

STANDING: WHO CAN SUE TO ENFORCE A LEGAL DUTY?

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I thank Dean Kenneth Randall for the invitation to this Symposium and Judge Bill Pryor for his lovely introduction. I especially thank Professor Heather Elliot, the organizer of this Symposium. Heather was my student in Civil Procedure at the University of California, Berkeley, School of Law, then known as Boalt Hall. When Heather asked if I would be willing to participate in a symposium discussing my article on standing, she knew me well enough to know that I would happily fall into her trap. I am deeply honored to be here.

I am very grateful, too, to the distinguished academics who have agreed to participate in the Symposium. Some of you are old friends whose work I know well. One of you, Professor Tom Rowe, is also my brother-in-law. And some of you I am happy to meet for the first time.

We all stand on the shoulders of others. I would particularly like to thank the late Professor Lee Albert, whose work on standing was very helpful. Professor Albert, then in his final year at Yale Law School before he left to teach at the University of Buffalo, taught me Administrative Law. While at Yale, he published a very perceptive article that provided some of the foundation for my own article published fourteen years later.¹ I hope that my article in turn has provided some of the foundation for later articles.²

I would also like to thank several others for the lessons they have taught me. My father, the late Professor Robert Fletcher of the University of Washington Law School, taught me that if you think hard enough, you can sometimes bring order out of chaos.³ My mother, the late Judge Betty Binns Fletcher of the Ninth Circuit, taught me that if you think hard enough, you can usually find a just resolution that is consistent with the law. My wife, Linda, asked after she read my first published article, “So what?”⁴ That is a pretty devastating question. I couldn’t really answer it,

1. Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

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

3. See Robert L. Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459 (1968).

4. William A. Fletcher, *Tribute to Judge Betty Binns Fletcher*, 85 WASH. L. REV. 1 (2010).

and the article sank almost without a trace.⁵ I now know to ask that question without waiting for Linda. Finally, our three daughters have taught me many things. As you will hear in a moment, two of them provided an insight that made its way into my article on standing.

Because we have a number of students in the audience, I will begin by recapitulating some of the core ideas of my article. Standing is a very old concept, as old as law itself. On the one hand, we have legal duties. On the other hand, we have those who are legally entitled to enforce those legal duties. But not all people who would like to enforce the legal duties of others have the legal right to do so. Standing tells us who can enforce legal duties and who cannot.

First-year students may already be familiar with two common law examples. The first comes from contract law. *A* and *B* enter into a contract. *C*, who is not a party to the contract, would benefit from *A*'s performance. *A* breaches. Does *C* have the right to enforce *A*'s contractual duty if *B* declines to enforce? Contract law nowhere uses the word "standing," but this is clearly a standing question. It asks whether *C* has the right to enforce *A*'s duty to *B*. The answer to this question is "maybe." Under the Second Restatement of Contracts, if *C* is an "intended" beneficiary of *A* and *B*'s contract, he has the right to enforce the contract. If he is an "incidental" beneficiary, he does not.⁶

The second example comes from property law. A remainderman wants compensation for waste committed by the holder of a life estate. Does he have the legal right to damages? Property law nowhere uses the word "standing," but this, too, is clearly a standing question. Again, the answer is "maybe." A vested remainderman has a right to damages. A contingent remainderman does not.⁷

As a separately articulated idea with its own doctrinal heading, "standing" is a relative newcomer to our law. Beginning in the 1930s, coinciding with the rise of the American administrative state, the Supreme Court began to develop a set of loosely linked proto-doctrines under the heading of standing.⁸ Then, beginning in earnest in the 1960s, standing questions became important in various kinds of constitutional litigation.⁹

The Supreme Court has articulated modern standing doctrine at a very high level of generality. The Court tells us that in order to have standing under Article III of the Constitution, a plaintiff must have suffered "injury

5. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

6. RESTATEMENT (SECOND) OF CONTRACTS §§ 302-315 (1981).

7. 1 AMERICAN LAW OF PROPERTY § 4.102, at 579 (1952).

8. See Albert, *supra* note 1, at 434-35.

9. Fletcher, *supra* note 2, at 227.

in fact”;¹⁰ the plaintiff’s injury must be “fairly traceable” to the conduct complained of;¹¹ and the plaintiff’s injury must be redressable by the remedy sought.¹² These general requirements must be satisfied in all cases, irrespective of the statutory or constitutional cause of action at issue brought in Article III courts.

The formulation of standing doctrine at this level of generality has meant that the Court has been unable to provide satisfactory explanations for many of its standing decisions. Justice Harlan complained in 1968 that standing is a “word game played by secret rules.”¹³ Justice Harlan’s complaint was, and continues to be, entirely justified if the Court’s decisions are explained in the terms provided by its doctrine. Academic criticism has been even more harsh. Words such as “manipulation,” “dishonesty,” and “hypocrisy” are not uncommon.¹⁴

Twenty-five years ago, I wrote an article explaining the Court’s standing decisions in a way that I hoped would allow us to see them as forming a coherent analytic structure. To borrow Justice Harlan’s words, I tried to explain the “secret rules”¹⁵ that the Court, perhaps not entirely consciously, had been following, and to show that the Court had been less lawless than it had seemed.

I began by showing that the Court’s explanations for its decisions were insufficient. For example, the Court tells us that a plaintiff must have suffered “injury in fact” in order to have Article III standing. This requirement originated in Justice Douglas’s 1970 opinion in *Association of Data Processing Service Organizations v. Camp*.¹⁶ Prior to 1970, the Court had never insisted that a plaintiff have “injury in fact.” I am fairly confident that Justice Douglas was not trying to make standing more difficult for plaintiffs. But ever since Justice Douglas articulated the injury-in-fact requirement, the Court has used it as a way of denying, rather than granting, standing to plaintiffs.

If we think carefully about “injury in fact,” we see that it is an almost meaningless requirement. Here comes the analytic contribution of our daughters. Our oldest girl is Anne; Leah is next. Caroline, our youngest, was too young to figure into the story. We gave Anne a bicycle for Christmas. Leah, two years younger, thought that she should have been given a bicycle, too. When she complained, I said, “It doesn’t hurt you that we gave your sister a bicycle.” Translated in a language of standing, I said,

10. See, e.g., *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970).

11. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984).

12. See, e.g., *id.*

13. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

14. See, e.g., *Fletcher*, *supra* note 2, at 290.

15. *Flast*, 392 U.S. at 129.

16. 397 U.S. 150, 152 (1970).

“You have no injury in fact.” But of course I was wrong to say that. Leah was in fact feeling hurt. What I really meant, or would have meant if I had thought about it, was, “You do not have an injury that we choose to recognize. You are invoking a familial equal protection clause. We disagree with your concept of equality, and you lose.”

“Injury in fact” may appear to be a neutral factual concept. But it is not. It is a normative concept. If we put people who lie to one side, it is apparent that anyone who feels himself or herself to be injured is, in fact, injured. We may not ourselves feel injured in the same situation. We may not choose to recognize someone’s injury as entitling that person to protection or compensation. But our refusal to recognize or provide a remedy is based on a normative rather than a factual judgment.

The analytical mistake I made in my response to my daughter, Leah, is the same mistake the Court makes in its standing decisions. In saying that a plaintiff does not have an injury in fact, the Court purports to be stating a neutral, factual proposition about that plaintiff’s injury. But what the Court is actually doing is refusing to recognize an “injury in fact” as a judicially cognizable injury. This analytical mistake has consequences for all three doctrinal requirements for Article III standing—that there be injury in fact; that the injury have been caused by the conduct complained of; and that the injury be redressable by the remedy sought. *Linda R.S. v. Richard D.*¹⁷ is a useful example that demonstrates how the Court has gone wrong.

Linda R.S. was, to use the old-fashioned terminology, the mother of an illegitimate child. In a civil suit decided just prior to *Linda R.S.*, the Supreme Court had held that Texas violated equal protection when it required fathers of legitimate children, but not fathers of illegitimate children, to pay child support.¹⁸ Linda R.S. sued her local Texas prosecutor. She asked for an injunction that would require the prosecutor, when deciding whether to bring a criminal prosecution against non-paying fathers, to treat the legitimacy or illegitimacy of the child as an irrelevant factor. Linda R.S. did not seek an order requiring the prosecutor to prosecute the father of her child. She sought only an order that would require the prosecutor, in deciding whether to prosecute, to disregard the fact that her child was illegitimate.

The Court denied Article III standing.¹⁹ It wrote that what Linda R.S. really wanted was child support payments, and that her injury in fact was her failure to receive them. Because in the Court’s view it was unlikely that prosecution of the child’s father would result in such payments—it believed that Richard D. was likely to go to jail rather than to pay Linda

17. 410 U.S. 614 (1973).

18. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

19. *Linda R.S.*, 410 U.S. at 619.

R.S.—her injury was not likely to be redressed by the remedy she sought.²⁰ The Court was right in a sense. Of course Linda R.S. wanted child support payments. What the Court missed (whether deliberately or not) is that this is not what she asked for. Linda R.S. did not claim as her legally cognizable injury her failure to receive child support. She claimed as her injury a violation of equal protection—the right to equal treatment by the prosecutor in his decision about whom to prosecute. It is not essential to an equal protection claim that a plaintiff obtain money or some other tangible benefit.²¹ The core of an equal protection claim is a claim to equal treatment and to the sense of dignity inherent in such treatment. Linda R.S. thus stated a perfectly valid equal protection claim.

Linda R.S. may be an example of the Supreme Court failing to follow its own “secret rules” on standing. But if we put *Linda R.S.* and one or two other cases to one side, I believed (and continue to believe) that we could explain the results in the Supreme Court’s standing cases so that they form a coherent whole. If we look not to the general requirements for Article III standing but rather to the particular statutory or constitutional claim at issue, the Court’s decisions can be made to look like law rather than unfiltered emotional reaction, like the product of the Court’s prefrontal cortex rather than the product of its amygdala.

I proposed in my article that there are two categories of cases. One is cases in which the cause of action is statutory; the other is cases in which the cause of action is constitutional.²² In the statutory category, I argued that if Congress has the power to describe the statutory duty, it should have plenary power to designate those who are entitled to enforce that duty.²³ The focus of the Court’s standing analysis should be the specific statutory provision at issue: what is the specific statutory duty prescribed by Congress, and whom did Congress intend to authorize as enforcers of that duty? In the constitutional category, I argued that the constitutional provision should be the primary, and in some cases the only, source of both the duty and the designation of those entitled to enforce the duty.²⁴ As in the statutory cases, the focus of the Court’s standing analysis should be the specific constitutional clause at issue.

We can take a case involving cruel and unusual punishment under the Eighth Amendment as an example of standing to enforce a constitutional

20. *Id.* at 618.

21. *See* *Weinberger v. Wiesenfeld*, 420 U.S. 636, 651–53 (1975) (holding that the Equal Protection Clause does not require an increase in Social Security benefits paid to widowers, but it does guarantee equality in payment for widowers and widows).

22. *Fletcher*, *supra* note 2, at 251.

23. *Id.* at 223–24.

24. *Id.* at 251.

provision. In *Gilmore v. Utah*,²⁵ Gary Gilmore, a death row inmate in Utah, was about to be executed by firing squad. His mother sued to halt the execution, arguing that the manner of execution was cruel and unusual punishment. Assuming for the moment that execution by firing squad violates the Eighth Amendment, did Gilmore's mother have standing to enforce the constitutional prohibition? His mother was clearly going to suffer because of the execution of her son, and perhaps would suffer more because of the manner of execution. The standing question for the Court was whether the right to object under the Eighth Amendment is a right that is individual to the person about to be executed, or whether it can be invoked by a third party. Gary Gilmore said that he did not want to raise the Eighth Amendment issue on his own behalf and that he preferred simply to proceed with the execution. The Court refused to allow Gilmore's mother to raise the issue.²⁶ We can agree or disagree with the Court's decision. I am not myself sure what the answer should be. But we should be able to agree that the basis of the Court's decision should be the Eighth Amendment itself: what does the Cruel and Unusual Clause prohibit, and who should be allowed to enforce that prohibition?

It is now twenty-five years since I wrote my article on standing. I am older. I may or may not be wiser. I continue to believe that the best way to deal with standing questions is to address them in the context of the particular cause of action that the plaintiff seeks to enforce. Indeed, the cases I will discuss in a moment reinforce that belief.

But I have rethought a few things, helped in part by the papers contributed to this Symposium. In my article, I criticized the Supreme Court for not admitting what it was doing.²⁷ The Court wrote that its purpose in limiting standing under Article III was to exercise judicial restraint and thereby preserve our democracy. In Justice Scalia's words, the Court was preventing the "overjudicialization" of our government.²⁸ But each time the Court holds that a grant of standing to enforce a statutory duty is unconstitutional under Article III, the Court is doing precisely what it says it is not doing. It is not deferring to the exercise of power by our democratically elected legislative body. Quite the contrary. It is restraining Congress's power and increasing its own.

While I have not exactly changed my mind, I have to say that my views have softened somewhat. I no longer insist so vigorously that the Court

25. 429 U.S. 1012 (1976).

26. *See id.* at 1013.

27. *See Fletcher, supra* note 2, at 243–44.

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

explain what it is doing and why, and I no longer object so strenuously to the Court's substituting its view for Congress's.

There are three lines of cases in which the Justices have been particularly vulnerable to charges that they have manipulated doctrine in an ad hoc and unprincipled way—that they are acting like politicians instead of judges. Two of the lines comprise constitutional cases; one comprises statutory cases. I do not agree that the Justices are acting like politicians in these cases. Rather, I think that they are acting like judges of a common law court of last resort.

The first line of cases is Establishment Clause challenges brought by federal taxpayers. The lead case is *Flast v. Cohen*,²⁹ in which the Court held in 1968 that Flast, a federal taxpayer, had standing to challenge a congressional expenditure of funds to pay for books and other supplies in religious schools.³⁰ The Court constructed an elaborate rationale that justified Flast's standing but that somehow managed not to mention the Establishment Clause. But the fact that Flast was bringing an Establishment Clause challenge was what differentiated her case from that of other federal taxpayers. In *Frothingham v. Mellon*,³¹ the Court had held forty-five years earlier that Frothingham did not have standing to challenge congressional expenditures under the Maternity Act as beyond the scope of the federal government's enumerated powers.³² The amount of Flast's taxes that went to the challenged expenditures was no less "remote, fluctuating and uncertain" than the amount of Frothingham's taxes.³³ The difference between the two cases, I argued, was that Flast brought a challenge under the Establishment Clause, a constitutional provision that had a special sensitivity to government-compelled contributions.³⁴

In the years following *Flast*, the Court has dramatically undermined any rationale for federal taxpayer standing based on the Establishment Clause. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,³⁵ the Court held that a federal taxpayer does not have standing to bring an Establishment Clause challenge to a federal grant of real property to a religious school.³⁶ It distinguished *Flast* on the ground that *Flast* applied only to congressional authorizations of expenditures.³⁷ Then, in *Hein v. Freedom from Religion*

29. 392 U.S. 83 (1968).

30. *Id.* at 106.

31. 262 U.S. 447 (1923).

32. *See id.* at 480.

33. *Id.* at 487.

34. *See Fletcher*, *supra* note 2, at 228.

35. 454 U.S. 464 (1982).

36. *Id.* at 481–82.

37. *Id.* at 479.

Foundation, Inc.,³⁸ the Court held that a federal taxpayer does not have standing to challenge a federal expenditure of funds to support the “White House Office of Faith-Based and Community Initiatives.”³⁹ The Court distinguished *Flast* on the ground that the challenged expenditures derived from funds directly appropriated by Congress, whereas the expenditures in *Hein* derived from funds generally appropriated by Congress to the Executive Branch.⁴⁰ The rationales the Court has used to distinguish *Valley Forge* and *Hein* from *Flast* are embarrassingly flimsy. If *Valley Forge* and *Hein* are right, *Flast* is wrong. To use the familiar phrase, *Flast* has become a ticket for this day and train only.

The second line of cases is equal protection challenges to affirmative action programs. The Court’s third requirement for Article III standing is that the injury of which a plaintiff complains must be redressable by the remedy sought. A challenge to an affirmative action program is usually brought by someone who unsuccessfully sought admission to a state-run school, or unsuccessfully sought a government contract, when the school or contracting agency has an affirmative action program that puts a thumb on the scale in favor of a minority group. A narrow application of the redressability requirement would result in Article III standing only for candidates who can plausibly argue that but for the affirmative action program they would have been admitted to the school or awarded the contract.

In *Regents of University of California v. Bakke*,⁴¹ Justice Powell wrote that Bakke did not need to show that he would have been admitted to the University of California’s medical school at Davis in the absence of the school’s affirmative action program.⁴² He needed to show only that he was deprived of the opportunity to compete for admission on an equal basis.⁴³ Similarly, in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*,⁴⁴ the Court concluded that a bidder seeking a contract need not show that the affirmative action program prevented him from getting the contract.⁴⁵ The Court wrote, “[t]he ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”⁴⁶ Perhaps the Court had forgotten what it

38. 551 U.S. 587 (2007).

39. *Id.* at 607.

40. *Id.* at 605.

41. 438 U.S. 265 (1978).

42. *Id.* at 280 n.14.

43. *Id.*

44. 508 U.S. 656 (1993).

45. *Id.* at 666.

46. *Id.*; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210–12 (1995).

had earlier written about what Linda R.S. really wanted, and why she had no standing to bring an equal protection challenge.

The third line of cases is statutory environmental suits. The Court has been very grudging in granting standing to environmental groups that sue to enforce federal environmental statutes. The most prominent example is *Lujan v. Defenders of Wildlife*,⁴⁷ in which the Court held that two members of the Defenders of Wildlife did not have standing under Section 7 of the Endangered Species Act (ESA) to require that the government consult with the Secretary of the Interior before financing two overseas projects that might adversely affect listed species.⁴⁸ Even though the Act provided that “any person” could bring suit to require consultation, the Court required the environmental group to show that it had members with specific connections to the particular listed species.⁴⁹ Another example is *Summers v. Earth Island Institute*,⁵⁰ in which the Court held that Earth Island Institute did not have standing under the National Environmental Policy Act (NEPA) to challenge the Forest Service’s assertion that it was not required to prepare either an Environmental Impact Statement or an Environmental Assessment before logging on 250-acre parcels scattered throughout the United States.⁵¹ According to the Court, the chance that a member of the environmental group would come into contact with any of these 250-acre parcels was “hardly a likelihood.”⁵²

Though I may disagree with them, I do not regard the decisions in any of these three lines of cases as an illegitimate exercise of power by the Supreme Court. In deciding these cases in the way it did, the Court was acting in accord with its common law heritage as a court of last resort. Supreme Court Justices, and, in particular, Supreme Court Justice nominees, sometimes deny that the Court makes law. That is not true. The Court does make law. It has always made law.

In the early nineteenth century, American courts wrote almost ad nauseum, in an attempt to preserve their common law authority to make law, “[s]tatutes made in derogation of the common law, are to be construed *strictly*.”⁵³ We now largely see ourselves as living in an age of statutes, where the will of the legislature should prevail.⁵⁴ But in truth our courts of last resort, including the United States Supreme Court, have continued to

47. 504 U.S. 555 (1992).

48. *Id.* at 578.

49. *Id.* at 563.

50. 555 U.S. 488 (2009).

51. *Id.* at 490–91, 496.

52. *Id.* at 495.

53. *Trotter v. Blocker*, 6 Port. 269, 284 (Ala. 1837) (quoting *Melody v. Reab*, 4 Mass. (3 Tyng.) 471 (1808)); *see also* *Brewer v. Hamor*, 22 A. 161, 162 (Me. 1891); *Gibson v. Jenney*, 15 Mass. (15 Tyng.) 205, 206 (1818).

54. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 7 (1982).

exercise substantial lawmaking power, in both constitutional and statutory cases.

I regard all three lines of cases as examples of the Supreme Court's use of its lawmaking power. The Establishment Clause standing cases are a paradigmatic example of the Supreme Court changing the law in response to changes in political opinion. *Flast* reflects a political world that had already begun to disappear by 1968—a world in which mainstream Protestantism had great influence, in which there was substantial anti-Catholic prejudice, and in which the wall between church and state was seen as a way to prevent the government from providing support for Catholic schools. The new world, to which *Valley Forge* and *Hein* are responsive, is one in which the influence of mainstream Protestants has diminished and in which anti-Catholic prejudice has greatly diminished. Newly powerful evangelical and fundamentalist Protestants have now formed a common cause with Catholics favoring the public support of religious institutions, and the Supreme Court's decisions reflect this.

The affirmative action cases are another paradigmatic example. Linda R.S. sought to bring an equal protection challenge to prevent the local prosecutor from basing a decision on the illegitimacy of her child. But unwed mothers and their children had little political constituency and, accordingly, a relatively weak political claim to equal protection. The Court told Linda R.S. what she really wanted and was unlikely to get (money) and ignored what she actually said she wanted and could have gotten if the Court had been willing to provide it (equal protection). By contrast, non-minorities who oppose affirmative action have increasing political influence. To facilitate equal protection challenges to affirmative action admission programs, the Court has granted standing to more than just those students who would have been admitted in the absence of such programs. The students who were denied admission because of affirmative action programs are, by definition, the very small number of good students who were high on the school's waiting list. The chances are good that such students will obtain and accept an alternative offer of admission to another school without seriously considering a lawsuit. So in these cases the Court has taken seriously the concept of equal protection, and it has granted standing to those who seek an equal opportunity to compete for admission, irrespective of whether admission will result.

The environmental cases also respond to the Court's perception of political reality. I am not sure that the Court has perceived the political reality as accurately in these cases as it has in the Establishment Clause and affirmative action cases, but that is largely beside the point. In the two cases I described, the Court used Article III to deny standing to

environmental groups, even though “any-person” standing had been granted explicitly in the ESA⁵⁵ and broad standing had been granted implicitly in NEPA.⁵⁶ In these cases, as in a number of other environmental cases, the Court is exercising the traditional lawmaking power of a common law court of last resort. In so doing, the Court is not narrowly construing statutes passed in derogation of the common law, but it is doing something very similar. It is narrowly construing statutes with whose policies it disagrees, using a standing doctrine that it has developed for this purpose.

The Supreme Court has not, and will not, explain its Establishment Clause, equal protection, and environmental standing decisions in the way that I have just explained them. It has not, and will not, state openly the degree to which it is making law. This is not a new phenomenon. Common law courts have always been reluctant to say openly the degree to which they are changing the law. They much prefer to emphasize the degree to which their decisions are consistent with, even compelled by, decisions reached in earlier cases. I do not regard the Court’s unwillingness, perhaps inability, to explain what it is doing as illegitimate or improper. The Justices are acting in the way they and their predecessors have always acted, making law even as they seek to disguise the degree to which they are doing it.

55. 16 U.S.C. § 1540(g) (2006).

56. The Administrative Procedure Act, 5 U.S.C. § 702 (2006), allows individuals “adversely affected or aggrieved by agency action within the meaning of a relevant statute” to seek judicial review.