⁵ Conservative members of the Court, including Justice Scalia, lined up adamantly on the other side of the debate. Chief Justice Roberts dissented on the standing question, and Justices Scalia, Thomas, and Alito joined his opinion.¹⁴⁶

On the merits, the majority found that the CAA authorized the EPA to regulate carbon dioxide emissions from new cars,¹⁴⁷ and that the EPA "offered no reasoned explanation for its refusal" to regulate them under the CAA's mandate.¹⁴⁸ On the first issue, the Court concluded that "[t]he statutory text forecloses EPA's [contrary] reading,"¹⁴⁹ as it contained a "sweeping definition of 'air pollutant' [that] includes 'any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air.'"¹⁵⁰ Thus, the Court found that the statute "[o]n its face . . . embraces all airborne compounds of whatever stripe."¹⁵¹ With respect to the second issue, although the statute conditioned the exercise of authority on the EPA's formation of a "judgment," the Court concluded that "the use of the word 'judgment' is not a roving license to ignore the statutory text," but instead "must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare'"; and if the EPA makes such a finding, it is statutorily required to regulate emissions of the pollutant.¹⁵² "[W]hile the President has broad authority in foreign affairs," the Court explained, "that authority does not extend to the refusal to

143. *Id.* at 1452 (quoting *Massachusetts v. EPA*, 415 F.3d 50, 60 (D.C. Cir. 2005)).

144. *Id.* (quoting *Massachusetts*, 415 F.3d at 65, 66).

145. *See id.* at 1444, 1446–63.

146. *See id.* at 1463–71 (Roberts, J., dissenting). Justice Scalia filed a separate dissenting opinion on the merits, which Chief Justice Roberts and Justices Thomas and Alito joined. *See id.* at 1471–78 (Scalia, J., dissenting).

147. *Id.* at 1459 (majority opinion).

148. *Id.* at 1463.

149. *Id.* at 1460.

150. *Id.* (quoting 42 U.S.C. § 7602(g) (2000)).

151. *Id.*

152. *Id.* at 1462 (quoting 42 U.S.C. § 7521(a)(1) (2000)) (alteration in original).

execute domestic laws.”¹⁵³ Conceding that judicial review of agency refusals to regulate is “‘extremely limited’ and ‘highly deferential,’”¹⁵⁴ the Court determined that this was one of those fairly rare occasions in which reversal was warranted.¹⁵⁵

What has caught commentators’ attention is the majority’s novel endowment of special solicitude for states’ standing.¹⁵⁶ There were numerous petitioners that alleged different harms attributable to the EPA’s decision, but the Court focused solely on the injuries alleged by Massachusetts. It distinguished *Lujan* as involving a private individual; in contrast, Massachusetts “is a sovereign State and not . . . [a] normal litigant[] for the purposes of invoking federal jurisdiction.”¹⁵⁷ “When a State [such as Massachusetts] enters the Union, it surrenders certain sovereign prerogatives,” leaving it powerless to force other states or countries to limit their greenhouse gas emissions and hampering its ability to regulate emissions within its own state.¹⁵⁸ “Massachusetts’ stake in protecting its quasi-sovereign interests,” therefore, “entitled [it] to special solicitude in our standing analysis.”¹⁵⁹ It may well be that even the majority would not have found standing in the absence of a state plaintiff and that, as a practical matter, only state plaintiffs will find *Massachusetts* helpful in securing standing in environmental cases.¹⁶⁰ Nonetheless, the majority opinion contains important language not expressly limited by state sovereignty interests that carries broader implications for future standing disputes in statutory enforcement cases.

153. *Id.* at 1463.

154. *Id.* at 1459 (quoting Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989)).

155. *Id.* at 1463.

156. *See supra* note 5 and accompanying text.

157. *Massachusetts*, 127 S. Ct. at 1453–54.

158. *Id.* at 1454. Such sovereign powers, the Court explained, now reside in the federal government and Congress, which through the Clean Air Act, “has ordered EPA to protect Massachusetts . . . by prescribing [emission] standards” and created a “procedural right to challenge” the agency’s refusal to exercise its rulemaking authority. *Id.* (citing 42 U.S.C. §§ 7521(a)(1) & 7607(b)(1) (2000)).

159. *Id.* at 1454–55.

160. The dissent was understandably flummoxed by the majority’s creation of “special solicitude” for States in standing analysis and grounding its holding on that basis. *See id.* at 1463–65 (Roberts, C.J., dissenting). There is nothing in Article III that accords special solicitude to the States in delineating the jurisdiction of the federal courts. It is somewhat disappointing that the majority chose to distinguish *Lujan* on that basis rather than wrestling with the ambiguities created by application of the injury-in-fact test to prior public law cases. One might speculate that the “special solicitude” language was inserted for largely political reasons, such as winning Justice Kennedy’s vote for the majority.

B. *Tinkering with a Broken Standard*

As discussed in Part III below, Justice Stevens's discussion of injury-in-fact on behalf of the majority was not the opening performance of the opinion on standing. He devoted several paragraphs to describing the framework for analyzing standing in public cases before getting to the minutiae of the three-part test applied in *Lujan*.¹⁶¹ When he finally addressed the concrete injuries that Massachusetts alleged, however, Justice Stevens's stage-setting diversions culminated in an *Akins*-style analysis of *Lujan*'s "adjectives."

The generalized grievance bar factored heavily in *Massachusetts*. It was the marquee argument against standing. Like Judge Sentelle below, the EPA construed the generalized grievance bar as categorically forbidding adjudication of broadly shared injuries. It argued that "because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle."¹⁶²

Justice Stevens acknowledged that the "serious and well recognized" harms of global warming affect every living creature on earth.¹⁶³ He pointed out, however, that the Court has never held that the mere fact that an injury is "widely shared" defeats standing.¹⁶⁴ The EPA found space to argue that the generalized grievance ban applies to all cases seeking broad relief for public harms in cases, like *Lujan*, which suggest that the particularity element requires injuries differentiated from those of a broader class of individuals.¹⁶⁵ If many people suffer from the warming planet, the argument goes, they must band together and effectuate political change—they cannot invoke the courts. In dissent, the Chief Justice adhered to this construction of the generalized grievance bar, complaining that "[t]he very concept of global warming seems inconsistent with this particularization requirement" because "[g]lobal warming is a phenomenon 'harmful

161. See *id.* at 1452–53 (majority opinion).

162. *Id.* at 1453.

163. *Id.* at 1455–56.

164. See *id.* at 1456 (citing *FEC v. Akins*, 524 U.S. 11, 24 (1998) (stating that the fact that a harm is shared by many persons does not render it non-justiciable)); see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 496–97 (1982) (Brennan, J., dissenting) ("[I]t can hardly be argued that the Constitution bars from federal court a plaintiff who has suffered injury merely because others are similarly aggrieved . . . [a]nd it is equally clear that the Constitution draws no distinction between injuries that are large, and those that are comparatively small." (citations omitted)).

165. *Massachusetts*, 127 S. Ct. at 1453. See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) (providing support for EPA's argument in *Massachusetts* by explaining that a claim for relief "that no more directly and tangibly benefits [the individual] than it does the public at large" fails to provide a basis for standing).

to humanity at large,' and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world."¹⁶⁶

The majority recognized, however, that the government's argument that global warming is per se non-justiciable reflected a fundamental misunderstanding of the generalized grievance bar. The Court explained that simply because the "environmental damage yet to come" as a result of climate change is "'widely shared' [did] not minimize Massachusetts' interest in the outcome of this litigation."¹⁶⁷ The Court went on to quote *Akins*: "'[W]here a harm is concrete, though widely shared, the Court has found injury in fact."¹⁶⁸ In *Akins*, the Court did not require a showing that the plaintiff's harm—a lack of information—was distinct from that of the broader populace.¹⁶⁹ The *Massachusetts* case thus reestablished the original scope and purposes of the generalized grievance bar—keeping out of court those cases that smack of generic complaints about the government's compliance with the Constitution or the laws of Congress—and suggested that *Akins* properly understood this concept as operating independently of the particularity requirement of the injury-in-fact test. For this reason alone, *Massachusetts* adds value to the jurisprudence of public law standing.

To be sure, the majority proceeded to satisfy *Lujan* by finding that particularized injury existed because the "rising seas have already begun to swallow Massachusetts' coastal land."¹⁷⁰ On a number of other fronts, however, the Court appeared to ascribe to the more lenient theory of public law standing that *Akins* adopted. First, it suggested that Congress has the power to alter the constitutional standing analysis. The Court did not embrace the *Lujan* majority's view that Congress's authorization of a suit has no bearing on constitutional standing analysis. Instead, it quoted Justice Kennedy's concurrence in *Lujan*, deeming it "of critical importance" that Congress authorized the lawsuit, as Congress can "'define injuries . . . that will give rise to a

166. *Massachusetts*, 127 S. Ct. at 1467 (Roberts, C.J., dissenting) (quoting *Massachusetts v. EPA*, 415 F.3d 50, 60 (2005) (Sentelle, J., dissenting in part and concurring in judgment)).

167. *Id.* at 1455–56 (majority opinion) (quoting *Akins*, 524 U.S. at 24).

168. *Id.* at 1456 (quoting *Akins*, 524 U.S. at 24) (internal quotation marks omitted).

169. Cf. Amanda C. Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. (forthcoming 2009) (characterizing *Massachusetts* as narrowing the reach of *Akins*, because it garnered only a five-member majority of the Court and because Justice Stevens's discussion of injury focused solely on pre-existing property loss versus future sea level rise).

170. *Massachusetts*, 127 S. Ct. at 1456.

case or controversy where none existed before'” so long as it “identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit.”¹⁷¹ This passage lends support to the theory underlying *Akins*, namely, that Congress can define which plaintiffs—as a class—can constitutionally bring a lawsuit, with the only constraint being the classic generalized grievance bar prohibiting “citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.”¹⁷² In other words, undifferentiated injury may not be objectionable per se in statutory enforcement cases, so long as Congress authorized the suit and “concreteness” remains.¹⁷³

Second, on the questions of imminence and the closely related concept of redressability, the Court did not subscribe to *Lujan*’s rigid formulations. It credited statements in affidavits that global sea levels had “already begun to swallow Massachusetts’ coastal land,” and underscored one Massachusetts official’s belief that additional coastline will be affected in the future.¹⁷⁴ The dissenters charged the majority with “render[ing] requirements of imminence and immediacy utterly toothless,”¹⁷⁵ because it found nothing in the record but “a single conclusory statement . . . to support an inference of actual loss of Massachusetts coastal land from 20th century global sea level increases.”¹⁷⁶ The dissenters’ view appears to comport with the injury-in-fact elements articulated in *Lujan*, which “are not mere pleading requirements but . . . must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.”¹⁷⁷ The *Massachusetts* majority responded simply that “[p]etitioners maintain that the seas are rising and will continue to rise, and have alleged that such a rise will lead to the loss of Massachusetts’ sovereign territory,” and that “[o]ur cases require nothing more.”¹⁷⁸

171. *Id.* at 1453 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)), *see also supra* note 31 and accompanying text.

172. *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)).

173. *See infra* Part III.C.

174. *Massachusetts*, 127 S. Ct. at 1456.

175. *Id.* at 1468 (Roberts, C.J., dissenting) (citing *Lujan*, 504 U.S. at 565 n.2 (majority opinion)).

176. *Id.* at 1467.

177. *Lujan*, 504 U.S. at 561.

178. *Massachusetts*, 127 S. Ct. at 1456–57 n.21 (majority opinion).

The Court also found “essentially irrelevant” the EPA’s *Lujan*-style arguments that the replacement of the millions of existing cars would delay redress indefinitely for the harms alleged by the plaintiffs, and that the greater culprits are “developing countries such as China and India,” which are projected to “substantially” increase emissions.¹⁷⁹ The Court instead credited testimony that domestic cars emit a significant amount of carbon dioxide into the atmosphere, and recognized petitioners’ argument that this “meaningful contribution to greenhouse gas concentrations,” which the EPA refused to regulate, contributes to global warming.¹⁸⁰ Standing was satisfied if the EPA regulatory activity would “slow or reduce” global warming, even if it could not reverse it; to hold otherwise, the majority concluded, “would doom most challenges to regulatory action.”¹⁸¹ The dissent took issue with the Court’s incremental approach to redressability, arguing that “[p]etitioners are never able to trace their alleged injuries back . . . to the fractional amount of global emissions that might have been limited with EPA standards.”¹⁸² Noting that the complained-of “150-year global phenomenon” has numerous causes, the dissent called the majority’s analysis a “sleight-of-hand,” as “[t]he realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will *likely* prevent the loss of Massachusetts coastal land.”¹⁸³

179. *Id.* at 1457–58; *cf. id.* at 1469 (Roberts, C.J., dissenting) (challenging the majority’s conclusion by noting that domestic new cars account for only four percent of greenhouse gas emissions globally, and that “80 percent of global . . . emissions [emanate from] outside the United States”). By contrast, the *Lujan* plurality had found a ten percent financial contribution to offshore projects affecting endangered species insufficient to satisfy redressability. See *supra* notes 36–38 and accompanying text.

180. See *Massachusetts*, 127 S. Ct. at 1457–58 (majority opinion).

181. *Id.*

182. *Id.* at 1469 (Roberts, C.J., dissenting).

183. *Id.* at 1469–70. The dissent likened the majority’s causation and redressability analysis to the “previous high-water mark of diluted standing requirements.” *Id.* at 1470–71 (citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973)). In *SCRAP*, an environmental association formed by law students brought an action challenging Interstate Commerce Commission orders allowing railroads to collect a 2.5 percent surcharge on freight rates pending adoption of selective rate increases. *SCRAP*, 412 U.S. at 674, 678. *SCRAP* alleged that the higher rate structure would discourage the use of “recyclable” materials, causing further consumption of forests and other natural resources and resulting in more refuse and undisposable materials to pollute the environment. *Id.* at 676, 678. The Court held that *SCRAP* had standing, relying on the allegation that its members used the forests, streams, mountains, and other resources in the Washington, D.C., area for recreation, and the increased waste brought about by the rate increase would harm the group’s members. *Id.* at 688. Even in the *SCRAP* decision, Chief Justice Roberts noted in his *Massachusetts* dissent, the majority conceded that “what was required was ‘something more than an ingenious academic exercise in the conceivable.’” *Massachusetts*, 127 S. Ct. at 1471 n.2 (quoting *SCRAP*, 412 U.S. at 688).

Third, the majority's holding that Massachusetts had standing to sue the EPA over dissatisfaction with its progress on regulating global warming implicitly challenged the fortitude of Justice Scalia's theory that standing exists to ensure that the judiciary does not impede on the executive's power. The Court rebuffed the EPA's attempt to lie behind the log on regulation of greenhouse gases as a means of preserving "agency discretion to pursue other priorities of the Administrator or the President."¹⁸⁴ Justice Scalia's private law theory of justiciability would appear to reject this kind of judicial intervention into the political realm.¹⁸⁵ In dissent, therefore, Chief Justice Roberts relied on *Lujan* to emphasize that the "problem" of global warming has not "escaped the attention of policymakers in the Executive and Legislative Branches of our Government," and that "[t]his Court's standing jurisprudence . . . recognizes that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts."¹⁸⁶ Ironically, however, *Lujan*'s emphasis on injury-in-fact may have worked to the disadvantage of the dissenting Justices, as the particularized nature of Massachusetts' lost coastline masked the broader Article II problems associated with the requested relief—an order directing the EPA to muster the political will to regulate car emissions that may contribute to global warming, despite the White House's contrary leanings.¹⁸⁷ As a consequence, *Lujan*'s separation of powers rationale—tacked onto injury-in-fact after the doctrine supplanted the legal rights model as a means of ensuring concrete adversity—hung in the balance.

Fourth, as shown below, although the majority found particularized injury in the form of receding Massachusetts coastline, it also identified several important caveats to the private law model of adjudication applied in *Lujan*, which may represent a necessary accommodation to the nuances of public rights problems.¹⁸⁸

184. *Massachusetts*, 127 S. Ct. at 1462 (majority opinion).

185. See *supra* notes 84–86 and accompanying text.

186. *Massachusetts*, 127 S. Ct. at 1463–64 (Roberts, C.J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992)).

187. The EPA ended up punting the question to the next administration in any event by seeking public comment on the feasibility of using the CAA to address global warming rather than issuing regulations addressing emissions from new cars. See Juliet Eilperin, *EPA Seeks Comments on Emissions Rules, Then Discredits Efforts*, WASH. POST, July 12, 2008, at A4.

188. Susan Bandes has compellingly argued that "[t]he Court uses contorted logic and tortured language to fit a public rights problem into the private rights mold," a "distortion [that] leads to incoherence and unpredictability, as well as to a lack of judicial accountability" because "[t]he private rights vision does not accommodate evolving social norms and cannot recognize the collective nature of rights and the systemic nature of harms." See Bandes, *supra* note 78, at 318–19.

What, then, are the contours of the injury-in-fact test after *Massachusetts*? Although technically Massachusetts' alleged loss of coastal lands satisfied *Lujan*'s construction of the particularization requirement, the Court's findings that projections of harm were sufficiently imminent and that an order directing the EPA to regulate new car emissions would likely redress the injury moved a class of public law standing cases away from *Lujan*'s stronghold and in the direction of the approach taken in *Akins*.¹⁸⁹ *Massachusetts* nudged an imminent injury standard towards one that credits projections of injury, and a likely-to-be-redressed standard towards one that accepts at face value the plaintiff's claim that the relief sought will make a "meaningful contribution" to redressing the injury.¹⁹⁰ What remains to be determined is, under the test for standing in public law cases as *Massachusetts* recalibrates it, which cases alleging commonly shared harms are justiciable and which are not. In the next Part, I attempt to bring some coherence to the law in this area by defending an alternative to the conventional injury-in-fact standard that is based on three criteria derived from the majority opinion in *Massachusetts*.

III. CRACKS IN THE MORTAR: UNDERSTANDING THE JUSTICIABLE GENERALIZED GRIEVANCES

Despite the majority's professions of fidelity to *Lujan*, the *Massachusetts* case may be an incremental defeat for the conservatives on the Court who subscribe to a purely private law model of adjudication on separation of powers grounds. In this Part, I describe three signposts for adjudicating standing that are inherent in *Akins* and *Massachusetts* and suggest that the Court disavow *Lujan*'s requirement of particularized, individualized injury in favor of a reconceptualized framework for analyzing standing in public law cases in which plaintiffs seek to

189. It should be noted that a narrow reading of *Massachusetts* that carves off the States—as possessors of "special solicitude"—from the strictures of injury-in-fact, causation, and redressability, but leaves the private sector to the rigidities of that standard, seems defensible. See *supra* notes 160–62 and accompanying text. It would mean that States can bring environmental cases of broad reach, so long as they can articulate some personal stake such as the deterioration of coastal lands alleged in this case. Massachusetts has a greater interest in EPA regulation of greenhouse gas emissions than the generic plaintiff because it is responsible for management of state resources. A "states-only" construction of *Massachusetts* would operate to grant environmental standing but limit it to scenarios where there is enough interest amongst the citizenry to prompt the states to spend political capital to force the issue. The environmental issue, in other words, would have been vetted through the political process before a State brings such a case. The democratic process would have thereby fingered the issue as warranting the attention of the federal courts in ensuring adequate enforcement of the applicable law by the executive.

190. *Massachusetts*, 127 S. Ct. at 1457–58 (majority opinion).

enforce a statute that indistinguishably benefits the public. In particular, injury-in-fact, causation, and redressability analysis should assume a different tenor when the case exhibits three characteristics: (1) an invocation of “procedural rights” created by statute and implicated by a federal agency’s action or failure to act; (2) a sufficiently concrete “personal stake” in the outcome of the case on the part of the plaintiff; and (3) congressional authorization to bring the challenge.

Such an approach has several advantages. It is more attuned to the realities of public law litigation, which the injury-in-fact test cannot serve without producing vast practical and theoretical problems.¹⁹¹ It is also based on a number of propositions that, when viewed independently, are uncontroversial. A majority of the Court, including Justice Scalia, agrees that some concrete stake is necessary for standing, and that some procedural injuries are incompatible with causation and redressability requirements.¹⁹² Thus, the approach I draw from *Massachusetts* does not require the dismantling of standing doctrine as we know it, as other commentators have reasonably proposed,¹⁹³ but is based on an application of principles already endorsed by the Court. As for the impact of congressional authorization of standing, such a framework gives appropriate weight to congressional grants of the right to sue federal officials or agencies, and clears up the ambiguity associated with the generalized grievance bar by confining it to its original purpose—preventing federal courts from becoming the “ombudsmen of the general welfare.”¹⁹⁴ Further, it recognizes that federal courts play an important role in the separation of powers by ensuring executive accountability in areas where Congress has signaled that deficiencies in the political process would otherwise leave commonly shared injuries unredressed.

191. Other commentators favor development of an affirmative public law model, “which [would] more effectively safeguard public constitutional values in an increasingly bureaucratized society.” See Bandes, *supra* note 78, at 276–87 & n.335 (discussing scholarship and stating that “[t]he private rights model offers little guidance in evaluating intangibles like concern for the environment or vote dilution”); Percival, *supra* note 4, at 136 (arguing that the private law model is inapposite in public law cases because, “[u]nlike the traditional model of private law litigation where one party seeks redress for harm caused by another, public law litigation seeks to require agencies to conform to law when exercising their regulatory authorities to prevent diffuse harm to the general public”).

192. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n.7 (1992) (revealing Justice Scalia’s views with respect to concrete interests and certain procedural injuries).

193. See, e.g., Elliott, *supra* note 112 (arguing for development of a “vibrant abstention doctrine” to replace most current applications of standing doctrine).

194. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982) (suggesting that the generalized grievance bar prevents plaintiffs from “roam[ing] the country in search of governmental wrongdoing and [revealing] their discoveries in federal court”).

A. *Leniency for Procedural Injuries*

First, the *Massachusetts* Court brought Justice Scalia's procedural rights caveat from *Lujan* into mainstream standing doctrine. It found that the CAA's provision authorizing judicial review constituted a congressional recognition of *Massachusetts's* "procedural right to challenge the rejection of its rulemaking petition."¹⁹⁵ Justice Stevens stated that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests'—here, the right to challenge agency action unlawfully withheld—'can assert that right without meeting all the normal standards for redressability and immediacy.'"¹⁹⁶ Such a "litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."¹⁹⁷ Hence, the *Massachusetts* majority cemented a significant exception to the traditional *Lujan* test—relaxed immediacy and redressability in public law cases involving a procedural right granted by Congress.

Of course, a crucial question arises as to what makes a procedural violation justiciable for purposes of this forgiving analysis.¹⁹⁸ At first

195. *Massachusetts*, 127 S. Ct. at 1454 (citing 42 U.S.C. § 7607(b)(1) (2000)).

196. *Id.* at 1453 (quoting *Lujan*, 504 U.S. at 572 n.7 and citing 42 U.S.C. § 7607(b)(1)).

197. *Id.* (citing *Lujan*, 504 U.S. at 572 n.7 and quoting *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002) ("A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.") (alteration in the original)).

198. The Court appears to have largely neglected the question of what constitutes a "procedural right" versus a non-justiciable interest in seeing that the government abides by procedures in the first instance, although the *Lujan* majority made the distinction. See *supra* note 43–45 and accompanying text. Justice Blackmun in his dissenting opinion noted that "I have the greatest sympathy for the courts across the country that will struggle to understand the Court's standardless exposition of this concept today," and suggested that:

Most governmental conduct can be classified as procedural In complex regulatory areas . . . Congress often legislates . . . in procedural shades of gray [I]t sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

Lujan, 504 U.S. at 601–02 (Blackmun, J., dissenting) (internal quotation marks omitted). Attempts at a more refined definition, however, readily become circular. See, e.g., *Hodges v. Abraham*, 300 F.3d 432, 444 (4th Cir. 2002) (defining "a procedural right" as "the right to have the Executive observe procedures mandated by law" (internal quotation marks omitted)). In this piece, I chip away at this question by identifying the outliers—the plaintiff seeking an individualized hearing to which she is constitutionally entitled and the ideologue complaining that the government failed to comply with a procedural requirement set forth somewhere in law—but do not attempt here to categorize the myriad kinds of procedures applicable to agencies into those that qualify as justiciable "procedural rights"

blush, the answer seems simple. Plaintiffs routinely challenge agency actions on the grounds that the agency failed to follow procedures required by law. When, for example, a private plaintiff raises procedural complaints in an adjudication involving that party, the alleged error may be ordinary, such as the failure to provide a proper hearing required by due process or the failure to comply with the APA's procedural requirements for formal adjudications.¹⁹⁹ Such an individual plaintiff's standing hinges on allegations of a separate cognizable injury—such as a denial of welfare benefits—for which she would have standing to challenge defects in the process used to reach that decision.²⁰⁰

A thornier issue is whether, assuming the plaintiff received the welfare benefits due, she would still have standing to sue an agency for having failed to follow the requisite procedures. Few welfare beneficiaries are likely to engage in litigation to ensure proper adherence to hearing requirements if they cannot identify some concrete harm that they want redressed.

Nonetheless, one might envision a definition of "procedural rights" that embraces cases brought to ensure the plaintiff's right to participate and be heard, regardless of whether the plaintiff demonstrates some separate concrete harm. Procedural due process is triggered if life, liberty, or property is at stake,²⁰¹ and Congress can create legal entitlements that, if withdrawn or compromised, carry due process protections, notwithstanding that such "rights" did not exist at common law.²⁰² The Supreme Court employs a balancing test to determine how much process is due to protect a constitutionally protected liberty or property interest.²⁰³ Hence, if a statutory procedure aimed at protecting a recognized liberty or property interest is constitutionally sufficient to protect that interest and if an agency fails to

and those that do not. Peter Raven-Hansen has addressed this issue by drawing a distinction between regulatory or statutory procedures that are "intended to benefit the public," which are mandatory, and internal procedures designed primarily for the "benefit of the agency—to promote uniformity, order, and convenience in the conduct of public business." Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws,"* 64 TEX. L. REV. 1, 20–22 (1985). The latter, he observes, may be waivable. See *id.* at 22.

199. See 5 U.S.C. §§ 554, 556, 557 (2006) (setting forth APA requirements for formal adjudications).

200. See *supra* notes 55–57 and accompanying text.

201. U.S. CONST. amend. V.

202. See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (considering whether the deprivation of legal entitlements such as welfare benefits constitutes a violation of due process); *Goldberg v. Kelly*, 397 U.S. 254, 261–62 & n.8 (1970) (same).

203. See *Mathews v. Eldridge*, 424 U.S. 319, 341–47 (1976) (discussing factors relevant to ascertaining due process requisites).

comply with that procedure, the fact of the procedural violation may be sufficient to create an Article III case or controversy even if the plaintiff cannot show that the deprivation caused some related harm that would independently satisfy injury-in-fact.

It is unlikely, however, that Justice Scalia had such a conception of procedural rights in mind when he wrote footnote seven of his *Lujan* opinion. He did not confine his procedural rights caveat to those cases in which the plaintiff has an individual right to due process, such as that of the welfare beneficiary denied a hearing, but he would extend relaxed causation and redressability requirements to:

[those cases] where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them).²⁰⁴

Although licenses may be considered property within the meaning of the Due Process Clause,²⁰⁵ it is harder to understand the procedural requirement for an environmental impact statement (“EIS”) as constituting the constitutional minima that must be afforded before a property owner can be deprived of his property. The property owner may be entitled to a full-blown preliminary injunction hearing on the grounds that the government action would amount to a constitutional taking, and that court action might result in an order directing the agency to produce an EIS, but the property owner is not likely to be constitutionally entitled to an EIS in addition to a hearing in order to satisfy the procedural minima that deprivation of his property affords.

Alternatively, a statutorily mandated procedure itself may create a property or liberty interest by creating a legal entitlement similar to those interests recognized as sufficient to establish standing under the antiquated legal rights conception of standing. The Court has refined the concept of a legal entitlement in various ways. It has looked to whether a statute or other source of positive law creates a reasonable expectation of entitlement on the part of a covered party.²⁰⁶ The more a statute limits the government’s discretion in some way, the

204. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n.7 (1992).

205. *Barry v. Barchi*, 443 U.S. 55, 64 (1979).

206. *See Roth*, 408 U.S. at 577.

greater the likelihood that a legal entitlement is created.²⁰⁷ But these standards assume that the thing a covered person is entitled to is, at the end of the day, property or liberty. Thus, allowance for “good time” credits on the part of prisoners is a legal entitlement because it creates a liberty interest in freedom from extended incarceration.²⁰⁸ A right to a specified procedure, in and of itself, does not create any liberty or property interests. The procedure might protect against arbitrary deprivation of liberty or property, but the mere failure to follow the procedure does not trigger procedural due process protections unless such a failure impacts constitutionally protected interests. Although the homeowner could point to a property interest in his home as prompting due process protections, such an interest is not created by the EIS requirements themselves. Thus, although qualifying for “special treatment” under *Lujan*’s footnote seven,²⁰⁹ an individual denied a right to a hearing does not define the ambit of the procedural rights exception to normal causation and redressability standards.

It is easy to understand why the other extreme that Justice Scalia identifies, that is “standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam,” does not warrant special “procedural rights” treatment.²¹⁰ A suit brought by a person with no proximity to the dam would be analogous to the citizen and taxpayer standing suits raising ideological disparities with executive branch authorities that have long been foreclosed under well-settled Supreme Court precedent. Because public law is about defining and controlling the process and activities of government,²¹¹ including its compliance with countless statutory and regulatory procedures, there is a danger of overreading the “procedural rights” exception. It is possible to characterize many, if not most, claims that aim to get the government to do its job as attempts to vindicate procedural rights to have the government comply with the law, leaving no limit on the statutory cases that federal courts may hear. Such arguments blur the right to a particular procedure with the merits of the government’s action and have

207. See *Town of Castle Rock, Colo. v. Gonzalez*, 545 U.S. 748, 756 (2005) (noting that a “benefit is not a protected entitlement if government officials may grant or deny it in their discretion”).

208. See *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (holding that state law that created a “good time” credit system by which inmates could reduce their sentences created a liberty interest in those credits, which could not be taken away without due process).

209. *Lujan*, 504 U.S. at 572 n.7.

210. See *id.*

211. See generally *Bell*, *supra* note 13, at 236–38 (describing the functions of public law).

the potential for authorizing standing where no injury actually occurs other than abstract noncompliance with the law.

Justice Scalia's competing illustration—that of a plaintiff challenging an agency's failure to complete an environmental impact statement prior to building a dam next door²¹²—is the most difficult to parse under the normal injury-in-fact test. In theory, standing might lie only if such a plaintiff could articulate some concrete injury flowing from a violation of the procedure, such as psychological harms caused by the process. But the homeowner plaintiff who would have standing in Justice Scalia's view is merely alleging that he *anticipates* that the failure to prepare an EIS will harm him or his property somehow, and that this risk of injury itself confers standing.²¹³ Such an injury is not imminent to the extent that the dam will not be completed until some future date. Arguably, therefore, it is not sufficiently particularized under *Lujan*, which rejected the plaintiffs' allegations of injury because they included no showing that aesthetic harm was imminent in connection with a *future* visit to the environmental sites.²¹⁴

A better argument under *Lujan* is that the person living next to the dam does have standing, as he resembles the hypothetical plaintiff

212. *Lujan*, 504 U.S. at 572 n.7.

213. Courts have evaluated such cases based on the probability or risk of harm. *See, e.g.*, *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 972–75 (9th Cir. 2003) (stating that procedural rights plaintiffs “need only establish the reasonable probability of the challenged action’s threat to [their] concrete interest” (internal quotation marks omitted) (alteration in the original)); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1179 (9th Cir. 2000) (applying *Lujan* procedural rights language); *Utah v. Babbitt*, 137 F.3d 1193, 1210 n.26 (10th Cir. 1998) (finding procedural injury insufficient to satisfy standing absent showing of concrete injury resulting from procedural violation); *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 665–66 (D.C. Cir. 1996) (applying a test for standing in procedural rights case that included a showing that “a particularized environmental interest of [the plaintiffs] will suffer demonstrably increased risk” and that it is “substantially probable” that the agency action will cause the injury); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 451–52 (10th Cir. 1996) (disagreeing with *Florida Audubon’s* “substantial probability” test and requiring plaintiffs to establish an “increased risk of adverse environmental consequences” from an alleged failure to follow NEPA); *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1537 (9th Cir. 1993) (holding that “environmental groups have Article III standing if for no other reason than that they allege procedural violations in an agency process in which they participated”). Whether they have done so coherently or successfully is beyond the scope of this paper, although others have addressed the subject. *See generally* Leiter, *supra* note 169 (discussing D.C. Circuit law regarding probability of risk of harm); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 45–63, 82–83 (2005) (discussing the Circuit split regarding standing analysis in NEPA procedural rights cases and arguing that courts should use a “reasonable possibility” standard in suits challenging governmental responses to global warming).

214. *Lujan*, 504 U.S. at 564.

who regularly visits an environmental site—he can show imminent injury to his property values and/or to his aesthetic enjoyment of his home because he lives there, or at least occupies it with some regularity. But even assuming *arguendo* that *Lujan* recommends such an outcome, what kind of standard does this imply for the broader category of public law cases lying between the outliers of the individual plaintiff denied due process and the malcontent complaining about bad government? As commentators have observed, “Congress often requires that agencies conform to certain decisional processes that require them to take into account specially identified public interests or values.”²¹⁵ In a rulemaking conducted for the benefit of the general public, an agency may be statutorily required to take into account certain considerations or costs, to engage certain governmental actors, or to make certain preliminary determinations before taking an action.²¹⁶ The National Environmental Policy Act (“NEPA”), for example, requires agencies to consider the environmental impact of proposed actions in myriad ways.²¹⁷ Such procedures do not operate to protect any particular party whose rights are at stake in an individualized determination. They protect and benefit the public as a whole. What must a plaintiff show to have standing to force compliance with them?

Justice Scalia’s talk of procedural rights for such a plaintiff could suggest quite simply that the failure to follow a procedure required by statute itself creates an injury, regardless of whether procedural due process protections are implicated. The congressionally mandated procedure, in other words, creates some kind of legal right without constitutional implications, and the injury is substantively linked to that procedure. Justice Blackmun embraced such congressionally created injury in his dissenting opinion in *Lujan*:

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty.²¹⁸

215. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 400 (2d ed. 2001).

216. *See id.*

217. The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (2000); *see generally* *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004) (observing that NEPA “imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions”).

218. *Lujan*, 504 U.S. at 605 (Blackmun, J., dissenting).

But this scenario is incompatible with the requirements of particularized and actual or imminent injury-in-fact, as well as with Justice Scalia's theory of standing as protecting only private rights; a majority of the Court rejected it expressly in *Lujan*.²¹⁹

The most satisfying understanding of the EIS example in Justice Scalia's procedural rights discussion lies somewhere short of traditional injury-in-fact. The EIS is not constitutionally required, nor does it create an actionable legal right. But EIS requirements lend further assurance to the homeowner that his property rights will not be arbitrarily taken from him, thereby increasing his "stake" in ensuring that an EIS is prepared, if required. Justice Scalia recognized that plaintiffs need not satisfy traditional standing requirements in cases involving procedural rights, so long as they retain a "separate concrete interest" in the outcome.²²⁰ In other words, if there is a procedural violation, the plaintiff does not need as much concrete harm as the injury-in-fact test would otherwise require. A procedural right and a concrete stake operate as reciprocals, just as an allegation of a procedural violation relaxes causation and redressability requirements.

For a number of reasons, the linkage between a procedural injury and the pre-Scalia conception of standing as requiring a concrete personal stake—divorced of the trappings of particularization, imminence, or redressability—provides a better and more consistent way of memorializing in coherent doctrine the inevitable need to find standing in public law cases for which traditional constructions of causation and redressability cannot be satisfied. By tolerating a relaxed causation and redressability analysis for the EIS plaintiff, *Lujan* reveals the fundamental ineptitude of the injury-in-fact test as a reasonable measure of constitutional standing in public law cases. If causation, redressability, and the related requirement of imminence are constitutionally mandated, the Court has no choice but to apply them equally to "procedural injuries." If they are merely prudential barriers imposed by judges, Congress's authorization of standing for the *Lujan* plaintiffs should have resolved the causation and redressability questions in that case. The procedural rights exception thus appears to be

219. See *id.* at 573 n.8 (majority opinion) ("If we understand [the dissent] correctly, it means that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed). We cannot agree.").

220. *Id.* at 572 & n.7. In dissent, Justice Blackmun similarly observed that "[the] action-forcing procedures" contained in the ESA "are designed to protect some threatened concrete interest of persons who observe and work with endangered or threatened species." *Id.* at 603 (Blackmun, J., dissenting) (citation and internal quotation marks omitted).

a creature of practical necessity. Because the application of a likely redressability standard would leave *no* plaintiff positioned to challenge the government's failure to comply with a statutory requirement for an EIS—other than perhaps the homeowner filing suit after the dam's construction to obtain its destruction—Justice Scalia carved out a hole in the prevailing test for standing in public law cases.

Most plaintiffs are similarly incapable of showing that the government's compliance with the correct procedure will even likely produce the desired result. Standing analysis must adjust to account for this causation problem and it has done so. But the Court has tinkered with the injury-in-fact analysis in public law cases without so acknowledging, without articulating any meaningful standards for applying the altered test, and without constraining itself from exercising excessive subjectivity in the process.

The express relaxation of redressability in procedural rights cases reflects a more realistic approach to the realities of public law litigation, in which the *Lujan* adjectives are notoriously difficult to apply with fidelity. The Court should take the further step of construing "procedural rights" to enable standing in a broader class of cases—one in which plaintiffs demonstrate a concrete stake in the government's compliance with statutorily required procedures, even if that stake would not independently satisfy each nuance of the standard injury-in-fact test—and make clear that the *Lujan* majority's injury-in-fact analysis does *not* apply in that context.²²¹

B. *Old Rhetoric, New Vigor: The Concrete Stake*

Second, the *Massachusetts* majority used the "concrete" or "personal stake" language of *Baker v. Carr* that historically characterized standing jurisprudence, prior to the advent of the separation-of-powers rationale, to justify the majority's rejection of the generalized grievance argument and to preface its analysis of injury-in-fact. Justice Stevens reiterated that, "[a]t bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely de-

221. See Buzbee, *supra* note 47, at 803 (stating that a "substantial body of judicial and scholarly analysis concludes that plaintiffs with an underlying 'concrete' interest have standing to complain of agency procedural breaches of law despite uncertain proof of causality or redressability in the sense of guaranteed or likely avoidance of the underlying threatened injury to a real interest"); *id.* at 790–91 n.138 (citing articles analyzing *Lujan's* discussion of procedural rights).

pendes for illumination.’”²²² He then quoted Justice Kennedy’s concurrence in *Lujan*—which similarly utilized the concrete stake concept for analyzing standing in a generalized grievance context—as if it were a leading opinion:

While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.²²³

Some version of the concrete or personal stake concept underlies all public law standing jurisprudence.²²⁴ In his *Lujan* opinion, Justice Scalia linked that concept with the adjectives in declaring that a particularized and actual or imminent injury-in-fact is normally required in order to establish the requisite personal stake.²²⁵ The *Akins* majority construed the injury-in-fact limitation more loosely, as “help[ing] assure that courts will not ‘pass upon . . . abstract, intellectual problems,’ but adjudicate ‘concrete, living contest[s] between adversaries.’”²²⁶ The *Massachusetts* Court extended the reasoning in *Akins* in holding that the undifferentiated nature of certain widespread injuries is not preclusive of standing, so long as the plaintiff has some personal stake that is concrete.²²⁷

The issue under this formulation, then, becomes whether the plaintiff was injured in a concrete and personal—but not necessarily individualized or differentiated—way. Concededly, this factor is itself contingent on adjectives, but it does a better job at capturing the nec-

222. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

223. *Id.* (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)).

224. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (stating that the requirement of a “personal stake” has been “refined by subsequent reformulation,” and “has come to be understood to require not only a distinct and palpable injury, to the plaintiff, but also a fairly traceable causal connection between the claimed injury and the challenged conduct” (citation and internal quotation marks omitted)).

225. *Lujan*, 504 U.S. at 560 (majority opinion).

226. *FEC v. Akins*, 524 U.S. 11, 20 (1998) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)).

227. *Massachusetts*, 127 S. Ct. at 1453–55.

essary minima for standing than injury-in-fact does in statutory enforcement cases.

There is no exposition of Justice Scalia's "concrete stake" showing for plaintiffs alleging procedural error other than by way of illustration. As noted above, there is a good argument that the homeowner in Justice Scalia's EIS illustration suffers imminent injury-in-fact under *Lujan* that distinguishes him from other interested parties in satisfaction of the particularization requirement. But his "stake" in the EIS is also personal and concrete because he lives next to the dam and his aesthetic interests associated with living in his existing home could be affected someday. Characterized this way, the homeowner is distinguishable from the "all who breathe" category of plaintiff in a manner that tidies the veritable mess that currently characterizes public law standing cases that otherwise purport to studiously apply the prevailing injury-in-fact test. It reconciles the concept of particularized injury with the more realistic holding in *Akins*, in which the voter-plaintiffs' lack of information about a third party's campaign-related activities rendered their interest concrete notwithstanding that the alleged injury was not differentiated from the public at large nor necessarily redressable by a favorable judgment.²²⁸

At bottom, the language of concreteness simplifies what it means to possess particularized injury in statutory enforcement cases: The plaintiff must experience some discernable adverse consequence by virtue of the defendant's actions.²²⁹ In *Baker v. Carr*, which set forth the personal stake concept, the analysis was straightforward. The Court found that plaintiffs had standing to challenge a state voting apportionment statute on equal protection grounds because they "[sought] relief in order to protect or vindicate an interest of their own, and of those similarly situated . . . asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes."²³⁰ In *Sierra Club v. Morton*,²³¹ the Court stated that "[t]he requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who

228. See *Akins*, 524 U.S. at 23–25. Arguably, the homeowner's stake in Justice Scalia's hypothetical is particularized by comparison, but not necessarily so.

229. To be sure, as Susan Bandes has observed, "concreteness [is] a matter of degree, not . . . an absolute." Bandes, *supra* note 78, at 267; cf. Nichol, *supra* note 12, at 336, 339 (arguing that the Court should stop using the injury requirement for statutory standing and advocating a presumption of injury in nonstatutory cases).

230. *Baker v. Carr*, 369 U.S. 186, 207–08 (1962) (internal quotation marks omitted).

231. 405 U.S. 727 (1972).

have a direct stake in the outcome.”²³² In public law cases seeking relief that benefits more parties than the plaintiff in substantially similar ways, a rough attempt may be the best the Court can do. While the adverse effect need not be unique to the plaintiff, it must be something more than mere “assertion of a right to a particular kind of Government conduct.”²³³

An utterly de minimis effect on the plaintiff, therefore, might still not suffice. In *Flast*, the Court suggested that the “petitioner in *Frothingham* was denied standing not because she was a taxpayer but because her tax bill was not large enough.”²³⁴ In Justice Scalia’s words, therefore, she was “not perceptibly affected by the unlawful action in question.”²³⁵ An imperceptible injury is not an injury in a meaningful sense of the term; like the generalized grievance bar, the concept marks the outer limit of standing on a concreteness theory.²³⁶

The language of concreteness is a better proxy for injury in the public law context than is injury-in-fact for a number of reasons.²³⁷ First, it detaches the particularization requirement from notions of uniqueness, thus clearing up confusion regarding the scope of the generalized grievance bar. Second, it lessens the subjectivity inherent in the imminence requirement that Justice Blackmun decried in *Lujan*.²³⁸ Third, like Justice Scalia’s procedural rights exception, its association with the more relaxed conception of standing illustrated in *Baker v. Carr* constitutes a recognition that public law cases necessitate an altered standing paradigm, which includes relaxed standards for causation and redressability. Fourth, it is grounded in longstanding, consistent Supreme Court doctrine. Both the *Lujan* and *Akins* majorities distinguished widely shared harms that are justiciable from those

232. *Id.* at 740; see also Percival, *supra* note 4, at 134–35 (observing that the *Massachusetts* Court’s “approach . . . is reminiscent of *Sierra Club v. Morton* where it described the purpose of standing as ‘a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome’ that will neither ‘insulate executive action from judicial review’ nor ‘prevent any public interests from being protected through the judicial process’” (quoting *Sierra Club*, 405 U.S. at 740)).

233. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982).

234. *Flast v. Cohen*, 392 U.S. 83, 93 (1968).

235. *Lujan v. Defenders of Wildlife*, 524 U.S. 555, 566 (1992).

236. Louis Jaffe likened the denial of taxpayer standing in *Frothingham* to ruling that the case raised a political question. Jaffe, *supra* note 63, at 1042 (discussing *Frothingham v. Mellon*, 262 U.S. 447 (1923)).

237. Cf. Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1176–77 (1993) (“Generalized allegations of logically plausible forms of individual injury should be sufficient to establish standing to obtain review of agency actions that have broad effects on the public.”).

238. *Lujan*, 504 U.S. at 593 (Blackmun, J., dissenting).

that are non-justiciable by pointing to the concreteness of the alleged injury or interest. In *Lujan*, Justice Scalia's opinion acknowledged the justiciability of "a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations."²³⁹ The voter-plaintiffs in *Akins* had no greater lack of information than the rest of the voting public, but their injury was nonetheless concrete in the sense that the plaintiffs perceptibly experienced it.²⁴⁰

To be sure, plaintiffs with a personal stake in a government action comprise a broader class of potential plaintiffs than do those with particularized, imminent injury. The showing of a perceptible effect on the plaintiff need only be enough to distinguish him from the citizen seeking to vindicate a generic right to a law-abiding government. But this weaker standard is shored up by the legislative authority to sue, which represents a meaningful measure of majority will to resolve the claim on the merits.²⁴¹

Furthermore, the dichotomy that the current formulation of particularized injury and the generalized grievance bar has, perhaps inadvertently, created—harms shared indiscriminately versus harms suffered by one or more individuals in a unique and differentiated way—is illusory. The entire population lacked the information sought in *Akins*, but each individual experienced that "injury" differently as each cast or declined to cast a vote, or participated or declined to participate in some other way in the electoral process. Each member of Friends of the Earth experienced aesthetic harms in a personal way, depending on background, experience, personality, and ideology regardless of whether they planned to regularly visit the environmental sites in question. One could alternatively argue that informational harm or harms to aesthetics that do not arise from physical proximity to environmental damage are completely undifferentiated from person to person, and that these distinctions are pure lawyer-spin with no real meaning. In any event, it is difficult to see how the political process would better handle certain claims over others based on such nu-

239. *Id.* at 572 (majority opinion).

240. See *FEC v. Akins*, 524 U.S. 11, 24–25 (1998) (finding that lack of election-related information that must allegedly be disclosed by law was sufficiently concrete and specific, notwithstanding the fact that the injury was widely shared).

241. See David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. 37, 57–58 (making a similar point regarding a personal stake criterion and arguing that prudential limitations should operate to deny standing); cf. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151 (1951) (Frankfurter, J., concurring) (opining that "[a]dverse personal interest . . . is ordinarily sufficient to meet constitutional standards of justiciability" where courts are "by statute . . . given jurisdiction over claims based on such interests," but that, "in the absence of a statute, something more than adverse personal interest is needed" to establish standing).

ances.²⁴² The most reasonable distinction amongst justiciable and generalized grievances, therefore, is between plaintiffs who sue in their capacity as citizens or taxpayers to vindicate the rule of law and other persons who can legitimately demonstrate a more concrete or personal stake in the outcome.²⁴³ Although this standard may operate to broaden the field of possible plaintiffs, it evades the subjectivity inherent in the injury-in-fact test's analysis of how much harm is enough to clear the hurdles of particularity, imminence, and the misunderstood generalized grievance bar, and thus injects more transparency and predictability into the standing analysis.²⁴⁴

In *Massachusetts*, moreover, the Court made an attempt at defining what kind of causation analysis applies in procedural rights cases²⁴⁵: It would consider "some possibility that the requested relief will prompt the injury-causing party to reconsider" the harmful decision to be enough.²⁴⁶ Such a formulation more realistically accounts for the realities of administrative litigation. Like Justice Scalia's EIS hypothetical, the plaintiffs' injuries in *Akins* and *Massachusetts* may never be redressed. The government might build the dam despite the EIS, the FEC could decline to prosecute the third party in *Akins* after further investigation, and the EPA's actions on remand might have no effect on climate change in Massachusetts. But the potential breaks in the causation chains in these scenarios are not much different from those that inhere in all administrative cases that result in a remand to the agency for further action. To account for this, the Court pre-*Massachusetts* had relied on alternatives to likely redressability, such as the existence of a "quantum of deterrence"²⁴⁷ or a "coercive effect"²⁴⁸ or

242. See generally Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 102 (2007) (explaining that the political process rationale for imposing a general grievance bar is not always justified).

243. See Elliott, *supra* note 112 (distinguishing between an "undifferentiated interest" in seeing the rule of law enforced and widespread yet particularized harm; for example, there is a general right to clean air, but each of us experience dirty air in a "particularized and concrete way"); cf. *Lujan*, 504 U.S. at 580–81 (Kennedy, J., concurring) ("I agree that it would exceed [Article III] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcreto [sic] interest in the proper administration of the laws.").

244. Cf. Nichol, *supra* note 12, at 318–19 (observing that attempts to distinguish between cognizable widely shared injuries and purely political ones is "debating injury on the head of a pin").

245. Cf. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 491 (1982) (Brennan, J., dissenting) (describing the "personal stake" requirement as having "two essential components," a "distinct and palpable injury" and "some causal connection" (internal quotation marks omitted)).

246. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007).

247. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 186 (2000).

248. *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

the “slow[ing] or reduc[tion]”²⁴⁹ of the harm alleged in public law cases. The Court should affirmatively adopt one of these formulations in crafting a definitive public law model of adjudication.²⁵⁰

C. Congress Says So

Third, the *Massachusetts* majority identified a strong connection between Congress’s creation of statutory rights and the judiciary’s purview over cases like *Massachusetts*. The Court deemed “of critical importance” the fact that “Congress has . . . authorized this type of challenge to EPA action,”²⁵¹ and further observed that “[t]he parties’ dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.”²⁵² Federal courts, in other words, construe federal legislation all the time. *Marbury v. Madison*²⁵³ secured the federal judiciary’s power to review the actions taken by the non-judicial branches and, in doing so, to “say what the law is.”²⁵⁴ In drawing a comparison between this *proper* dispute and those that are *improper* as a matter of the case-or-controversy requirement (for example, adjudication of a political question, a request for an advisory opinion, or adjudication of a mooted question), the Court suggested that the eminently “judicial” task prompted by a lawsuit seeking construction of a statute comports with a finding of Article III standing.²⁵⁵ *Massachusetts* thus affirmed that a plaintiff’s assertion of a concrete or personal stake in a case seeking to enforce statutory procedures is enhanced if Congress legislatively authorized the lawsuit.²⁵⁶

249. *Massachusetts*, 127 S. Ct. at 1458 (emphasis omitted).

250. See generally *supra* notes 179–183 and accompanying text (discussing the *Massachusetts* Court’s approach to the redressability prong of the injury-in-fact analysis). As Susan Bandes has observed, “causation is a concept inherently incapable of acting as a bright line. It is by nature a continuum. The crucial task the Court has avoided is justifying why it draws the line where it does, *i.e.*, what it considers to be the requisites of a constitutional case.” Bandes, *supra* note 78, at 270. She adds, however, that “[c]hoices about access based on value preferences are an unavoidable part of jurisdictional decisions, not a new slippery slope which can be avoided by adherence to the private rights model.” *Id.* at 299; see also Elliott, *supra* note 112 (stating that a “practical link” is all that redressability usually requires); Sunstein, *Standing and Privatization*, *supra* note 12, at 1459 (observing that the Court’s causation decisions “are informed by norms of separation of powers, quite apart from ideas about causation”).

251. *Massachusetts*, 127 S. Ct. at 1453 (citing 42 U.S.C. § 7607(b)(1) (2000)).

252. *Id.*

253. 5 U.S. (1 Cranch) 137 (1803).

254. *Id.* at 177–78.

255. *Massachusetts*, 127 S. Ct. at 1452.

256. *Id.* at 1453.

Nonetheless, the Supreme Court has sent conflicting signals on this issue. No Justice has taken the position that Congress lacks the power to influence standing analysis. It is well established that Congress can create standing by creating statutory “injuries” unknown at common law²⁵⁷ and that, if the generalized grievance bar is construed as prudential, Congress can override it legislatively.²⁵⁸ But there is no consensus as to whether Congress’s imprimatur on standing is constitutionally meaningful in public law cases that otherwise confound injury-in-fact analysis.²⁵⁹ If the generalized grievance bar is constitutional, *Lujan* stands for the proposition that Congress cannot bolster the plaintiffs’ necessary showing of particularized injury-in-fact by authorizing the lawsuit.²⁶⁰ To Justice Scalia, the matter is fairly straightforward. Injury-in-fact, causation, and redressability are required in all cases. Whether, even if those elements are satisfied, courts might prudentially decline to hear the case because large segments of the population share undifferentiated harm is beside the constitutional point. Congress can affect the latter inquiry, but not the former.

Elsewhere, however, the Court has long acknowledged that Congress does influence the constitutional standing analysis. In *Havens Realty Corp. v. Coleman*, the Court found that “testers” who merely posed as renters or home purchasers had standing to sue under the Fair Housing Act in part because “Congress has . . . conferred on all ‘persons’ a legal right to truthful information about available hous-

257. See *supra* notes 68–71 and accompanying text; see also Bradford C. Mank, *Standing and Statistical Persons: Should Large Public Interest Organizations Have Greater Standing Rights than Individuals?*, 36 *ECOLOGY L.Q.* (forthcoming 2009) (observing that notwithstanding concerns about potential excessive congressional interference with executive discretion, courts have recognized that Congress can authorize suits against the Executive Branch for failing to implement legal requirements “so long as the plaintiff has suffered at least a small concrete injury from the legal violation”).

258. See *supra* notes 128–129 and accompanying text.

259. Cass Sunstein has argued prominently that “[a]s a general rule, the question for purposes of standing is whether Congress has created a cause of action.” Sunstein, *Standing and Privatization*, *supra* note 12, at 1461; see also Sunstein, *Informational Regulation*, *supra* note 49, at 642–43 (“[T]he principal question . . . for purposes of ‘injury in fact,’ is whether Congress or any other source of law gives the litigant a right to bring suit.”).

260. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566, 577 (1992) (stating that “[i]t makes no difference” what Congress attempts to do by way of legislation when it comes to Article III standing—the Constitution always requires injury-in-fact); see also *id.* at 580–81 (Kennedy, J., concurring) (“The Court’s holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.”).

ing,” and such evidence of “congressional intention cannot be overlooked in determining . . . standing.”²⁶¹ Dissenting from a finding of taxpayer standing in *Flast*, Justice Harlan similarly opined that “litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits.”²⁶² In *Akins*, Justice Breyer considered widely shared “informational injury” to be “sufficiently concrete and specific” so as not to “deprive Congress of constitutional power to authorize its vindication in the federal courts.”²⁶³ Concurring in *Lujan*, Justice Kennedy expressed the view that Congress can legislate standing in a way that alters the constitutional analysis so long as it is explicit in defining injury and the chain of causation.²⁶⁴ And in *Massachusetts*, Justice Stevens observed that congressional authorization of “this type of challenge to EPA action” is “of critical importance to the standing inquiry,” and went on to affirm the plaintiffs’ standing despite loud protests from four colleagues that his analysis undermined the injury-in-fact standard as we know it.²⁶⁵

261. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982).

262. *Flast v. Cohen*, 392 U.S. 83, 131 (1968) (Harlan, J., dissenting). He added that “[a]ny hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President.” *Id.* at 131–32; *cf. Sierra Club v. Morton*, 405 U.S. 727, 732, 739 (1972) (stating that standing depends in the first instance on whether that party relies on a “specific statute authorizing invocation of the judicial process” but ultimately holding that the Sierra Club lacked standing to challenge the construction of a ski resort because “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the APA”).

263. *FEC v. Akins*, 524 U.S. 11, 24–25 (1998).

264. *See Lujan*, 504 U.S. at 580.

265. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007). *Massachusetts* arguably did not involve a citizen-suit provision per se, as in authorizing judicial review the CAA does not expressly confer standing on any person or aggrieved party. *See supra* note 141 and accompanying text (addressing 42 U.S.C. § 7521(a)(1) (2000)). This distinction may carry significance. In *Bennett*, for example, the Court found the “‘any person’ formulation” of the ESA to be critical to the prudential standing analysis because it “applies to all . . . causes of action,” and “not only to actions against private violators of environmental restrictions.” *Bennett v. Spear*, 520 U.S. 154, 166 (1997). Were the *Massachusetts* Court’s affirmation of congressional power to confer standing in some measure to take a greater hold on the Court’s standing jurisprudence, a related question would be what kind of statutory language is necessary to effectuate that power. In this regard, it bears mentioning that, although the APA authorizes any “person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute” to bring suit, that umbrella statute appears to be unique. 5 U.S.C. § 702 (2006). The “zone of interests” test initially developed as a prudential gloss on standing in the APA context to make clear “that Congress, in enacting § 702, had not intended to allow suit by every person suffering injury in fact.” *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 395 (1987) (discussing Ass’n of Data Processing Serv.

The Court's deference to congressional endorsements of standing draws upon historical notions of standing premised on the existence of a legal right to sue. Based on an Hohfeldian analysis, Congress confers standing to sue whenever it creates a statutory "right" or entitlement, authorizes judicial review for purposes of enforcing that right, and defines the ambit of potential plaintiffs.²⁶⁶ What differs from the Hohfeldian context under modern administrative law is that statutory rights do not always inure to the benefit of an individual. When they benefit the public and Congress authorizes citizen suits to vindicate them, separation of powers problems arise as courts attempt to apply the *Lujan* formulation of the injury-in-fact test. The *Massachusetts* Court's recognition of Congress's power to impact the standing analysis marks some distancing from the *Lujan* private law model.

Proponents of the modern injury-in-fact test, such as Justice Scalia and Chief Justice Roberts, would argue that the Constitution does not empower Congress to define the jurisdiction of Article III courts in a way that impinges on executive authority to take care that the laws are enforced. Article III, however, says nothing about standing, the separation of powers, or limits on Congress's ability to establish the boundaries of the case or controversy requirements of the Constitution.²⁶⁷ The Supreme Court has never adopted the theory, famously advanced

Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970), which held that "the interest[s] sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). In conjunction with the APA's passage, the Department of Justice explained that the statute's judicial review provision was designed as "a general restatement of the principles of judicial review embodied in many statutes and judicial decisions . . . [that] generally leaves the mechanics of judicial review to be governed by other statutes." U.S. DEP'T OF JUSTICE ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93 (1947). As such, the APA may not represent a congressional authorization of statutory standing that is commensurate with, say, that of the FECA as construed by the *Akins* majority.

266. Louis Jaffe posited that the problem of suits by non-Hohfeldian plaintiffs "should be solved in terms of formal legislative action taken to demonstrate the desire of a majority for such judicial determination." Jaffe, *supra* note 63, at 1044. An issue that arises here, which I do not discuss in this paper, is the determination of congressional intent and the extent to which the analysis parallels the zone of interest test for prudential standing.

267. See generally Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 178 (1992) [hereinafter Sunstein, *What's Standing*] (arguing that "[t]here is absolutely no affirmative evidence that Article III was intended to limit congressional power to create standing" and that "[t]here is no affirmative evidence of a requirement of a 'personal stake' or an 'injury in fact'"); see also Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 835 (1969) (arguing that there is no historical or constitutional basis for the traditional separation of powers theory of standing as protecting the political branches from undue judicial intrusion).

by Justice Story in dictum in *Martin v. Hunter's Lessee*,²⁶⁸ that if Congress decides to create federal courts pursuant to its express Article III powers, it must vest in them some version of “the whole judicial power.”²⁶⁹ By the same logic, the Constitution creates no immutable ideal of “judicial Power” that cannot be refined by Congress as it defines the lower federal courts’ jurisdiction.

Nor, for that matter, does the Take Care Clause indicate that Congress cannot enable private parties to sue the executive over statutory breaches.²⁷⁰ The Take Care Clause is an obligation imposed on the President to give effect to the laws of the United States, including those enacted by Congress—not a source of power or an unbridged right that must be protected at all costs.²⁷¹ The argument that any “enforcement” of the laws by the judiciary overrides the executive prerogative also ignores the porous nature of the walls separating the branches in numerous other areas.²⁷² The ordinary work of the Judiciary includes ensuring that the executive branch fulfills its constitu-

268. 14 U.S. (1 Wheat.) 304 (1816). Scholars have advanced similar theories. See generally Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206, 210 (1985) (arguing that Article III, § 2’s reference to “all” cases indicates that jurisdiction must exist in some federal court for all cases arising under federal law).

269. See *Hunter’s Lessee*, 14 U.S. at 328–39 (interpreting the Constitution as requiring that Congress vest the authority to hear all cases and controversies in federal courts).

270. U.S. CONST. art. II, § 3.

271. See Mary M. Cheh, *When Congress Commands a Thing to be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 275 (2003) (describing the Take Care Clause as imposing a duty rather than as conferring power); Sunstein, *Standing and Privatization*, *supra* note 12, at 1471 (“If administrative action is legally inadequate or if the agency has violated the law by failing to act at all, there is no usurpation of executive prerogatives in a judicial decision to that effect. Such a decision is necessary in order to vindicate congressional directives, as part of the judicial function ‘to say what the law is.’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

272. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”); THE FEDERALIST NO. 47, at 140 (James Madison) (Roy P. Fairfield ed., 1966) (suggesting that the separation of powers only prevents the “whole power of one department” from falling into the hands of an official or institution that also exercises the “whole power” of another department); Berger, *supra* note 267, at 828 (discussing Madison’s reference to a necessary “blending” of powers); Chayes, *supra* note 13, at 1307 (observing that “[i]n practice, all governmental officials, including judges, have exercised a large and messy admixture of powers”). But see Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 8–9 (1994) (advocating a formalist approach to separation of powers that would permit “[n]o commingling of legislative, executive, or judicial power . . . except where specifically provided in the constitutional text” and implying that such a model would not harmonize with the current administrative state).

tional duty to take care that the laws are faithfully executed.²⁷³ Although Congress's power is not unlimited—it may not enable federal courts to issue advisory opinions,²⁷⁴ for example—it is generally “undisputed” that Congress can “create interests sufficient to confer the personal stake demanded by access standing.”²⁷⁵ As Jonathan Siegel has observed, “Justice Scalia’s own preference for majoritarian decision making suggests that courts should respect Congress’s desire and permit Congress to enable any citizen to demand implementation of the statutory scheme.”²⁷⁶ In recognizing standing where Congress has authorized standing to sue to enforce a statute, courts carry out the majority’s will.²⁷⁷ Congress certainly has the power to limit who can sue.²⁷⁸ Given that the particularized injury requirement does not coherently identify those grievances that are so generalized as to justify disregarding congressional authorizations to sue, the better view is to look to congressional intent in determining whether a particular statutory enforcement case may be resolved in the courts.²⁷⁹

IV. FINALLY: AN EMERGING PUBLIC LAW MODEL OF STANDING

The approach to standing in statutory enforcement cases that I derive from *Massachusetts* has several advantages. First, it does away with the uncertain specter of the generalized grievance bar for cases involving widespread harm, confining it to the purely ideological citizen or taxpayer disgruntled with the operation of government. Sec-

273. Siegel, *supra* note 242, at 100.

274. Nichol, *supra* note 79, at 91–92 (citing *Muskrat v. United States*, 219 U.S. 346 (1911)); see also Logan, *supra* note 241, at 61 & n.99, 62 (arguing that courts should defer to congressional authorizations of standing and noting possible limits on congressional power to do so).

275. Nichol, *supra* note 79, at 92; see also Siegel, *supra* note 242, at 105–06, 127 (arguing that Congress can authorize courts to redress widely shared injuries because it can statutorily create rights and *qui tam* actions give it “an effectively unlimited ability to create general public standing to enforce federal law”).

276. *Id.* at 104.

277. See Chayes, *supra* note 13, at 1314 (adding that “the legitimacy of judicial action can be understood to rest on a delegation from the people’s representatives”).

278. See Siegel, *supra* note 242, at 103 (stating that Congress can limit by statute the set of potential plaintiffs who can challenge government action).

279. See Pierce, *supra* note 237, at 1181, 1192, 1201 (arguing that Congress can confer standing legislatively and that courts should enforce its policy decisions against agencies); Sunstein, *What’s Standing*, *supra* note 267, at 223 (arguing that Congress’s grant of standing in *Lujan* should have resolved the issue); Sunstein, *Standing and Privatization*, *supra* note 12, at 1433 (arguing that the “principal question” for standing “should be whether Congress has created a cause of action”). But see Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1794 (1993) (arguing that “Article II prohibits Congress from vesting in private parties the power to bring enforcement actions on behalf of the public without allowing for sufficient executive control over the litigation”).

ond, as *Massachusetts* makes clear, a majority of sitting Justices agree that congressional approval of standing is meaningful in the constitutional analysis and that procedural rights are special in standing analysis; therefore, a robust commitment to these factors in public law standing analysis is a realistic goal.

In this Part, I address two more plusses. The first is the framework's accommodation of what has been for too long ignored: the concept of surrogate standing, which is necessitated by the rise of the administrative state, and which *Lujan's* private law model cannot adjust for. Rather than pay lip service to *Lujan*, the alternative approach proposed here would bring above ground for scrutiny and debate an analysis that has already been selectively applied in public law cases under the guise of injury-in-fact.²⁸⁰ Second, it does away with the flipside of the *Lujan* Court's separation of powers concern—circumscribing citizen-standing statutes for lack of particularized injury-in-fact—and serves a purpose of separation of powers that the injury-in-fact's monolithic emphasis on executive autonomy does not: checking and balancing power.

A. A Reconceptualized Model Applied

In this Subpart, I revisit my opening hypothetical to show how application of the three revised criteria that I derive from *Massachusetts*—a statutory authorization, a procedural injury, and a concrete stake—interact to present a picture of public law standing that offers more clarity than the injury-in-fact and its adjectives can accommodate. To be sure, this approach liberalizes standing to enable Bear Friends to sue without producing a member who regularly visits the affected bear habitats. But it does so at Congress's behest, and with greater transparency than the injury-in-fact test requires.

Bear Friends' claims that the Secretary impermissibly failed to consult with the FWS, and that the FWS failed to prepare a biological opinion under the ESA, constitute procedural injuries that would trigger a relaxed redressability analysis, but only so long as the plaintiff simultaneously demonstrates a concrete stake in the case. Although the deprivation of information about the effects of an increased cattle population on grizzlies that would presumably appear in a biological opinion does not satisfy the adjectives, it constitutes the kind of concrete stake that the Court expressly recognized in *Akins*. The group's

280. See Bandes, *supra* note 78, at 294–95 (arguing that judicial precedent narrows the scope of discretion and renders the decisionmaking process more democratic by permitting public scrutiny of the Court's choices).

concern that its *raison d'être*—preservation of grizzly bears—is jeopardized by the agency's action further works a perceptible effect on the plaintiff that distinguishes Bear Friends from the general population. Although both harms are felt by a broader population, they relate specifically to this organization's function and purpose; together these "stakes" signal more than the abstract injury to ideology that the Court has consistently rejected as non-justiciable.²⁸¹ Lastly, the ESA authorizes citizen-suits such as this one—a congressional stamp of approval that the majority deemed "important" in *Massachusetts* and that operates to stem what could be a flood of public law claims challenging procedural irregularities on limitless theories of a cognizable "stake."

The framework derived from *Massachusetts* is hardly unassailable, or devoid of opportunities for subjectivity and manipulable line-drawing. But it provides an important step toward moving through the quagmire that cases like *Lujan* created by reinserting private law theory into the public law realm. The approach's gentler and more realistic application of redressability for procedural plaintiffs, as well as its detachment from a misunderstanding of particularized injury as requiring harm that is unique and differentiated, is sensible given the diffuse and non-linear effects that an increasingly bureaucratized government has on society. And, as I have noted previously, concerns over undue judicial influence on executive prerogative may be addressed at the merits stage of litigation by virtue of the deferential standards governing judicial review of executive action.²⁸² Theoretically, moreover, rendering standing more available with congressional authorization serves an important separation of powers function that the prevailing test ignores.

B. *Reconciliation and Justification*

Akins and *Massachusetts* demonstrate that the Court has declined to consistently uphold the *Lujan* Court's Article II objective in statutory enforcement cases. This may be, as others have suggested,²⁸³ be-

281. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583 (1992) (Stevens, J., concurring) (opining that "[i]f respondents are genuinely interested in the preservation of the endangered species and intend to study . . . these animals in the future, their injury will occur as soon as the animals are destroyed").

282. *See Brown*, *supra* note 18, at 724–28; *see also Siegel*, *supra* note 242, at 125 ("If we had no doctrines of justiciability whatsoever, the courts would still play only a proper, and properly limited, role in our democratic society, so long as they confined themselves to enforcing legal constraints on executive and congressional action.").

283. *See, e.g., Bandes*, *supra* note 78, at 277–78 (discussing what she calls "the 'checks and balances' model" of separation of powers); Elliott, *supra* note 112 (calling a lawsuit "a brake on runaway agencies" in service of separation of powers).

cause the prevailing separation of powers justification for standing is wrongly confined to protection of the executive from judicial interference.²⁸⁴ When the Court perceives commonly-shared harms as substantial and susceptible to evading redress because the executive has failed to act, it may hear them.²⁸⁵ The framework I identify for analyzing standing in statutory enforcement cases captures this “checks-and-balances” concept without giving courts unfettered discretion to decide when the executive has gone too far in abdicating its obligations to enforce the law. It assumes that, by authorizing a lawsuit, Congress has acted as the people’s representatives in determining that judicial enforcement is appropriate and even necessary. This balancing of constitutional power does not unlawfully demean the executive branch. It maintains that the executive prerogative enjoys no superior protection than the protections afforded the other branches in the separation of powers scheme.²⁸⁶

In the two contexts highlighted in this paper—cases brought under environmental statutes and those brought under federal campaign finance and election laws—the *Lujan* formulation of injury-in-fact overcorrects for judicial interference with the democratic process.²⁸⁷ Once an election is over and the winning candidate is in of-

284. I am not purporting to undertake a full analysis of the Court’s view of separation of powers here. For more on the separation of powers issue, see, for example, Pushaw, *supra* note 66, at 396, 472, 483, 489 (arguing, among other things, that justiciability undermines separation of powers by restricting judicial review). See also Logan, *supra* note 241, at 61–63 & n.108 (arguing that separation of powers concerns warrant describing deference to congressional decisions regarding justiciability).

285. Although there is disconnect between statutory enforcement cases and constitutional ones, it is not my objective to fully account for the latter in this paper. Susan Bandes has argued persuasively that the definition of a case under Article III should be guided in the first instance by the federal courts’ primary role of upholding the Constitution. See Bandes, *supra* note 78, at 277; see also Nichol, *supra* note 79, at 78 (observing that, under current practice, rights that the Framers considered sufficiently important to put in the Constitution are least likely to be found cognizable). Acceptance of her position would warrant unraveling the case law leading up to *Hein* to similarly enable judicial review of failures of the political branches to uphold the Constitution. Carl Esbeck has recently characterized *Flast* as creating a “legal fiction” necessitated by the fact that without taxpayer standing under *Flast*, no plaintiff would have standing to challenge a law which “strikes at the core of the American church-state settlement.” Carl H. Esbeck, *What the Hein Decision Can Tell Us about the Roberts Court and The Establishment Clause*, 78 Miss. L.J. (forthcoming 2008).

286. Indeed, Robert Pushaw has persuasively argued that the overriding goal of the Founders’ approach to separation of powers was to prevent tyranny and that it informed the early Court’s ideas of justiciability. Pushaw, *supra* note 66, at 451.

287. The Court has wrestled with the generalized grievance bar in another notable context: public housing cases. See *supra* note 261 and accompanying text (discussing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)); see also Logan, *supra* note 241, at 54–66 (discussing the Court’s decisions in *Valley Forge Christian Coll. v. Ams. United for Separation*

fi ce, the loser's injury—a failed election—is not likely to be redressed by an order directing a third party to comply with the FECA. A voter's inability to make a fully informed choice cannot be remedied because the election is over. Had the *Akins* Court not seized on the lack of information to find standing and glossed over particularization and redressability problems,²⁸⁸ no plaintiff could sue to enforce the FECA in federal court, despite a citizen-suit provision reflecting a congressional determination that leaving enforcement of the FECA exclusively to the FEC is inadequate.²⁸⁹ The Court has repeatedly emphasized the indispensable role that campaign and finance laws play in a functioning democracy.²⁹⁰ The FEC has been roundly criticized as ineffective in carrying out its important mission,²⁹¹ with the Supreme Court deriding it for subverting the federal election and campaign finance laws that it is charged with enforcing.²⁹² Congress enabled judicial intervention via citizen suits to ensure executive compliance with the rule of law. The statute reflects a legislative judgment of a heightened need for executive accountability regarding enforcement of critical legislation designed to facilitate a fair election system.²⁹³

A majority of the Court appears to view global warming as similarly justifying a model of justiciability that enables litigation to supplement politics. In *Massachusetts*, the majority explained that, “[n]otwithstanding the serious character of th[e] jurisdictional argument . . . the unusual importance of the underlying issue persuaded us to grant the writ.”²⁹⁴ The impact of climate change is diffuse, with

tion of Church & State, Inc., 454 U.S. 464 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979); and *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972)).

288. See *FEC v. Akins*, 524 U.S. 11, 23–25 (1998), for the Court's discussion of particularized injury and redressability.

289. Note that the Court has tolerated this result in the context of constitutional enforcement cases. See *Bandes, supra* note 78, at 267 (“In *Schlesinger* and *Richardson* . . . the Court denied standing despite its recognition that no better plaintiff was likely to exist and that the issue might therefore never be litigated.” (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *U.S. v. Richardson*, 418 U.S. 166 (1974))).

290. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (describing “profound national commitment” to open debate over candidates); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (characterizing the right to “public discussion” as constitutionally moored).

291. See generally *Brown, supra* note 18, at 708–15 (describing the widespread criticism of the FEC's shortcomings, and the congressional responses thereto).

292. See *McConnell v. FEC*, 540 U.S. 93, 142–44 (2003) (explaining that the FEC's regulatory regime permitted the use of soft money in election campaigns and describing the corruption associated with soft money contributions).

293. See *Jaffe, supra* note 63, at 1046 (“[I]f there is to be judicial protection of the individual from the impact of . . . unconstitutional exercises of power, it may be that an action by a plaintiff whose credentials are something less than traditional must be allowed.”).

294. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1447 (2007).

effects that are insidious and imperceptible but dangerously irreversible. The ideally injured plaintiff who can satisfy the prevailing adjectives may not surface until it is too late to reverse compounding adverse effects on the planet. Although a number of statutes and treaties were in place to address climate change when *Massachusetts* was decided,²⁹⁵ the Court perceived that Congress—through the CAA—required more of the executive branch. The EPA had refused to read the statutory mandate that it regulate “vehicles [that contribute to] air pollution which may reasonably be anticipated to endanger public health or welfare”²⁹⁶ as covering substances that contribute to global warming.²⁹⁷ The Court could have declined to hear the case on standing grounds and waited for Congress to amend the statute to expressly cover new auto emissions. It instead found standing to hear a case that culminated in a judicial condemnation of the EPA for “refus[ing] to comply with this clear statutory command.”²⁹⁸

This outcome recognizes that lawsuits serve another separation of powers function: ensuring that the executive branch enforces federal statutes and promulgates rules consistent with them notwithstanding political tampering from the White House.²⁹⁹ As Jody Freeman and

295. Congress passed two statutes addressing climate change before 1990, when it last comprehensively amended the Clean Air Act. See National Climate Program Act, Pub. L. No. 95-367, § 3, 92 Stat. 601, 601 (1978) (codified at 15 U.S.C. § 2902 (2006)) (requiring President to establish a program to “assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications”); Global Climate Protection Act of 1987, Title XI of Pub. L. No. 100-204, § 1103(b), 101 Stat. 1407, 1408 (1987) (codified at 15 U.S.C. § 2901 note (2006)) (directing EPA to propose to Congress a “coordinated national policy on global climate change”); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2703 (1990) (codified at 42 U.S.C. §§ 7403(g)(1) & 7671a(e) (2000)). The United States also signed the United Nations Framework Convention on Climate Change (“UNFCCC”), a nonbinding agreement among 154 nations to reduce carbon dioxide emissions, United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107, but did not ratify the UNFCCC protocol adopted in Kyoto for assigning mandatory targets for reduction in greenhouse gas emissions. See S. Res. 98, 105th Cong. (as passed by Senate, July 25, 1997). For a description of the legislative history related to global warming, see *Massachusetts*, 127 S. Ct. at 1447-50.

296. 42 U.S.C. § 7521(a)(1) (2000).

297. *Massachusetts*, 127 S. Ct. at 1450.

298. *Id.* at 1462.

299. See Donald L. Doernberg, “We the People”: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CAL. L. REV. 52, 96 (1985) (advocating recognition of collectively shared interests in standing doctrine as necessary to correct government lawlessness, as “[w]hen government violates the Constitution, the stake in the outcome of the controversy is society’s stake, and is the most fundamental interest possible: the interest in government functioning as agreed upon by its creators”); Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT’L L. 757, 781 (2002) (noting that the public law “expansion of standing and duty was in the service of assuring

Adrian Vermeule recently suggested, *Massachusetts* “is best understood not so much as an environmental case,” but as an “episode[] in which Justice Stevens and Justice Kennedy have joined forces to override executive positions that they found untrustworthy, in the sense that executive expertise had been subordinated to politics.”³⁰⁰

There are two readily apparent criticisms of this checks-and-balances function of standing. First, it compromises executive authority to take care that the laws are faithfully executed, including the ability to ignore statutory obligations where it deems it appropriate. Second, it aggrandizes judicial power at the expense of the other branches. The first critique begs the question of whether standing doctrine is properly monopolized by Justice Scalia’s theory of separation of powers as operating to protect against improvident judicial intrusion into the prerogative of the executive branch.³⁰¹ Although important, this theory proves too much. In other areas of agency law, the Court has recognized that traditional rules of judicial engagement do not apply if the executive abjures its authority. Under *Heckler v. Chaney*,³⁰² an agency’s abdication of its authority is a basis for review of a non-enforcement decision that is otherwise immune from judicial review; Chief Justice Rehnquist explained that the decision of whether courts are the most appropriate body to police the failure of an agency to carry out its designated powers “is in the first instance for Congress.”³⁰³ If Congress has authorized judicial review, Article II should similarly present no independent barrier to federal jurisdiction.³⁰⁴

governmental compliance with domestic law, and thus reinforced the presumptive justiciability of duties to comply with the Constitution and statutes”).

300. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52.

301. See Bandes, *supra* note 78, at 277 (noting that “the Court subscribes to a highly particularized and controversial vision of the separation of powers and fails to acknowledge that any alternative vision exists”); see generally Scalia, *supra* note 82 (arguing that standing protects the separation of powers).

302. 470 U.S. 821 (1985).

303. *Id.* at 834.

304. In *Laidlaw*, the majority noted the separation of powers objections to finding standing, but ultimately rejected them as “overdrawn” on the facts. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 188 n.4 (2000). The Department of Justice had “endorsed this citizen suit from the outset,” the “Federal Government retain[ed] the power to foreclose a citizen suit by undertaking its own action” under the Clean Water Act, and “if the Executive Branch opposes a particular citizen suit, the statute allows the Administrator of the EPA to ‘intervene as a matter of right’ and bring the Government’s views to the attention of the court.” *Id.* (citing 33 U.S.C. § 1365(b)(1)(B) (2000) and quoting 33 U.S.C. § 1365(c)(2) (2000)). Rather than reject Congress’s power to enable standing outright, the Court found some invasion of the executive prerogative permissible, as if it were applying a sliding scale for standing in the public law context, with gradations that depend on the nature of the public injury in question and the specific language of the statute. Of

Executive power, after all, is not unlimited. In *Marbury v. Madison*, Chief Justice Marshall identified fundamental constraints on the executive's ability to flout the commands of Congress and avoid lawful process of the courts.³⁰⁵ Congress is vested with the power to make all laws "necessary and proper" to carry into execution its full legislative powers, and with "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."³⁰⁶ It also approves officers nominated by the President.³⁰⁷ Mary Cheh has argued, therefore, that executive officials can be ordered by Congress to perform certain functions and duties "without interference even from the [P]resident of the United States."³⁰⁸ Justice Souter pointed out in *Hein* that "there is no difference" on the point of separation of powers "between a Judicial Branch review of an executive decision and a judicial evaluation of a congressional one."³⁰⁹ The executive, in other words, enjoys no special treatment when it comes to separation of power protections, and has no constitutional authority to violate the law.³¹⁰ Just as the legislature may give the executive certain prerogatives to deal with unforeseen circumstances—either by regulation, adjudication, or informal agency action—it can make a determination that the executive should be

course, *Lujan* was also an environmental case, but it did not implicate the abdication by the executive of its enforcement obligations in the same way that *Massachusetts* and *Akins* did. It involved a challenge to a legislative rule implementing a statute pursuant to delegated authority, rather than agency nonenforcement of existing law. See Cheh, *supra* note 271, at 285 (describing Chief Justice Marshall's approach to judicial review in *Marbury* as contemplating close scrutiny of executive inaction "if there was a pattern of inaction, or some evidence of impermissible purposes as disclosed by a departure from prior norms, irregular procedures, or improper political influence").

305. See Cheh, *supra* note 271, at 257–59 (explaining that Chief Justice Marshall's opinion in *Marbury* "is still a powerful exposition on the limits of executive power and the judiciary's power and duty to enforce those limits").

306. U.S. CONST. art. I, §§ 1, 8, cl. 18.

307. *Id.* art. II, § 2, cl. 2.

308. Cheh, *supra* note 271, at 261.

309. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2586 (2007) (Souter, J., dissenting). Justice Souter contrasted the Court's decision in *Flast v. Cohen*—which authorized an Establishment Clause challenge to congressional appropriations—with the *Hein* plurality's refusal to apply *Flast* because it involved executive versus congressional expenditures. Justice Souter wrote, "if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away." *Id.* at 2585–86.

310. See generally *Luther v. Borden*, 48 U.S. (7 How.) 1, 53 (1849) (observing that federal courts have jurisdiction to ensure that the executive does not violate the Constitution or laws); cf. Berger, *supra* note 267, at 829 (arguing that courts may decide whether a "legislative usurpation" has occurred, even if they cannot legislate, and that a "legislative usurpation does not change character when it is challenged by a stranger").

accountable to the people as a whole for its exercise of that delegated authority.³¹¹

Moreover, if Congress provides for judicial review, the ensuing judicial function of ensuring that the executive does not abdicate its enforcement obligations is properly within the province of the federal courts. To quote Mary Cheh, “[e]ven in the face of modern translation difficulties . . . *Marbury*’s core message remains clear and powerful: pursuant to constitutional and statutory commands, the executive has the obligation to act within the law, and the courts have the duty to enforce the law.”³¹² And as *Massachusetts* reaffirmed, the proper construction of a statute is something “eminently suitable to resolution in federal court.”³¹³ The constitutional requirement that the executive “faithfully” execute the laws³¹⁴ suggests an objective, externally enforceable meaning of the executive branch’s duty.

The inter-branch fight triggered by generalized grievance cases is really between Congress and the executive, not the executive and the courts.³¹⁵ If Justice Scalia is correct, and standing should strictly operate to shield the executive from judicial review notwithstanding congressional intent, laws passed by a democratically elected branch could simply go unenforced. The Court long ago rejected the argument that the President may direct an executive official to refuse to carry out congressionally prescribed duties.³¹⁶ Mary Cheh has observed that such a principle, “if carried out in its results . . . would be clothing the President with a power entirely to control the legislation of [C]ongress, and paralyze the administration of justice.”³¹⁷ Once the President has signed a bill into law (or his veto has been overridden), he is hard-pressed to justify a refusal to enforce the law as an

311. Cf. Doernberg, *supra* note 299, at 63–64 (discussing John Locke’s theory of government as the product of a compact, with the government-as-trustee obligated to the people and not vice versa).

312. Cheh, *supra* note 271, at 255.

313. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007).

314. U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

315. Cheh, *supra* note 271, at 265.

316. See Cheh, *supra* note 271, at 260–61 (discussing *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 612–13 (1838), which rejected the argument that the President could order an executive official not to carry out duties delegated by Congress).

317. See Cheh, *supra* note 271, at 260–61 (quoting *Kendall*, 37 U.S. at 613). I do not attempt in this Article to delve into the vast body of literature debating the theory of a “unitary executive,” which perceives the President as having the final word on the exercise of all executive authority, regardless of contrary congressional intent. See, e.g., David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 708 (2008) (“[T]he unitary executive theory . . . maintains that the President’s Article II power to execute the law gives him the right to control all other officers who have law enforcement responsibilities.”).

executive prerogative. This is particularly so if the decision to ignore a statute is undertaken by a constitutionally anomalous government agency. Justice Scalia's answer to this dilemma is that it is a "good thing," because "[y]esterday's herald is today's bore"; the federal bureaucracy's failure to enforce certain laws, in other words, may signal that social change is needed.³¹⁸ Justice Alito similarly commented in *Hein* that "[i]n the unlikely event" that "a parade of horrors" by the executive were to occur without judicial review, "Congress could quickly step in" and fix it legislatively.³¹⁹

But the answer that Congress can enact a statute directing the executive to comply with a preexisting statute is unsatisfying. Not only is the majoritarian process frustrated³²⁰ when the executive does not enforce the law, and served when courts require adherence to legislation that survived the hurdles of bicameralism and presentment,³²¹ an executive branch content with pushing the boundaries of the law may not be receptive towards additional congressional directives aimed at checking executive overreaching. In practice, moreover, the expectation that Congress and the executive branch will simply work these problems out is unrealistic.³²² The very existence of broad delegations of authority to administrative agencies demonstrates Congress's inability to manage the minutiae of its own legislation, and the concomitant need for judicial supervision of the executive, which cannot be expected to police itself.³²³ Yet ironically, the private law model produces the bizarre effect of narrowing judicial oversight as the bureaucratization of government—and the accompanying power assigned to agencies—increases.³²⁴ And as others have observed, gener-

318. See Scalia, *supra* note 82, at 897.

319. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2586, 2571 (2007) (plurality opinion).

320. As Abram Chayes has pointed out, however, laws are subject to minority veto, so "to retreat to the notion that the legislature itself—Congress!—is in some mystical way adequately representative of all the interests at stake . . . is to impose democratic theory by brute force on observed institutional behavior." Chayes, *supra* note 13, at 1311.

321. Louis Jaffe observed that citizen-suit provisions "enable citizen groups to participate in the decision-making process," in which individual citizens often feel excluded from "the vast, multitudinous complexes" of government. Jaffe, *supra* note 63, at 1044. He saw "[t]he judicial process as a vehicle for self-government," and "[t]he usual taxpayer and citizen suit [a]s thoroughly consistent with the primacy of majority rule." *Id.* at 1045. "The issue," he wrote, "will be the statutory authority of the official action, and the lawsuit itself will be prescribed by statute." *Id.*

322. See generally Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006) (discussing the various ways that Congress can influence the executive branch).

323. See Cheh, *supra* note 271, at 264 ("Congress's broad powers of oversight [are] simply inadequate to insure agency fidelity to statutory dictates.").

324. See generally Bades, *supra* note 78, at 296 n.473 (discussing the substantive criticisms of the private law model).

alized grievances are precisely the kind of injuries that the political process is unlikely to rectify, as slightly or identically harmed parties would have little incentive to mobilize politically because of “free-rider” problems.³²⁵

The time has come, therefore, for the Court to expressly reconceptualize particularized injury-in-fact in statutory enforcement cases and embrace a public law model derived from one or more principles that *Massachusetts* and *Akins* offer.³²⁶ Although a new model is susceptible to subjectivity and malleability, this critique would apply to much of what the Supreme Court does. The vagaries of “standards” as distinct from the predictability of “rules” exist by necessity, to enable judges to take into account unforeseen and nuanced circumstances and produce a fair result. Judicial discretion is inevitable in applying constitutional principles, and courts can handle such authority. It is, indeed, “[t]he unprincipled and unarticulated use of that discretion”³²⁷ that is troubling.

V. CONCLUSION

Standing was initially conceived as a means of ensuring that a case was sufficiently adversarial to create good judicial decisionmaking. Later, with the advent of the administrative state and the concept of “surrogate standing” in public law cases, a theory of standing as a means of enforcing the separation of powers gave birth to the modern injury-in-fact test. The Court has had trouble applying that test consistently in public law cases that are not moored in the common law causes of action that historically defined justiciable injury. *Massachusetts v. EPA*, although resolved ostensibly on the basis of a “special so-

325. See Siegel, *supra* note 242, at 102 (discussing the limits of relying on the political process to resolve widespread harms); see also Elliott, *supra* note 112 (noting the benefit of having federal courts resolve widespread yet particularized harms in the context of contemporary mass tort and class action cases).

326. Numerous commentators have argued for adoption of a public rights model of justiciability. See Bandes, *supra* note 78, at 299 (“The Court’s access determinations, though rooted in the private law tradition, increasingly reflect acceptance of the public law model [and] suggest that [the model] is workable and contains principles of limitation.”); Siegel, *supra* note 242, at 122–23 (arguing that, despite the private rights theory of justiciability, in “the real world . . . courts *do* have the special function of . . . ensuring that government behaves lawfully”); Woolhandler, *supra* note 299, at 780 (suggesting that the focus of standing has effectively become the breach by the government defendant, “rather than the injury to the plaintiff”). *But cf.* Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 2–3, 6 (2001) (arguing that creation of a public law model of standing is unnecessary because legal and equitable principles that apply to state courts of general jurisdiction can accommodate Article III requirements).

327. Bandes, *supra* note 78, at 302.

licitude” exception for states’ standing, refused to apply the bar on generalized grievances to an attempt to prompt the EPA to stall global warming by regulating new car emissions, and gave short shrift to the “adjectives” affixed to the traditional injury-in-fact test. The Court indicated that standing, at bottom, seeks to ensure the presence of a precursor to injury-in-fact—the concrete or personal stake—and that congressional authorization of standing carries constitutional weight.

In this Article, I highlighted the broader implications of *Massachusetts* for public law standing doctrine, and proposed that the Court embrace an alternative framework for statutory enforcement cases based on three characteristics drawn from the majority opinion: (1) the plaintiff’s invocation of “procedural rights” established by statute; (2) a “concrete” and “personal” stake that distinguishes the plaintiff from the pure ideologue; and (3) a congressional authorization of the suit. This framework has numerous advantages to injury-in-fact in the public law context. It removes what has become a formalistic pretense and unveils a shadow standard that, by necessity, is more attuned to the disparate effects of government decisionmaking. Additionally, it clarifies the scope of the misunderstood generalized grievance bar in statutory cases, confining it to its original purpose of precluding judicial review claims raising ideological challenges to agency action or inaction. Indeed, its premises have already garnered a majority of support from the sitting Justices, and would thus not require full-scale reconstruction of the law of standing, as other commentators have suggested. Furthermore, it gives due weight to congressional judgments about required process. And it serves the checks-and-balances purpose of the separation of powers, namely, ensuring executive accountability to the public and the other branches of government.