Generalized Grievances and Judicial Discretion

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INTRODUCTION

Standing jurisprudence is one of the most obscure areas of the law.¹ Like the other justiciability doctrines, standing is a “gatekeeper” doctrine that may serve as a bar to a plaintiff’s claim in federal court.² The key factor distinguishing standing from other justiciability doctrines is that it does not regulate the plaintiff’s claim itself, but rather whether the plaintiff is the proper person to assert that claim.³ Within the law of standing, generalized grievances may in turn be one of the least clear, and therefore most poorly understood, areas of doctrine.

Although the Supreme Court has employed the generalized grievances concept repeatedly in its standing analysis since the 1920s,⁴ the term “generalized grievances” did not appear in a federal judicial opinion until Flast v. Cohen in 1968.⁵ The Flast Court held that standing should be denied “where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.”⁶ Although this statement suggested some of the situations in which a generalized grievance might arise, it did not explain precisely what one is. And in

* J.D. Candidate, University of California, Hastings College of the Law, 2007; B.A., University of California at Berkeley. I would like to thank Professor Evan Tsen Lee for his help in understanding the complexities—and opacities—of standing jurisprudence in general, and for his guidance on this Note specifically. Thanks also to the editors of the Hastings Law Journal for their hard work on this Note, and to my friends and family for their support and encouragement throughout the writing and editing process.

3. Flast v. Cohen, 392 U.S. 83, 99–100 (1968) (“[T]he question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.”); see also Chemerinsky, supra note 1, at 60; Lee, supra note 2, at 606.
5. See Flast, 392 U.S. at 106.
6. Id.
fact, one could argue that it is still unclear what a generalized grievance is now, almost forty years and many cases later.7

One reason for this lack of clarity is that the doctrine’s definition has fluctuated over time.8 For example, in Flast, Justice Warren referred to “generalized grievances about the conduct of government.”9 This definition suggests that the key issue is the substance of the claim, not the identity of the claimant. But in Warth v. Seldin, Justice Powell suggested that the range of potential plaintiffs was an essential matter; he defined a generalized grievance as a claim in which “the asserted harm is... shared in substantially equal measure by all or a large class of citizens.”10 And in Lujan v. Defenders of Wildlife, Justice Scalia seemed to indicate that a generalized grievance involved both of these factors at once.11 Most recently, in Federal Election Commission v. Akins, Justice Breyer wrote that generalized grievances had “invariably” been found in cases where both factors were present, but noted that the second factor, a “widely shared” harm, did not by itself require a court to find a generalized grievance.12 That explanation, however, did not make clear which factors do necessitate finding a generalized grievance.13

Ultimately, the current state of the doctrine makes it effectively impossible to announce a simple definition.14 But we can define the doctrine to some degree. It is important to do so, because the doctrine raises essential questions that go to the heart of the issue of standing, with its exacting injury requirements.15 Relevant issues include what type

8. Id.
9. 392 U.S. at 106.
11. 504 U.S. 555, 573-74 (1992) (plaintiff fails to state justiciable claim when alleging “only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large”).
13. See The Supreme Court, 1998 Term—Leading Cases, 112 Harv. L. Rev. 122, 253 (1998) [hereinafter Leading Cases] (“The Court’s resolution of the standing question in Akins, whether by necessity or design, fails to elucidate the constitutional boundaries of Congress’s ability to confer standing.”). Contra Chemerinsky, supra note 1, at 91 (asserting that Akins clearly defines generalized grievances as cases in which “plaintiffs sue solely as citizens concerned with having the government follow the law or as taxpayers interested in restraining allegedly illegal government expenditures”).
14. See supra notes 7-8 and accompanying text.
15. Injury (sometimes referred to as injury in fact) is one of three requirements for what the Supreme Court calls “Article III” or “constitutional” standing. Professor Chemerinsky offered the following succinct summary of Article III standing:

First, the plaintiff must allege that he or she has suffered or imminently will suffer an injury. Second, the plaintiff must allege that the injury is fairly traceable to the defendant’s conduct. Third, the plaintiff must allege that a favorable federal court decision is likely to redress the injury. . . . The latter two requirements—termed causation and redressability—often have been treated by the Court as if they were a
of injury the plaintiff must have, whether there are limits on Congress’s ability to grant standing to large, poorly-defined groups of plaintiffs, and whether plaintiffs, in order to have standing, must suffer an injury different from the injuries others have suffered from the same harm.

The answers to these questions will help us understand standing doctrine, but they also implicate our basic notions of fairness and help define the role of courts in our society. This Note argues that, over time, two competing visions of the doctrine have struggled for dominance. The first, epitomized by Justice Scalia’s opinion for the Court in *Lujan* and his dissent in *Akins*, accords with a “private rights” view of standing jurisprudence. Such a view employs the generalized grievances doctrine to exclude claims that appear insufficiently specific or individualized. The other theory, on display in Justice Breyer’s majority opinion in *Akins*, seeks to vindicate the goals of a “public values” view of standing (or in Justice Breyer’s case, the goals of his own “active liberty” view of jurisprudence). Under this theory, generalized grievances should not bar claims that would be allowed by a common sense view of basic fairness under the Constitution. This Note argues that, with *Federal Elections Commission v. Akins*, the public values view has won out—at least for now.

Part I of this Note explores the foundations of the generalized single test...
grievances doctrine, which were laid in three early twentieth century cases: *Fairchild v. Hughes*, 20 *Frothingham v. Mellon*, 21 and *Ex Parte Levitt*. 22 I theorize that the doctrine emerged from the Court’s attempts to exclude plaintiffs whose claims seemed inconsistent with the broad purposes of federal court adjudication. Two issues that emerged in these cases have since played a significant role in the Court’s generalized grievances jurisprudence: a reluctance to grant standing to plaintiffs whose injury is shared by a large number of non-plaintiffs, and separation of powers concerns. The Court has vacillated on the significance of both of these issues. 23 In Part II, I discuss the private rights view of generalized grievances, which tends toward a strict doctrine that in many cases contravenes congressional intent to provide standing. After exploring the Court’s treatment of generalized grievances doctrine in the 1970s and 1980s and discussing Justice Scalia’s pre-*Lujan* views, this Part addresses *Lujan* itself, which, at the time it was decided, represented a significant victory for the private rights view. Part III will outline the public values theory of generalized grievances, exploring how *Akins* modifies the doctrine established by *Lujan* and attempting to define the doctrine as it stands today. Ultimately, I argue that Justice Breyer’s formulation of the doctrine in *Akins* is preferable to Justice Scalia’s alternative, which would place unjustifiable limits on Congress’s power to grant access to the federal courts and would leave too many injured plaintiffs without the opportunity for judicial redress. 24 Part IV briefly analyzes how courts have applied the doctrine since *Akins*. The results of the post-*Akins* generalized grievances cases, I contend, have been not only doctrinally correct, but also equitable. I conclude that although the doctrine remains unsettled in some ways, even an unsettled public values theory of generalized grievances is preferable to an overly restrictive private rights formulation.

20. 258 U.S. 126 (1922).
23. For the Court’s equivocation on the first issue, which I refer to as the “widely-shared” problem, compare *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978) (holding that standing should be denied where the “harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure”), with *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 678, 687 (1973) (holding that a group of five law students had standing even though “all persons who utilize the scenic resources of the country, and indeed all who breathe its air” could potentially claim the same injury as the plaintiffs). On the separation of powers issue, compare *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 (1974) (arguing that allowing standing to a generalized grievance would “distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing ‘government by injunction’”), with *Federal Election Commission v. Akins*, 524 U.S. 11, 24 (1998) (finding that even if the interest claimed by a plaintiff might be more readily addressed by the political branches, that “does not, by itself, automatically disqualify [it] for Article III purposes”).
I. ORIGINS OF THE DOCTRINE

The generalized grievance concept first appears in recognizable form in decisions by the Taft Court of the early 1920s. The doctrine did not stand on its own at first; the Court did not suddenly announce a new rule excluding "general" or "generalized" complaints. Rather, the Court prohibited generalized claims as an extension of the requirement of injury and as a corollary to broader separation of powers concerns. The Court started in each case with the proposition that the plaintiff's interest was insufficient to support standing. It then offered the generalized nature of the claim as evidence supporting that holding.

In *Fairchild v. Hughes*, the Court rejected an attempt to enjoin the formal adoption and enforcement of the Nineteenth Amendment, which had already been ratified by a sufficient number of states to become law. The "[p]laintiff's alleged interest in the question" was based on his status as a citizen and taxpayer who objected to the Amendment as an infringement on the power of the states to control suffrage. Justice Brandeis wrote that this interest was "not such as to afford a basis for this proceeding." Ostensibly, the rationale was that the plaintiff could not claim to have been injured by enforcement of the Amendment, because it did not directly affect him, but only required state election officials to allow women to vote. The Court also noted that the Amendment impacted the plaintiff less than it did many other Americans, because it did not change the suffrage laws in his home state of New York (which had allowed women to vote before ratification).

Political concerns, however, could not have been far from the justices' minds. By the time the Court faced the case, the constitutionally mandated steps for enacting the Nineteenth Amendment were complete. It was part of the Constitution "for all Intents and Purposes." Fairchild, then, was not just arguing for the overturning of an act of Congress; he wanted the Court essentially to delete an

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26. 258 U.S. 126, 127, 130 (1922). The Nineteenth Amendment provides that "[t]he right . . . to vote shall not be . . . abridged . . . on account of sex." U.S. Const. amend. XIX, § 1.
28. Id. at 129.
29. Id.
30. Id.
31. See U.S. Const. art. V (prescribing that a constitutional amendment, after being passed by Congress, "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States"); *Fairchild*, 258 U.S. at 127.
32. See *Fairchild*, 258 U.S. at 127.
Amendment from the Constitution.

Even if the Court had purported to do so, it might have been unclear whether it was exceeding its rightful powers. By granting standing, the Court would have implicitly held that it possessed the power to overturn a legislative enactment ratified by thirty-four state legislatures following an explicit constitutional procedure. If it could invalidate ratified Amendments, what was to stop the Court from deleting portions of the Bill of Rights at the behest of a single citizen? Although the Court is of course an inherently antimajoritarian institution (because it is unelected and because its judges serve for life), it is extremely unlikely that the justices failed to consider the antidemocratic implications of what they were being asked to do.

Amongst these dizzying legal and political concerns, the pronouncement that “[p]laintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys not be wasted” appears in Fairchild almost as an afterthought (and not a very important one). This “general right” was insufficient for standing purposes because it involved no direct injury; thus the claim was not an Article III “case.” Justice Brandeis said nothing about the widely shared nature of the injury. The Court rejected “citizen standing” for Fairchild not because it was too broad, but because it was impractical and imprudent for other, more vital, reasons.

Ex Parte Levitt involved similar political concerns and legal arguments, and treats the generalized grievances doctrine in a similarly cursory way. The plaintiff sought to invalidate the appointment of Justice Black to the Supreme Court, arguing that the appointment was invalid under Article I, Section 6. As in Fairchild, the political volatility of the issue and its implications for separation of powers are obvious. Six months after President Roosevelt first proposed his Court packing plan, the justices can hardly have wanted to precipitate a direct constitutional confrontation by directly considering whether to expel one of Roosevelt’s appointees at the behest of a single disgruntled lawyer. Yet

33. See U.S. Const. art. V; Fairchild, 258 U.S. at 127. Even if Fairchild had obtained the remedy he sought—preventing the Secretary of State from proclaiming the amendment ratified, id.,—the amendment would arguably have been valid, because the Constitution doesn’t require an official proclamation of the ratification. By issuing the injunction, the Court would have raised grave constitutional questions by impliedly asserting its authority to halt the ratification process in a way not explicitly authorized by Article V.
34. Fairchild, 258 U.S. at 129.
35. Id.
37. Id.
38. See CHEMERINSKY, supra note 1, at 255 (explaining that President Roosevelt proposed the Court packing plan in March 1937). Levitt was decided in October 1937, 302 U.S. at 633.
39. We know that Levitt was a lawyer because the Court referred to him as “a member of the bar.
the Court aloofly failed to acknowledge these concerns. Instead, it based its holding on the plaintiff’s lack of a “direct injury,” blandly reciting that he had demonstrated “no interest . . . other than that of a citizen.” The Court raised the fact that the plaintiff “had merely a general interest common to all members of the public” almost casually, in the second to last sentence of the opinion. Again, the justices used the generalized nature of the harm primarily as evidence of a lack of injury, appearing less concerned with the former than the latter.

Frothingham is different from Fairchild and Levitt in that it highlights the generalized grievances concern. At the same time, it introduces the widely-shared concept and discusses the separation of powers implications of allowing broadly based standing. The plaintiff sought “taxpayer standing”; her alleged injury stemmed from the fact that she challenged a statute appropriating taxpayer funds. The appropriation of those funds, she claimed, constituted a taking of her property without due process of law. The Court denied standing, holding that Frothingham was required to claim “some direct injury” stemming from the enforcement of the law, and “not merely that [s]he suffers in some indefinite way in common with people generally.”

To focus on the fact that the plaintiff’s claim was widely shared would be to miss the point of Justice Sutherland’s argument. True, the Court did point out that Frothingham’s interest in the case was “shared of this Court.” Levitt, 302 U.S. at 633.

40. See id. The fact that the opinion is per curiam may suggest the justices’ awareness of the political sensitivity of the issue. By refusing, on standing grounds, to address the issue, and doing so in a single voice, the Court could mollify potential concerns that it would challenge the President’s use of his appointment power.

41. Id. This is not to say that the Court’s injury rationale was solely a pretext for avoiding the political and separation of powers issues. But it was likely at least in part such a pretext.

42. Id.

43. See id.

44. In United States v. Richardson, Chief Justice Burger would argue that Levitt was denied standing because, “whatever [his] injury, it was one he shared with ‘all members of the public.’” 418 U.S. 166, 179–80 (1974). This seems incorrect. Levitt was not denied standing because he had a widely shared injury, but rather because he had no measurable injury at all.


46. See id.

47. Id. at 479–80. In a taxpayer standing case, the plaintiff’s claim of injury is that his taxes are being used to support or enforce an illegal government action or statute. The plaintiff then attempts to use this claim to support a facial challenge to the allegedly illegal action or statute.

48. Although 1923 was the heyday of a period during which the Court invalidated a number of acts of Congress on substantive due process grounds, most of the overturned statutes involved economic regulation. See Chemerinsky, supra note 1, at 606–07. Frothingham, in contrast, challenged the Maternity Act, social legislation designed to reduce infant mortality. Frothingham, 262 U.S. at 479. This distinction may explain why Justice Sutherland’s opinion does not bother much with the merits of the plaintiff’s due process claim. See id. at 486–89.

49. Frothingham, 262 U.S. at 488.
with millions of others.  

But it did so only in the course of holding that her interest generally failed to provide a "basis . . . for an appeal to the preventative powers of a court of equity." The problem was not only that the interest was widely shared. It was also that it was "comparatively minute and indeterminable," and that the connection between her taxes and the statute was "remote, fluctuating and uncertain." In other words, any potential harm to Frothingham from the operation of the statute was simply so vague and poorly defined that it wasn't clear that there was any harm at all. The case suggests that no taxpayer can demonstrate a well-defined injury based solely on their taxpayer status, because it is so difficult to measure the existence and extent of a loss resulting from the alleged use of some portion of their taxes to enforce a specific statute. Therefore, as in Fairchild and Levitt, the plaintiff's claim of harm was simply too insubstantial to constitute an injury.

The Court's opinion also raised the specter of the slippery slope, pointing out that "[i]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same" for any statute requiring an appropriation of public funds. This was the closest the Court came in Frothingham to holding that widely shared harms are invalid as such. But even this statement did not amount to a new rule that generalized claims could not be heard. Rather, the "attendant inconveniences" inherent in allowing standing to every taxpayer formed part of the rationale for prohibiting claims based solely on taxpayer status.

Justice Sutherland also believed that the plaintiff's claim raised constitutional concerns associated with separation of powers. He connected these to the injury analysis. Invalidating a statute without direct injury, he argued, would infringe on Congress's rightful exercise of its lawmaking power and would exceed the Court's power "to decide a judicial controversy." Although he did not explain why this would be so, one could argue that without any harm at all to evaluate, a court can only evaluate the statute on broad, general facts and pure policy grounds.

50. Id. at 487.
51. Id.
52. Id.
53. The Court eventually recognized a limited basis for taxpayer standing under the taxing and spending clause of the Constitution in Flast v. Cohen. 392 U.S. 83, 102-03 (1968). Subsequent cases, however, seem to have limited Flast to its facts—that is, to situations in which the plaintiff is using her status as a taxpayer to challenge government expenditures as violative of the Establishment Clause. Chemerinsky, supra note 1, at 94.
54. Frothingham, 262 U.S. at 487.
55. See id. ("[S]uch a result, with its attendant inconveniences, goes far to sustain the conclusion . . . that a suit of this character [i.e., a taxpayer suit] cannot be maintained.") (emphasis added).
56. Id. at 488-89.
57. Id. at 489.
What other basis could it have for making a decision in such a case? And making such pure policy decisions based on general facts is traditionally a task more in the nature of legislation than adjudication. Thus, the problem with taxpayer standing in *Frothingham* ultimately had little to do with the fact that many people shared the same injury. Rather, the problem was that any given plaintiff seeking standing under this theory, considered as an individual, had no definable injury in the first place, and thus could not state a claim that provided the Court with a basis for decision on other than pure policy grounds.

Rather than developing new doctrine based on the "generalized" nature of the claim, the Court in all three of these cases considered a range of already-existing legal and non-legal factors—lack of injury, political concerns, and structural constitutional concerns associated with separation of powers. Assessing these factors together, the justices judged in each case that the plaintiff was simply not an appropriate person to bring the claim. That the harm was "general" was a shorthand or synonym for this notion of "appropriateness." It was a convenient one, because citizen standing and taxpayer standing have in common that they theoretically allow for suits by tens of millions of plaintiffs with identical claims. But in the end it was the insufficiency of each of those individual potential claims that was the ultimate problem, not their "general" nature when considered collectively. At its inception, then, the generalized grievances concept was simply a convenient way for the Court to describe plaintiffs with deficient claims—an umbrella term encompassing a variety of reasons to deny standing. It was not an independent theory of exclusion.

II. PRIVATE RIGHTS VIEW OF GENERALIZED GRIEVANCES

The generalized grievances doctrine eventually came to be considered a stand-alone doctrine within the Court's standing jurisprudence. To some extent it was still, as in the Taft Court cases,

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58. The idea that these early cases, and to some extent standing doctrine in general, are ultimately concerned with finding “appropriate plaintiffs” and excluding “inappropriate” ones, was first suggested to me by Professor Evan Tsen Lee.

59. Lee Albert proposed a similar theory of the generalized grievances doctrine:

> Upon finding a litigant to be without any other interest, courts have said that he ‘suffers in some indefinite way in common with people generally’ or that the cause is one of public concern. To infer from this that the collective character of an interest is relevant to its insufficiency for private standing would be error. A litigant’s interest in the lawfulness of particular government action may be shared with others but whether it is or not is immaterial to the ruling that he is without standing. . . . [T]hese expressions do not provide a reason for the finding of standing; they describe the result. Attribution of the interest to the public is a figure of speech, expressing the conclusion that general law enforcement must be left to public officials or the public in its political capacity.

associated with a lack of individual injury, and as such it fit in well with a private rights view of standing. Such a view focuses on the idea of a court case as a way to resolve disputes. Private rights theory is closely related to the Article III "case or controversy" requirement: under this model, a "case or controversy" by definition involves a dispute in addition to an injury to the plaintiff. Justice Powell explained the connection between standing, dispute resolution, and Article III under the private rights model in Warth: "Standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case . . . ."60

Despite these Article III concerns, the doctrine was still considered prudential (at least before Lujan).61 At the same time, however, courts often invoked another constitutional concern in support of it: a reluctance, based on separation of powers, to interfere with decisions made by the political branches of government.62

It would take Justice Scalia to announce a unified theory by which the doctrine was (1) required by Article III and (2) mandated by separation of powers, thus "constitutionalizing" the generalized grievances concept.63 To date, Lujan represents the zenith of the private

61. Id. (emphasis added).
63. See Valley Forge, 454 U.S. at 475 (finding that generalized grievances are “most appropriately addressed in the representative branches”); Warth, 422 U.S. at 500 (stating that a court entertaining a case involving a generalized grievance would be forced “to decide abstract questions of wide public significance even though other governmental institutions may be more competent to [do so]”).
64. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74, 576-77 (1992) (stating that “a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy” and arguing that allowing claims based on “the undifferentiated public interest in . . . compliance with the law” violates separation of powers).


Given that both Warth and, seven years later, Valley Forge, explicitly state that the doctrine is prudential, see supra notes 62-63, it seems incorrect to argue that the generalized grievances doctrine was constitutionalized before those cases. Lujan marks the first time that the Court explicitly barred a generalized grievance based primarily on Article III standing requirements.
rights theory of the doctrine in Supreme Court case law, although Justice Scalia's dissent in Akins suggests that, given the chance, he would push the theory even further.\textsuperscript{65}

A. CONSTITUTIONALIZATION OF GENERALIZED GRIEVANCES DOCTRINE

Prudential justiciability doctrines are "judicially self-imposed limits on the exercise of federal jurisdiction."\textsuperscript{66} "[U]nlike their constitutional counterparts, they can be modified or abrogated by Congress."\textsuperscript{67} This distinction matters because many federal statutes contain citizen suit provisions purporting to grant a very broad right to sue.\textsuperscript{68} If the doctrine is prudential, Congress can override it simply by authorizing standing.\textsuperscript{69} A prudential generalized grievances doctrine would therefore never bar suits under these broadly worded citizen suit provisions. But if the doctrine is constitutionally mandated, then no generalized grievance can ever be justiciable, even if a statute authorizes standing for the claim.\textsuperscript{70} In that case, claims brought under broadly worded citizen suit provisions would always be barred if found to be generalized grievances.

I am distinguishing here between a prudential doctrine based on constitutional concerns and a "constitutionalized" doctrine. As I use the term here, "constitutionalized" means more than that the Court mentions the Constitution in its analysis of a given doctrine. By constitutionalization, I mean the act of judicially construing a standing doctrine as mandated by the Constitution. Thus, when a court invokes constitutional concerns, it is not necessarily constitutionalizing; constitutionalizing involves taking a further step and saying that the Constitution requires a given result. In its baldest incarnation, a court might say something like, "We have no power to review this case, because Article III of the Constitution specifically forbids us to take jurisdiction over cases involving [for example] manatees."\textsuperscript{71} Of course, it

\textsuperscript{65} See infra Part II.B.


\textsuperscript{67} Bennett v. Spear, 520 U.S. 154, 162 (1997) (citing Warth, 422 U.S. at 501).

\textsuperscript{68} For example, broadly worded citizen suit provisions can be found in several key environmental laws. See, e.g., 16 U.S.C. § 1540(g) (Endangered Species Act) (providing that "any person may commence a civil suit on his own behalf" to enjoin violations and that "the district courts shall have jurisdiction"); 33 U.S.C. § 1365 (Clean Water Act) (same). The constitutional/prudential distinction is thus particularly important to the ability of environmental plaintiffs to gain standing. See CHEMERINSKY, supra note 1, at 95-96.

\textsuperscript{69} See Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("Congress' decision to grant [standing] . . . eliminates any prudential standing limitations.").

\textsuperscript{70} Id. ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

\textsuperscript{71} This invented example uses explicit language to demonstrate the doctrinal move involved. For an actual, less extreme example, see Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.").
is only constitutionalization the first time a court does this—after that, it
is a fait accompli. More precisely, since the Supreme Court is the final
arbiter of the Constitution, it is a fait accompli when that Court does it.
Lower courts can attempt to constitutionalize, but will never have a final
say in the matter.

When the Court grounds a standing doctrine in the Constitution,
several important consequences follow. The first is a loss of judicial
flexibility. The decision is binding on the lower courts, so that lower
court judges are barred from hearing claims based on statutes or
common law principles that violate the doctrine. Instead, when faced
with a claim based on such a statute or principle, the court must hold that
the claim is proscribed by the Constitution. Less obviously, the decision
restricts the rhetorical and analytical flexibility of the Supreme Court
itself. For prudential doctrines, stare decisis requires the Court to
consider itself generally bound, but it may still reverse itself if “good
cause to the contrary is demonstrated.”72 To avoid applying a prudential
doctrine, it can either: (1) modify the doctrine so that it operates to reach
the result that the judge thinks correct in the case, (2) hold the doctrine
inapplicable to the situation, or (3) simply repudiate it. It need not
provide much justification for doing these things; some policy ground
invented by the Court or offered by a litigant will suffice. But when a
doctrine is constitutionally compelled, although the Court can still
distinguish a case or clarify the doctrine, it will have to work harder to
justify modifying or eliminating the doctrine.73 If past opinions have said
that Article III requires an injury in fact, the Court will not suddenly
decide on pure policy grounds that it does not. Unless the Constitution
has changed in the interim, it must explain how the Constitution now
requires or permits the new result.74 This will tend to slow down changes
in the constitutionalized doctrine and freeze the current canons in place.

72. Lee, supra note 2, at 617.
grounded rules deprive both future courts and Congress of flexibility in defining jurisdictional
requirements. . . . Unquestionably, prudential limits on the Court are preferable because they are
more flexible.”). This is not to say that the Court cannot overturn established constitutional precedent
when it wishes to. See, e.g., Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling a prior case
because it “was not correct when it was decided, and it is not correct today. It ought not to remain
common wisdom that the rule of stare decisis is not an ‘inexorable command,’ and certainly it is not
such in every constitutional case.”) (citation omitted).
74. See Casey, 505 U.S. at 854 (“[W]hen this Court reexamines a prior holding, its judgment is
customarily informed by a series of prudential and pragmatic considerations designed to test the
consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective
costs of reaffirming and overruling a prior case. [Listing several such considerations].”). But when the
Court overrules previous constitutional precedents, it generally expends significant energy on a
lengthy analysis of the propriety of doing so. See, e.g., Lawrence, 539 U.S. at 567–79 (justifying the
overruling of Bowers v. Hardwick, 478 U.S. 186 (1986)).
Furthermore, constitutionalization circumscribes Congress’s power to grant standing by creating statutory rights of action. Therefore, if the generalized grievances doctrine is prudential, then a court can, at its discretion, hold that a citizen suit provision grants standing even to a plaintiff with a “generalized” claim. But if it is mandated by the Constitution, then Congress lacks the power to grant “generalized” standing, and a federal court must find a statute that attempts to grant such standing unconstitutional insofar as it does so. By imposing such limitations on Congress, the Court actually creates a constitutional problem by encroaching upon Congress’s constitutionally granted authority over federal court jurisdiction.

Litigants’ rights are plainly affected when constitutionalization narrows the range of choices for Congress and the courts. When a litigant brings a claim in a borderline standing case, the courts are less free to interpret standing doctrine broadly to allow the plaintiff’s claim. The Supreme Court may be less willing to modify the doctrine to allow standing to a sympathetic plaintiff. And if Congress believes that the constitutionalized doctrine unfairly bars litigants from court, its ability to affect the situation is limited.

1. The Seeds of Constitutionalization

Before Lujan, and particularly in the 1970s and 1980s, the Court confused the issue of whether the generalized grievances concept was prudential or constitutional by invoking constitutional grounds for the doctrine while at the same time explicitly calling it prudential. The constitutional grounds involved separation of powers concerns about courts making policy decisions more properly reserved to Congress and the President. Effectively, the justices were saying that these institutional competence issues provided a policy justification for denying standing to generalized claims, but did not compel courts to refuse jurisdiction in the same way that an absence of Article III standing would. It is reasonable to take the Court at its word and assume that

75. See Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").
76. See id.
77. See infra Part II.A.
78. See Gilles, supra note 64, at 315 n.2, explaining:
[The landmark constitutional cases of the last century... were driven by private plaintiffs who sought not only redress for the harms they had personally suffered, but also protection for society at large against those harms. The Court’s constitutionalized standing doctrine has effectively neutered the popular force that powered these reformative enterprises.
79. See supra notes 62–63 and accompanying text.
80. See supra notes 62–63 and accompanying text.
81. See supra notes 62–63 and accompanying text.
before *Lujan* the doctrine was prudential. At the same time, many pre-*Lujan* cases did suggest a connection between Article III and a bar on generalized grievances. Thus, Justice Scalia’s opinion in *Lujan* properly traced the kernel of his constitutionalization argument back as far as *Fairchild*, even though he exaggerated when he said that the earlier cases had “consistently held” that generalized grievances conflicted with Article III.

Two separate constitutional arguments about generalized grievances wind through the cases that Justice Scalia cited in *Lujan* to support his constitutionalization argument. The first idea, articulated in *Fairchild*, is that a claim based on taxpayer standing “is not a case, within the meaning of section 2 of Article III.” Justice Sutherland further explained in *Frothingham* that the claimed injury in such a case is “remote, fluctuating, and uncertain,” because the plaintiff can allege a violation of the Constitution, but cannot show a clear connection between the violation of the law and any measurable harm to her own interests. As already noted, this argument is really saying that a plaintiff claiming taxpayer standing lacks injury, not that her claim is barred because many people share it.

The Court in *Ex Parte Levitt*, and much later in *Schlesinger v. Reservists Committee to Stop the War*, extended the same argument to cases involving citizen standing, in which the plaintiff’s only claim of injury is that the law has not been followed. The lack of measurable harm is even more obvious in citizen standing cases than in taxpayer suits, because plaintiffs in citizen standing cases do not even claim an injury to economic interests. As a result, as Justice Burger put it, “it can be only a matter of speculation whether the claimed violation has caused concrete injury to the particular respondent.” Any claimed injury is “abstract” and therefore difficult to measure. Again, however, while these decisions are based on Article III-related concerns about injury,

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82. *Contra* Condon, *supra* note 64, at 1170–73 (arguing that two 1974 cases constitutionalized the generalized grievances doctrine eighteen years before *Lujan*).
84. *See* id.
85. *See* id. at 574–76.
90. *Schlesinger*, at 226–27 (contrasting a “generalized grievance” with a “case or controversy”); *Levitt*, 302 U.S. at 633 (holding that a litigant lacks standing unless “he [can] show that he has sustained, or is immediately in danger of sustaining, a direct injury” and that “a general interest common to all members of the public” does not satisfy that requirement).
they do not deal directly with the "generalized" nature of the injury. Rather, each plaintiff, considered separately, has an insufficient claim. This is likely why the generalized grievances doctrine was still considered prudential before *Lujan*. Plaintiffs in certain categories—such as those who sue as taxpayers or citizens—both lack injury and have broad claims that may be related to a "generalized" violation of the law. But the Court did not consider those two factors to be invariably connected.

The other constitutional argument running through the pre-*Lujan* cases is based on separation of powers concerns. These centered around fears of interfering with the policy-making authority of Congress and the President. In *United States v. Richardson*, for instance, Justice Burger argued that claims based on taxpayer standing were "committed to the surveillance of Congress, and ultimately to the political process." Although Richardson could not prove Article III injury, he retained "the right to assert his views in the political process," and that process was the proper forum for his claim, not the courts. Similarly, in *Schlesinger*, Justice Burger wrote that allowing citizen standing to plaintiffs without "concrete injury" would "distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction'." Significantly, although Justice Sutherland had made a similar argument in *Frothingham*, Justice Burger did not emphasize it in *Schlesinger*. Rather, he used it only as a rejoinder to the plaintiffs' argument that someone must have standing to require a court to enjoin unconstitutional government action. Thus, it is unlikely he considered it crucial to the outcome of the case. In fact, before *Lujan*, a separation of powers argument that a grievance was generalized had never been used as primary basis for denying standing. *Frothingham, Levitt, Richardson*, and *Schlesinger* all ultimately denied standing because of a lack of injury, not because of separation of powers concerns.

In 1983, however, while a judge on the D.C. Circuit, Justice Scalia...
wrote a law review article articulating a separation of powers rationale for constitutionalizing generalized grievances. He argued that standing doctrine in general restricts courts to their "traditional undemocratic role of protecting individuals and minorities against impositions of the majority." Under this theory, injury is a good indicator of whether a court should hear a case, because a plaintiff who is directly harmed by a law requires protection from the court, whereas a plaintiff who objects to a law that does not injure her requires no such protection. Furthermore, when judges attempt to decide cases not involving individual injury, they must be attempting to vindicate the interests of the majority, since their intervention is not required to protect the minority. Deciding such issues would be "even more undemocratic," Justice (then-Judge) Scalia argued, because it is properly the role of the elected branches, not the inherently aristocratic and (because appointed for life) politically unaccountable judiciary. All of this is simply to say that separation of powers concerns, not just Article III, compel the plaintiff to show injury to get standing.

But Justice Scalia took the theory one step further: he claimed that separation of powers barred some widely shared injury just because it was widely shared, even if the plaintiff could claim a concrete injury. This theory essentially claimed that sufficiently widely shared injuries were constitutionally barred. If a statute granted standing to too large a group of potential litigants, he argued that a showing of injury "would not suffice to mark out a subgroup of the body politic requiring protection" by the courts. Yet Justice Scalia did not explain very well how this prudential concern about institutional roles empowered the courts to ignore Congress's overt intent to grant standing. His argument appears to have been that such a statute would constitute an impermissible attempt by Congress to delegate its role of protecting majority interests to the antimajoritarian branch.

The irony of this position is striking. Justice Scalia was saying that in order to avoid abusing their own "undemocratic" powers, courts should refrain from taking a case that the democratically elected Congress wants the courts to hear. Yet ignoring an express grant of jurisdiction by

103. Id. at 894.
104. Id.
105. Id. at 894, 896.
106. Id. at 895-96.
107. Id.
108. Cf. id. at 896 ("There is surely no reason to believe that an alleged governmental fault of such general impact would not receive fair consideration in the normal political process.").
Congress just because the outcome affects a large group of people usurps majority power more than it would to simply follow the majority’s wishes by deciding the case.\footnote{110}

2. **Constitutionalization in Fact: Lujan v. Defenders of Wildlife**

In *Lujan*, Justice Scalia drew on both threads of constitutional argument running through the earlier cases, and gave a new twist to the separation of powers argument. \footnote{111} Weaving these arguments together, he built a strong case that the generalized grievances doctrine is mandated by the Constitution.\footnote{112}

First, Justice Scalia argued that Article III definitively barred claims “raising only a generally available grievance about government.”\footnote{113} He defined generalized claims as those “claiming only harm to [the plaintiff’s] and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large.”\footnote{114} Moreover, he applied the generalized grievances doctrine to exclude a claim that seemed to be explicitly authorized by Congress.\footnote{115} This itself was an important doctrinal move that no earlier case had made. *Frothingham, Levitt, Richardson,* and *Schlesinger* had all denied standing to a taxpayer or a citizen suing as such, in cases where there was no specific statutory right of action.\footnote{116} Congress had apparently intended to grant “any person” a right to sue to remedy any violation of the Endangered Species Act.\footnote{117} But the Court in *Lujan* said that a violation of the Act, by itself, was an insufficient injury to grant standing, because it amounted to a generalized grievance, which was constitutionally barred.\footnote{118} As a result, a plaintiff suing under the citizen suit provision in *Lujan*—or any other

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\footnote{110}{Justice Scalia explicitly acknowledged in his article that his standing theory undermined congressional power, commenting that it was no loss for “important legislative purposes, heralded in the laws of Congress,” to be indefensible in the courts. Scalia, *supra,* note 102 at 897. For other criticisms of the arguments Justice Scalia made in this article, see Sunstein, *supra* note 109, at 646-47.}
\footnote{111}{See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-78 (1992).}
\footnote{112}{See *id.*}
\footnote{113}{Id. at 573.}
\footnote{114}{Id.}
\footnote{115}{The plaintiffs in *Lujan* claimed that the Department of the Interior had violated the Act by issuing an impermissible regulation and then applying the regulation so as to harm endangered species that plaintiffs wished to observe. *Lujan*, 504 U.S. at 559, 562-64. The citizen suit provision of the Endangered Species Act authorizes “any person to commence a civil suit on his own behalf” to (a) “enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this Act,” or to (b) force the Department of the Interior to fulfill certain of its responsibilities under the statute; and expressly granted district courts jurisdiction to order appropriate remedies. 16 U.S.C. § 1540(g).}
\footnote{116}{See *supra* note 101.}
\footnote{117}{See *supra* note 115.}
\footnote{118}{*Lujan*, 504 U.S. at 577-78.}
\end{flushleft}
broadly worded citizen suit provision—had to demonstrate Article III injury independent of the statutory violation.\textsuperscript{119} Constitutionalization was the only way that the Court could have reached this result, because it had to override legislative intent to do so. Essentially, the case held that the citizen suit provision of the Endangered Species Act was unconstitutional to the extent that it allowed standing where the plaintiff could not demonstrate individual injury.\textsuperscript{120}

With regard to separation of powers, the Court trotted out the old argument from\textit{Frothingham} that deciding cases based on broadly based claims would usurp the policy-making power of another branch.\textsuperscript{121} However, Justice Scalia also added a new twist. He claimed that if Congress could proclaim a violation of the law by the executive to be a valid injury for standing purposes, it would force the courts to infringe upon “the Chief Executive’s most important constitutional duty, to ‘take care that the laws be faithfully executed.’”\textsuperscript{122} This was an ingenious doctrinal move, because it argued that an overbroad congressional grant of standing violated separation of powers in two separate ways: it infringed on both political branches’ policy-making authority, and it intruded on executive power. Justice Scalia emphasized through the forcefulness of his language that these arguments were not merely prudential; they mandated a finding that the prohibition on generalized grievances was constitutional.\textsuperscript{123}

\textit{Lujan} has been excoriated by many commentators.\textsuperscript{124} Most of the attacks have focused on the injury arguments,\textsuperscript{125} but the separation of powers arguments are also subject to a number of objections. For one thing, Justice Scalia overstated the extent to which broad citizen suit provisions transfer the Executive’s power to enforce the laws to the courts. Congress has anticipated and compensated for potential problems

\begin{itemize}
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} Cf. David A. Logan, \textit{Standing to Sue: A Proposed Separation of Powers Analysis}, 1984 Wis. L. Rev. 37, 58 (1984) Logan proposed essentially the argument as that in the text:
    \begin{quote}
      [I]f Congress passes a statute declaring that certain behavior is proscribed and then allows ‘any person’ to sue to enforce that statute, does ‘any person’ in fact have standing to sue irrespective of whether that person can assert any injury to himself? . . . [No, because] article III’s requirement that a plaintiff be ‘injured’ would control and render that statute unconstitutional.
    \end{quote}
  \item \textsuperscript{121} \textit{Lujan}, 504 U.S. at 577.
  \item \textsuperscript{122} \textit{Id.}
  \item \textsuperscript{123} \textit{Lujan}, 504 U.S. at 576 (recognizing standing based solely on statutory requirements, without the presence of a separate injury, “would be discarding a principle \textit{fundamental} to the separate and distinct constitutional role of the Third Branch—one of the \textit{essential elements that identifies those ‘Cases’ and ‘Controversies’ that are the business of the courts rather than of the political branches.”) (emphasis added).
  \item \textsuperscript{124} See, e.g., Gene R. Nichol, Jr., \textit{Standing for Privilege: The Failure of Injury Analysis}, 82 B.U. L. Rev. 301, 316–18 (discussing \textit{Lujan} under the heading “Standing’s Absurdities”).
  \item \textsuperscript{125} See, e.g., \textit{id.}
\end{itemize}
in this area, because "diligent prosecution" provisions in many citizen
suit statutes expressly safeguard executive enforcement authority against
interference from such citizen suits.\textsuperscript{126} These provisions prohibit citizen
suits wherever the government is already pursuing a case against the
same defendant for the same alleged wrongdoing.\textsuperscript{127} For example, citizen
suits against private parties to enforce the Clean Water Act (CWA) are
preempted when: (1) the government begins and is "diligently
prosecuting" its own enforcement action against the same defendant; (2)
a state has done so; or (3) the defendant has already paid penalties for
the same violation.\textsuperscript{128} Citizen suits under the CWA may proceed if they
were filed before the Environmental Protection Agency (EPA) files its
own action, but all the EPA needs to do to exclude the possibility of a
citizen suit is to bring its case first.\textsuperscript{129} Since \textit{Lujan}, in fact, the Court itself
has pointed out that concerns about citizen suits inhibiting executive
enforcement are easily overstated.\textsuperscript{130}

More broadly, both infringement on the political process and
encroachment upon executive power are to some extent endemic in the
courts' institutional role. Indeed, they are not even all that uncommon.
Every time a court invalidates a statute, it interferes with the political
process, and every time it invalidates a regulation, it interferes with the
executive's enforcement of the laws. It is precisely the Court's role to
correct errors and check overreaching by the political branches.\textsuperscript{131} It is
therefore illogical to characterize its attempts to do so as a threat to the
separation of powers principle. Justice Scalia believes that the
countermajoritarian nature of the Court requires it to exercise a strong
measure of self-restraint with regards to situations where the rights of the
other branches are implicated.\textsuperscript{132} But even if this is true, judicial self-
restraint is very different from a constitutional mandate to deny standing.

Furthermore, arguing for judicial self-restraint is almost bizarre in

\textsuperscript{126} Jonathan E. Wells, Comment, \textit{Shouldn't Standing Be Closer to the Heart of Congressional Intent?}, 49 \textit{Emory L.J.} 1359, 1395 (2000).
\textsuperscript{127} Id. ("[C]itizen suits do not pose separation of powers problems. Every citizen suit provision
precludes filing of the action if the United States is prosecuting a case against the violator.").
\textsuperscript{128} 33 U.S.C. § 1319(g)(6)(A)(i)-(iii).
\textsuperscript{129} 33 U.S.C. § 1319(g)(6)(B); see 42 U.S.C. § 7604(b)(1)(B) (Clean Water Act provision
providing for preemption of citizen suits under certain circumstances).
\textsuperscript{130} See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 188 n.4 (2000). The
Court states:
Certainly the federal Executive Branch does not share the dissent's view that such suits
dissipate its authority to enforce the law. . . . [T]he Federal Government retains the power
to foreclose a citizen suit by undertaking its own action. . . . And if the Executive Branch
opposes a particular citizen suit, the statute allows the . . . EPA to 'intervene as a matter of
right.'
\textsuperscript{131} See Sunstein, \textit{supra} note 109, at 647-48 (arguing that it does not violate Article III for a court
to decide whether the Executive has violated or failed to enforce the law).
\textsuperscript{132} See \textit{supra} text accompanying notes 103-05.
this context, because a standing rule that partially invalidates a statute that purports to grant jurisdiction, as in Lujan, is the epitome of antimajoritarian judicial usurpation. After all, the legislature is powerless to confer standing if the courts refuse to recognize it. If Congress intends to grant standing, but a court turns away plaintiffs who try to take advantage of it, the court has directly stripped Congress of its discretion to create rights of action. To nullify statutes in the name of separation of powers is therefore to invite charges of hypocrisy.

B. THE GOALS OF THE PRIVATE RIGHTS VIEW OF STANDING: DRAWING BRIGHT LINES

In his dissent in Akins, Justice Scalia merges the generalized grievances doctrine with the requirement of a particularized injury in fact. While this theory never became law, it suggests one way that a private rights view of the generalized grievances doctrine might develop. In the course of explaining why he thought the plaintiff in Akins could state only a generalized grievance, Justice Scalia directly contrasted "generalized" and "particularized" grievances, arguing that by definition a generalized grievance was not particularized. By particularized, he meant that the alleged injury must "affect the plaintiff in a personal and individual way." He contrasted this with a generalized grievance, which he said involves an "undifferentiated" interest—one "common to all members of the public." Because current Article III standing doctrine requires that "the complained of injury be particularized and differentiated, rather than common to all the electorate," under this theory the generalized grievances doctrine loses its independent life. It simply becomes a corollary of the particularity requirement; if an injury is not sufficiently particularized, it is a generalized grievance.

Though this approach has the advantage of apparent simplicity, in practice it is very difficult to distinguish between particularized harms and undifferentiated ones. Justice Scalia attempted to demonstrate the difference by comparing a mass tort with the claim of standing based on the Accounts Clause of the Constitution in United States v. Richardson. He argued that when a number of plaintiffs suffer burned arms in a mass tort case, their injuries are particularized and differentiated, because

133. See supra note 110 and accompanying text.
135. Id. at 35-36.
136. Id. at 35 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 560 (1992)).
137. Id. Justice Scalia is careful to note that "it is a gross oversimplification to reduce the concept of a generalized grievance to nothing more than 'the fact that [the grievance] is widely shared.'" Id. at 35. The key problem, he believes, is that the plaintiff fails to allege some unique or greater injury that others suffering the same harm do not. Id.
138. Id. at 36.
139. Akins, 524 U.S. at 35-36.
each plaintiff suffers a burn, and each plaintiff's burned limb is distinct from the others. 140 In contrast, when a plaintiff is denied access to information, even though he has a legal right to the information, the harm is "undifferentiated," and therefore a generalized grievance, because his injury is "precisely the same as the harm caused to everyone else"—a denial of access to the same information. 141 However, it is entirely plausible to characterize the first harm as undifferentiated and the second as particularized. We might say that each burn victim suffers exactly the same harm (a burned arm), such that their injury is undifferentiated. Similarly, the denial of access to information could be particularized and differentiated. Each person has her own, personal, statutorily granted right to certain information, and if not granted access to that information suffers a unique injury because she is a different person. Almost any widely shared injury could similarly fall on either side of the particularized/generalized divide. This dichotomy therefore does not help to identify a generalized grievance.

Justice Scalia's focus on particularity also means that he would classify some relatively small harms (say, minor personal injury claims) as injuries in fact, but certain more serious harms (such as failures by the EPA to enforce the Clean Air Act, which could lead to serious health problems nationwide) as generalized grievances not justiciable no matter how severe they are. This result is perverse. Even if the courts' function is to redress injuries to individuals, if a harm to only one person grants standing, a greater harm to a larger number of people should also. Indeed, the Supreme Court itself has recognized this problem. 142 The traditional—by now, almost rote—response to this objection has been that the political process provides an adequate mode of redress for such injuries. 143 But as the Court itself acknowledges, that process can be "slow, cumbersome, and unresponsive," and may therefore in fact be an insufficient forum for addressing such injuries. 144

140. Id. at 35 ("Even if both [possible plaintiffs] suffer burned arms they are different arms.") (emphasis in original).
141. Id. at 35-36.
142. See United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688 (1973) ("To deny standing to persons who are in fact injured because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody. We cannot accept that conclusion.").
143. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974); United States v. Richardson, 418 U.S. 166, 179 (1974) ("Lack of standing within the narrow confines of Article III jurisdiction does not impair the [plaintiff's] right to assert his views in the political forum or at the polls.").
144. Richardson, 418 U.S. at 179. Consider, for example, the following hypothetical. Suppose that three months after his inauguration, a new President appoints an EPA Administrator who immediately ceases to enforce the Clean Air Act. Studies show that without the clean air standards embodied in the Act, rates of asthma and cardiopulmonary disease are likely to rise sharply, and those with such diseases are likely to get sicker. Yet until these effects surface, no one may be able to get
Justice Scalia’s mode of reasoning is designed to draw bright lines: particularized/generalized, constitutional/unconstitutional. Moreover, he implicitly errrs on the side of excluding some plaintiffs who may have valid injuries instead of granting standing to all such plaintiffs at first, and then sorting out any frivolous or politically sensitive claims in the pleading stages. These doctrinal moves support a private rights model of standing jurisprudence, to which Justice Scalia subscribes. If the goal is rapid, efficient dispute resolution, excluding borderline cases may serve to ensure that the Court does not get bogged down with difficult, politically sensitive matters. Furthermore, a proponent of this view might argue that a strong generalized grievances doctrine, by preventing plaintiffs from advocating broad public interests, requires the courts to focus on resolving disputes between individuals. Moreover, the argument would continue, the plaintiff can always resort to the political process as a fallback position if she cannot get standing.

III. PUBLIC VALUES VIEW OF GENERALIZED GRIEVANCES

With regards to standing doctrine in general, proponents of the private rights theory have gained the upper hand in recent decades. Although both public values and private rights theories of jurisprudence are vigorous and relevant today, the success of the doctrine of Article III injury, with its emphasis on the “case or controversy” requirement, represents a jurisprudential victory for the dispute resolution model. Judges who believe in a public values model and are concerned with protecting public values through decisions in individual cases have limited doctrinal maneuvering room within the dominant “case or controversy” standing framework. Stare decisis and the constitutionalization of the injury in fact requirement force them “to

standing to challenge the Administrator’s failure to perform her statutory duties, because no one can show particularized injury in fact, even though the Clean Air Act’s citizen suit provision ostensibly provides a right to sue.

What political redress is available in this situation? Both the President and his EPA Administrator are invulnerable to short term attack by the electorate, since the President is just beginning his term and the Administrator is unelected. The President might ignore popular outrage on this matter; some presidents will stick to unpopular policies despite lack of popular support. Congress’s options are limited: (1) defund other programs in retaliation (which may or may not be effective and will harm those other programs unduly); (2) hold hearings (which may have no effect at all); (3) impeach the President (likely politically untenable, perhaps overkill, and of dubious legality). A more effective solution: allow someone to sue, under the Clean Air Act’s citizen suit provision, to require the EPA Administrator to do her duty and enforce the Act.

145. See Lee, supra note 2, at 626–27.
146. See supra note 143.
147. See Lee, supra note 2, at 626.
148. Id.
149. Id. (arguing that private rights-oriented judges have “used Article III to enshrine the dispute resolution vision in the Constitution”).
150. Id. at 626.
couch their own endeavor in dispute resolution terms.\textsuperscript{151}

In 1998, \textit{Akins} presented this problem with regards to generalized grievances specifically. To grant standing in that case, a public values-oriented judge would have to reconcile the case law—especially \textit{Lujan}—with an innate sense that it would be unjust to deny standing to the plaintiffs, whom the government argued could not demonstrate a concrete, particularized injury.\textsuperscript{152} The Court resolved this quandary in \textit{Akins} by deconstitutionalization—that is, by classifying the generalized grievances doctrine as prudential rather than compelled by the Constitution.\textsuperscript{153} As a result, federal courts post-\textit{Akins} have increased maneuvering room to allow congressional grants of jurisdiction to stand. Because \textit{Akins} gives greater effect to rights of action granted by Congress than \textit{Lujan} did, it allows more plaintiffs standing to request relief for statutory violations, and thereby provides a forum for aggressive judicial enforcement of the public values embedded in those statutes. The \textit{Akins} Court also left at least one loose end in its explication of generalized grievances; the current doctrine is therefore malleable and subject to judicial manipulation.\textsuperscript{154} Nevertheless, this flexibility has not caused significant interpretive difficulties for subsequent courts applying \textit{Akins}, nor has it led to incorrect or unfair decision making.\textsuperscript{155}

A. Deconstitutionalizing Generalized Greivances

Grounding generalized grievances doctrine in Article III and separation of powers concerns, as the Court did in \textit{Lujan}, restricts the ability of the federal courts to implement public values. The most

\textsuperscript{151} Id. (referring to the attempts of public values-oriented justices to work within the private rights model as “an intellectually disastrous enterprise”); see also Bandes, \textit{supra} note 73, at 229. (”[T]he unstated acceptance of the private rights model . . . leads to contorted logic when the Court wishes to deviate from [that] model.”).

\textsuperscript{152} Justice Breyer’s opinion for the Court in \textit{Akins} provides an excellent example of a judge attempting to vindicate majoritarian values while navigating within the confines of the Court’s strict Article III jurisprudence. See Fed. Election Comm’n \textit{v. Akins}, 524 U.S. 11, 20-21 (1998) (citations omitted). One of his tactics is to articulate the established doctrine, but then skate fairly quickly over the facts and analysis, reaching a decision almost conclusorily. In this way, he avoids being drawn into the quagmire of meeting Justice Scalia on his own terms and arguing the concreteness or particularity of the elements in detail. Instead, he places as much emphasis on the public interest involved (the usefulness of the information sought by the plaintiffs) and the majoritarian nature of his holding (the statute requires the information to be made available) as on the doctrinal elements. See \textit{id.} (concluding that harm to plaintiff qualifies as injury in fact). Another, related mode of reasoning is to aggressively distinguish unfavorable precedents on their facts, so that it is not necessary to distinguish them on the law (which would, again, require the judge to grapple in detail with the undesirable doctrine). See \textit{id.} at 21-23 (distinguishing United States \textit{v. Richardson}, 418 U.S. 166 (1974) from \textit{Akins} on its facts).

\textsuperscript{153} See Sunstein, \textit{supra} note 109, at 643-45 (using \textit{Lujan} as an example of how “[b]efore \textit{Akins}, it was fair to say that the bar on generalized grievances was moving from a prudential one to one rooted in Article III,” and arguing that after \textit{Akins}, it “is retained as . . . prudential”).

\textsuperscript{154} See \textit{infra} Part III.B.

\textsuperscript{155} See \textit{infra} Part IV.
important context for this problem is the situation in *Lujan* and *Akins*, in which a statute's citizen suit provision appears to grant standing, but the defendant questions whether the plaintiff is sufficiently injured. The strict private rights view, as laid out in *Lujan*, requires concrete and particularized injury in this situation, in service of the "case or controversy" requirement. If the statute purports to grant standing to insufficiently injured plaintiffs, it is invalid—indeed, unconstitutional—to that extent, because the injury requirement is compelled by Article III.

In the same situation, a public values-oriented judge would focus on the public interest underlying the statute. To a large degree, this is an issue of enforcing legislative intent: if the statute is designed to minimize workplace injury, then the court, in making its decision, should seek to vindicate that goal. But a certain amount of judicial discretion enters the project also. The judge may see a public benefit inherent in the statute—perhaps one that has become apparent in the decades since a venerable law was passed—and may seek to further that benefit as well. Before a judge can effectively vindicate these values, however, the statute must be broadly enforceable. Because *Lujan's* constitutionalization of generalized grievances requires denying standing to many plaintiffs attempting to litigate actual violations of the statute, it limits the situations in which the courts may vindicate the public values underlying the statute. Thus, *Lujan*, if enforced, may impede the enforcement of public values.

These values are better served by a theory of the doctrine that comes closer to allowing standing in situations where Congress intended to provide it. After all, if Congress attempted to grant standing in a given situation, it must have believed that its statutory purpose would be best served if plaintiffs in that situation had a cause of action. To achieve this effect within the context of current Article III jurisprudence, a court might say that when Congress granted standing to challenge violations of a law, it intended for courts to consider plaintiffs per se injured by such violations. In effect, this holding would classify a legal injury as an injury in fact.

I. Congress's Power to Create New Injuries in Fact

Justice Breyer employed this doctrinal move in a limited context in

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158. See supra note 120 and accompanying text.
159. Justice Blackmun, in dissent in *Lujan*, recognized this. See *Lujan*, 504 U.S. at 666 (Blackmun, J., dissenting) ("[A]s a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement.").
his opinion for the majority in Akins. On its face, the statute in Akins allowed the plaintiffs to sue in federal court to challenge the Federal Election Commission’s dismissal of their complaint in an administrative adjudication. Nevertheless, the government argued that the plaintiffs, who complained of just such a dismissal, lacked injury in fact. Indeed, it would have been difficult for the plaintiffs to show exactly how they had been harmed by their alleged injury, the inability to get a specific piece of information about a specific political group. How could they prove that the information would have changed their ability to make free choices in the voting booth? The public values model was squarely implicated, because if the government’s interpretation of the injury in fact requirement under that statute were correct, virtually no one would be able to meet that standard. Thus, although “Congress . . . intended to authorize this kind of suit,” the citizen suit provision would be rendered virtually useless, and Congress’s goal of increasing access to voting information by allowing judicial review of Commission decisions would be frustrated. However, the Court saved the claim by reframing the concept of injury under the Federal Election Campaign Act. It held that a violation of the statute’s information disclosure requirements in itself constituted an injury: “a plaintiff suffers an ‘injury in fact’ when [she] fails to obtain information which must be publicly disclosed pursuant to a statute.”

This holding directly conflicted with Justice Scalia’s finding in Lujan that an Article III injury was required even if the statute purported to

161. Justice Breyer holds something like a traditional public values view of adjudication. See Stephen Breyer, Active Liberty 17 (2005) [hereinafter Breyer, Active Liberty] (arguing that judges “should try to find and finally say” what is the purpose underlying each statute.). He believes that the courts should allow “constitutional room . . . for citizens, through their elected representatives, to govern themselves.” Id. at 10. As a result, he argues, “it should be possible to trace without much difficulty a line of authority for the making of governmental decisions back to the people themselves—either directly, or indirectly through those whom the people have chosen. . . . And this authority should be broad.” Id. at 15.

This view suggests that the courts, when in doubt, should defer to Congress (“those whom the people have chosen”) on issues involving important governmental decisions. That, in turn, suggests that the Court should defer to Congress’s decision to grant standing.

However, Justice Breyer’s perspective differs from an orthodox public values model in two ways. First, he does not seek to vindicate public values directly through judicial decision making so much as through carrying out congressional intent, which in turn reflects the popular will. See Breyer, supra (explaining that “judicial restraint” is proper and that courts should not engage in lawmaking). Second, judges must occasionally “offer protection against governmental infringement of” certain constitutionally guaranteed freedoms, “including infringement by democratic majorities,” thus frustrating majoritarian objectives. Stephen Breyer, Our Democratic Constitution, 77 N.Y.U. L. Rev. 245, 249–250 (2002) [hereinafter Breyer, Our Democratic Constitution].

163. Id. at 18–19.
164. Id. at 20.
165. Id. at 21.
grant redress for any violation.\footnote{166} By doing so, it undermined the grounding of the generalized grievances doctrine in Article III and removed a barrier to broad congressional grants of standing. Although injury was still required, the Court was indicating that, contrary to \textit{Lujan}, the injury need not always be independent of the statute. If Congress granted standing, the plaintiff could demonstrate injury simply by showing that she suffered the harm for which the citizen suit provision prescribed a remedy.\footnote{167}

In the larger standing context, there was nothing revolutionary about the Court's analysis in this respect, except insofar as it conflicted with \textit{Lujan}. The Court had several times before held that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."\footnote{168} Commentators had also long been arguing that the issue of standing should hew closer to legal interests that Congress intended to create.\footnote{169} In \textit{Lujan}, Justice Kennedy wrote a separate concurrence in which he emphasized that "Congress . . . has the power to define injuries and articulate chains of causation where none existed before."\footnote{170} Indeed, since Justice Kennedy joined the \textit{Akins} majority, he must have felt that Congress had done exactly that in the Federal Election Campaign Act.

Nevertheless, by applying this principle to a case claimed to be a generalized grievance, Justice Breyer effected a significant shift in the law. By allowing Congress to define a statutory violation as an injury, the Court essentially was holding that, with regards to such statutes, the plaintiff has a "right, possessed by every citizen, to require that the

\footnotesize{166. See \textit{supra} text accompanying notes 113–20.}

\footnotesize{167. One could argue that this holding only applies to cases similar to \textit{Akins}, where the statute grants a statutory right to information. See \textit{Sunstein, \textit{supra} note 109}, at 642–43. After all, Justice Breyer did not proclaim a broad rule putting the standing question "in the hands of Congress," nor did he explicitly overrule \textit{Lujan} on this point. \textit{Id.}} Regardless of how broad the holding, however, it is clear that \textit{Akins} undermines \textit{Lujan} at least to some extent, because \textit{Lujan} would seem not to allow for standing in the \textit{Akins} situation—hence Justice Scalia's dissent in \textit{Akins}. See \textit{Akins}, 524 U.S. at 29–37 (Scalia, J., dissenting).

\footnotesize{168. \textit{Linda R.S. v. Richard D.}, 410 U.S. 614, 617 n.3 (1973) (citing \textit{Trafficante v. Metro. Life Ins. Co.}, 409 U.S. 205, 212 (1972) (White, J., concurring)); see also \textit{Warth v. Seldin}, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."); \textit{Trafficante}, 409 U.S. at 212 (White, J., concurring) (noting that a statutory right of action supported a finding of standing where there would otherwise be none).}

\footnotesize{169. See, e.g., \textit{1 Laurence H. Tribe, American Constitutional Law} 397 (3d ed. 2000) ("there is good reason to afford Congress a wide berth in specifying . . . new forms of 'injury'"); \textit{William A. Fletcher, The Structure of Standing}, 98 \textit{Yale L.J.} 221, 290–91 (1988) ("Standing . . . is a question of substantive law, and the answers to standing questions will vary as the substantive law varies."); \textit{Logan, \textit{supra} note 120}, at 42 ("In the statutory context, the Court should uniformly . . . accord[] great deference to Congress' power to provide judicial redress to parties asserting even novel claims with attenuated causal relationships.").}

Government be administered according to law." 171 And that concept had traditionally been associated with nonjusticiable generalized grievances.172 Thus, the Court in Akins loosened Article III standing in cases where a statute prescribes a broad right of action.

2. **Deconstitutionalization and the Democratic Process**

As already discussed, reversing Lujan's constitutionalization of generalized grievances furthers majoritarian goals because Lujan, by rejecting standing authorized by Congress, "recommends judicial invalidation of the outcomes of democratic processes." However, Justice Scalia's executive power separation of powers argument implies a counterargument to this point of view. If overbroad grants of standing do, as Justice Scalia claims, transfer the power to enforce the laws from the President to the courts,174 then in creating them, Congress transfers power from a majoritarian branch to an unelected, nonmajoritarian one. Justice Scalia's 1983 article suggests why he opposes this outcome.175 If, as he believes, the role of the courts is to protect minorities, rather than to vindicate majority interests,196 then the protection of majority interests should be left to the majoritarian branches, not sent to the courts. The problem with this argument is that the President's power and responsibility to enforce a statute is derived entirely from Congress, which generates the law and assigns enforcement to a given executive agency. Congress's decision to grant judicial review of agency action to a certain plaintiff doesn't deprive the executive of its ability to enforce the laws. It simply provides a needed check on executive power. That check furthers not only Congress's intent to grant review, but also its initial purpose in passing the statute, by ensuring that the Executive's enforcement is proper. Thus, congressional grants of standing allow the courts to "require[e] the executive branch to adhere... to outcomes that the political process has endorsed."177

The interplay of power between the branches that lies at the heart of these issues implicates the question of which branch should ultimately control the standing issue. More specifically, should the judiciary, as the sole unelected branch, repulse congressional attempts to confer standing? Both constitutional and prudential reasoning suggest that it

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171. *Id.* at 574 (quoting Fairchild v. Hughes, 258 U.S. 126, 129 (1922)).
172. *See* Allen v. Wright, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").
174. *See supra* text accompanying note 121.
175. *See supra* text accompanying notes 103–04.
should not. Standing is a jurisdictional requirement. And the Constitution clearly contemplates significant congressional control over federal court jurisdiction. Congress exercises this power when it creates a right of action in the federal courts, thus granting the courts jurisdiction over that particular type of claim. This principle, the elected Congress’s control over the scope of power of the unelected judiciary, is inherently majoritarian and democratic. For one thing, the people have the power to rein in the courts if need be. For another, they can enlist the courts to help ensure that the executive is enforcing the law and that the outcomes serve Congress’s ultimate goals.

Whenever the Court refuses to hear a case over which Congress has granted it jurisdiction—whether it does so for standing reasons or for some other reason—it is to some extent infringing upon Congress’s structurally inferred power to employ the judiciary in service of the popular will. This “judicial abdication” presents a “threat to the values underlying the principle of congressional control over federal court jurisdiction” and to the majoritarian values underlying that control. Embedding the standing doctrines in the Constitution is particularly pernicious in this respect, because it leaves lower courts little room to defer to Congress’s jurisdiction-making role in the future and imposes limits on congressional power that are not implied in the Constitution. Thus, constitutionalizing the standing doctrines encroaches upon Congress’s jurisdictional power, violating the separation of powers principle and infringing on the constitutionally implied principle of democratic control over jurisdiction. In reversing this process, Akins

178. Fletcher, supra note 169, at 223 ("Standing is a preliminary jurisdictional requirement, formulated at a high level of generality and applied across the entire domain of law.").
179. Lauf v. E.G. Shinner and Co., 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress… to define and limit the jurisdiction of the inferior courts."). This power is grounded in (1) Article III’s Exceptions and Regulations Clause, U.S. Const. art. III, § 2, (2) Article I’s provision granting Congress the power to “constitute inferior tribunals,” and (3) Article III’s provision granting Congress the power to “ordain and establish” the lower federal courts. See Lee, supra note 2, at 613.
180. Lee, supra note 2, at 634-35 ("In the context of standing, the congressional control principle manifests itself in Congress’ broad power to create standing by enacting statutory causes of action.”).
181. See id. at 617 ("The institution more reflective of majoritarian sentiment is permitted an important part in setting the agenda of a powerful but unrepresentative judiciary.”).
182. Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 115 (1984) (arguing that Congress’s lawmaking power “necessarily includes the authority to employ the federal judiciary to enforce the substantive statutory programs adopted by Congress”).
183. Lee, supra note 2, at 634-35.
184. See id. at 608 (arguing that a constitutional standing doctrine is inconsistent with the principle of congressional control over federal court jurisdiction).
185. See Cohens v. Virginia, 19 U.S. 264, 404 (1821) (asserting that “to decline the exercise of jurisdiction which is given... would be treason to the constitution”); Logan, supra note 120, at 42 (“When a plaintiff asserts what is in the Court’s view a ‘generalized grievance,’ separation of powers concerns counsel that the Court consider disposing of the case on prudential rather than article III
represents a step toward fuller majoritarian control over federal court jurisdiction.

B. THE PRUDENTIAL GENERALIZED GRIEVANCES DOCTRINE

Beyond deconstitutionalization, it is difficult to say with certainty what *Akins* means for generalized grievances doctrine. In some ways, it clarifies matters significantly, but in others, the law is still murky. *Akins* does establish, more plainly than any prior case had, that a claim is not a generalized grievance merely by virtue of being widely shared. To help draw the distinction between valid injuries and generalized grievances, the Court differentiated between two types of widely shared injuries, "abstract" and "concrete." The latter could constitute injury in fact sufficient to establish standing, while the former could not. The emphasis on abstract harms is helpful insofar as it clearly classifies certain types of harms as nonjusticiable. But as described below, Justice Breyer's argument in the course of developing this theory may indicate a shift in the definition of a "concrete" injury for Article III purposes, and it is unclear how far this change goes. At the same time, the Court did not hold that the widely shared nature of a harm was entirely irrelevant—but neither did it make clear what the relevance, if any, was.

Because of these ambiguities, *Akins* ultimately "fails to elucidate the constitutional boundaries of Congress's ability to confer standing," and leaves open issues with regards to generalized grievance doctrine. Even so, this lack of clarity is not necessarily a bad thing; as discussed below, it leaves the doctrine more flexible, and that flexibility may provide greater opportunities for courts to decide cases in accordance with public values.

1. Ban on Citizen or Taxpayer Standing

*Akins* does make clear that a plaintiff claiming citizen or taxpayer standing—that is, one who claims an "injury to the interest in seeing that the law is obeyed"—does not state a valid claim under Article III standing jurisprudence Reviewing past cases that discussed the

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186. Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998) (holding that widely shared interests "may count as an injury in fact"). This point was hardly new. See Albert, supra note 59, at 487-88 (arguing that "collective harms" may qualify as constitutional injury and that the "size of the injured group" is not relevant to the issue of whether there is injury). However, it appears that no Supreme Court majority opinion had ever explicitly made it before *Akins*.


188. *Id.* The difference between "concrete" and "abstract" harms is discussed in detail infra Part III.B.2.

189. Leading Cases, supra note 13, at 253, 262 (analyzing *Akins* as failing "to articulate the outer limits of Congress's power to confer standing").

190. *Akins*, 524 U.S. at 23-24; see Chemerinsky, supra note 1, at 91 ("The prohibition against generalized grievances prevents individuals from suing if their only injury is as a citizen or a taxpayer...".)
generalized grievances issue, the Court concluded that in cases where the Court denied standing to a widely shared harm, it did so not because the harm was widely shared, but because it was "abstract." Justice Breyer defined "abstract" injuries as "injury to interest in seeing that certain procedures are followed," or as injury to "the public's interest in the administration of the law." Such injuries have in common mainly that they are not based in a common law or statutory right, but only in a vague idea that some injustice exists and should be redressed. The Court added that such claims are problematic because they would allow a plaintiff to "obtain[] what would, in effect, amount to an advisory opinion."

The prohibition on abstract interests probably means that a plaintiff's claim must derive from a statute or common law provision. Such a provision outlines an injury with "concrete specificity" against which the court can measure the extent of the harm to the plaintiff. Any claim not based on such a source must be seeking to vindicate the "common concern for obedience to law" shared by all citizens or taxpayers, and is prohibited. Akins reaffirms that such claims do not establish injury for standing purposes. This point of view is not inconsistent with the dominant private rights view of jurisprudence. Without a source of law against which to judge the scope of the injury, the Court implied, it would simply be adjudicating the correctness of the challenged law rather than deciding a case or controversy between two parties.

2. Defining Concreteness

Because Akins defines "concrete" interests in contrast to abstract ones, it suggests that all non-abstract interests satisfy the concreteness prerequisite for Article III injury in fact. This is a strong rhetorical
move, because it suggests that simply by establishing that an interest is not abstract—that it is not citizen or taxpayer standing—it clears one of the primary hurdles involved in establishing Article III injury in fact. This syllogism constitutes a significant shift in the definition of concreteness in the Article III context, however, from a solid, palpable injury, to an injury to an interest defined by a common law or statute.

The everyday meaning of “concrete” is “specific,” “particular,” “real,” or “tangible.” Prior to Akins, the Court had explained the concreteness requirement consistently with this definition, declaring that the plaintiff had to show “concrete facts demonstrating that the challenged practices harm him.” Yet Justice Breyer’s opinion defines concreteness very differently. Unlike an abstract interest, a concrete interest, according to Akins, is based either on a “common-law injury,” such as tort law providing for redress of physical harm, or on “rights conferred by law,” such as the plaintiff’s statutory right to information in Akins. The tangibility of the harm is not the key issue. Rather, what matters is the source of the right whose violation constitutes the injury. The injury is concrete when the right to redress is clearly articulated by pre-existing law, regardless of the nature of the harm itself. This suggests that the first question to ask in analyzing a generalized grievances problem is whether the plaintiff claims injury to a valid, pre-existing legal right. By establishing that there is, and therefore that the injury is concrete, we also partially answer the question of whether there is injury in fact.

However, nothing in Akins suggests that a tangible common law or statutory interest is sufficient, by itself, to establish standing. Such an injury is sufficient to satisfy the “concreteness” element of injury in fact, but, presumably, the other elements must also be satisfied. Indeed, Justice Scalia argued as much in his dissent. Although he seemingly acceded to the majority’s labeling of the harms in Akins as concrete, he argued that they were nevertheless nonjusticiable because they were not particularized. Moreover, it is not clear that the Court has employed

200. Akins, 524 U.S. at 24. Justice Frankfurter had identified the same two possible sources for a valid injury several decades earlier. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) (noting that standing could be based on “a governmental action...that, if taken by a private person, would create a right of action cognizable by the courts,” or “on an interest created by the Constitution or a statute”).
203. Id. at 34–36.
3. The Persistence of the Widely-Shared Problem

The key uncertainty in Akins lies with the ambiguous way the Court handles the issue of widely shared harms. Justice Breyer wrote, as already noted, that widely shared injuries may still be valid claims under Article III. Some commentators have suggested that the Court was advocating recognition of any widely shared harm, so long as it is "concrete"—that is, grounded in a statute or in common law. But the opinion carefully avoids this explicit holding, so a more nuanced reading seems proper.

Justice Breyer noted that the widely shared nature of an injury "counsel[s] against . . . interpreting a statute as conferring standing." This suggests that the widely-shared factor is still independently relevant in the standing calculus, although it does not suggest when it might be relevant. He further explained that the availability of a political forum to address widely shared harms "does not, by itself, automatically" mean that the harm is not an Article III injury. While these caveats indicate that the availability of a political forum does not decide the standing issue on its own, they also signify that it is a factor that should somehow enter into the standing decision. The Court also stated that "such a[] [widely shared] interest . . . may count as an 'injury in fact'" if "sufficiently concrete." That a widely shared harm "may"—not "will"—count as injury in fact if it is concrete implies that even if it is concrete, the courts may still sometimes deny standing precisely because an injury is too widely shared.

Ironically, the widely shared nature of the harm had not been the core of the doctrine when it was first announced, and the Court had since held that the widely shared nature of a harm did not cause it to be nonjusticiable. Yet here we see Akins subtly reviving the widely-shared

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205. See, e.g., Sunstein, supra note 109, at 644 (arguing that Akins modifies standing doctrine so that "Congress is entirely authorized to grant standing to individuals who share an injury with many other people, even with all citizens"); Leading Cases, supra note 13, at 259. Recent circuit court cases involving standing issues commonly cite Akins for this proposition. See, e.g., Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton, 422 F.3d 490, 496 (7th Cir. 2005); Covington v. Jefferson County, 358 F.3d 626, 651 (9th Cir. 2004). The idea that the widely shared nature of a harm should be completely irrelevant to standing is hardly new. See Albert, supra note 59, at 487–88 ("The size of the injured group is no more relevant . . . than the severity or kind of injury. Conceivably, a potential plaintiff class could include the entire population.").


207. Id. (emphasis added).

208. Id. (emphasis added).

209. See supra text accompanying notes 58–59.

210. Of course, as noted supra note 23 and accompanying text, the Court has vacillated on this
concept by suggesting that, under some unspecified circumstances, a court could consider the widely shared nature of a harm as a factor in denying standing. At the same time, nothing in \textit{Akins} suggests how courts should decide whether the widely shared nature of a given claim matters, or how it should be weighed against other factors in the standing calculus. In particular, it is not clear whether concrete claims may ever be denied on the grounds that they are too widely shared, or, if so, when.

To deny standing because a harm is widely shared raises important issues of fundamental justice.\textsuperscript{211} But it also poses a significant doctrinal problem: it requires identifying what harms are widely shared, which in turn depends on whether the harm is defined broadly or narrowly. For instance, in \textit{Lujan v. Defenders of Wildlife}, the Court held that the plaintiffs’ claimed interest in viewing endangered animals was not sufficient to constitute injury in fact.\textsuperscript{212} Should widely shared in \textit{Lujan} have been defined broadly, as “an interest shared by everyone who could potentially want to see the animals at some point” or narrowly, as “an interest shared by everyone who is actually likely to view the animals during some specified time period”? Under the broader definition, the plaintiffs’ interest would have been widely shared, because almost everyone in the country might have wanted to view the animals at some point. Under the narrower definition, it probably would not have been, because the narrowly defined group was likely to have been much smaller.

It would be difficult—perhaps futile—to attempt to provide a sufficiently precise definition for widely shared to suggest a resolution for the broad range of factual situations judges are likely to encounter. Thus, even if \textit{Akins} did offer some clue as to how judges should use the widely-shared factor in their standing decisions, it would still leave the problem of defining widely shared harms to individual judges in individual cases. Both the definition and the relevance of the widely-shared factor are therefore left to judicial discretion.

4. \textit{The Pitfalls and Benefits of a Flexible Doctrine}

The doctrine that emerges from this analysis lies in an indefinite position between extremes. A generalized grievance is not simply widely shared. However, the doctrine does preclude traditional citizen and taxpayer suits that imply a right of action on the part of all or nearly all citizens. Furthermore, the doctrine is prudential. The key areas for judicial discretion are \textit{(1)} how to determine when a harm is widely shared, and \textit{(2)} when and to what extent the widely shared nature of a harm is relevant in the standing decision. Moreover, the Court has given

\textsuperscript{211}. See supra note 142 and accompanying text.
the lower courts little guidance as to how they should exercise that discretion.

The interpretive leeway permitted by the Court's opinion in Akins raises the specter of results-oriented judging. As Justice Rehnquist complained in another context, the Court's failure to define the widely-shared concept more definitively may "invite subjective judicial preferences or prejudices relating to particular types of legislation." In fact, Justice Scalia has explained that he favors firm rules that bind judges for just this reason. Such rules, he believes, prevent judges from subordinating pure legal analysis (whatever that may be) to their own personal policy preferences.

Most lawyers, judges, academics and law students would doubtless agree that results-oriented judging is a real phenomenon. In point of fact, this problem—if indeed it is a problem—is so ubiquitous that one might question Justice Scalia's premise that hard and fast rules tend to restrain judges. After all, one could argue that many courts manage to announce a clear rule of black letter law while at the same time engaging in results-oriented judging. Perhaps this is so because judges may indulge their policy preferences not only through manipulation of applicable legal rules and standards, as Justice Scalia fears, but also by choosing which legal rules and standards to apply. Justice Breyer has made precisely this argument. He points out that an emphasis on bright line rules does not relieve judges of the need to choose between and interpret rules, a process that, he claims, may be as fraught with subjectivity as making a decision without a clear rule as guidance. Moreover, a judge making a decision without reference to a clear legal rule is still bound by her own values as well as by a "need for consistency over time." Thus, the absence of a hard and fast rule for generalized grievances (or for anything else) does not necessarily increase the likelihood of results-oriented decision making.

Some things may necessarily remain unclear when the Court attempts to vindicate public values through standing jurisprudence. But this lack of clarity can be a boon to public values adjudication rather than a hindrance. A private rights view favors bright lines, which in the case of standing means excluding certain plaintiffs definitively in the interest of focusing judicial attention on the most adversarial of cases. But a public values view of standing may function better when there are fewer

215. See id. at 1180. ("Only by announcing rules do we judges hedge ourselves in.").
216. Breyer, Our Democratic Constitution, supra note 161, at 270.
217. See id.
218. Id.
restrictions on standing. Judges will have more freedom to vindicate the public interest if the doctrine allows for some inconsistency of application. Thus, to the extent that it serves a public values view, Justice Breyer’s doctrine perhaps works better, in the sense of serving public values, for the fact that it is loosely defined.

IV. POST-AKINS DEVELOPMENTS

A. SUPREME COURT CASES

The Supreme Court has not decided a major generalized grievances case since Akins. In fact, the Court has mentioned the doctrine only five times in recent years.219 In no recent case has the Court overturned a grant of standing on the grounds that it was a generalized grievance.220 (In fact, the Court has not done that since Lujan.221) However, its discussions of generalized grievances in recent cases indicate that it has accepted and continues to apply the analytical framework outlined in Akins.

In Massachusetts v. Environmental Protection Agency, for example, Justice Stevens’ majority opinion explicitly reaffirms the two least controvertible holdings of Akins: that a claim is not nonjusticiable merely by virtue of being widely shared; and that plaintiffs do not have standing when they seek to vindicate a nonpersonal interest in ensuring that government follows the law.222 Justice Stevens’ mention of generalized grievances in his dissent in Vieth v. Jubelirer is also consistent with Akins. There, he explained his view that a plaintiff claiming an equal protection violation as a result of gerrymandering of congressional districts did not state a valid injury unless she herself was a resident of the gerrymandered district.223 To hold otherwise, he argued, would be to allow the plaintiff to assert “only a generalized grievance against


220. Among the cases cited supra note 219, only Massachusetts v. EPA, Elk Grove and Devlin actually discuss the doctrine in a majority opinion as a potential ground for deciding the case, and none of the three actually decides the case on generalized grievances grounds. See Massachusetts v. EPA, 127 S. Ct. at 1453-56; Elk Grove, 542 U.S. at 12; Devlin, 536 U.S. at 7.

221. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-577 (1992). But see United States v. Hays, 515 U.S. 737, 743-44 (1995) (discussing the doctrine as a ground for rejecting one of the appellant’s claims, even though that rejection didn’t decide the case). Even in Lujan, one could argue that the discussion of generalized grievances was dictum; the case may have been decided on injury grounds. See Lujan, 504 U.S. at 562, 573-577.

222. Massachusetts v. EPA, 127 S. Ct. at 1453, 1456. This case never actually uses the term “generalized grievances,” but it is clear from Justice Stevens’ use of the term “widely shared,” and his citation to Akins, that he had the doctrine firmly in mind when composing the majority opinion. See id. at 1456.

governmental conduct of which he or she does not approve," that is, the
construction of a district in which she has no personal interest.
Justice Stevens appeared to be saying that such a claim was abstract in the Akins
sense, because no common law principle or statute grants a right for
redress of an equal protection violation suffered by another person.
Thus, an attempt to claim injury in fact based on such a harm is in
essence a prohibited attempt to claim citizen standing.
Notably, the Court in these cases never seriously considers any
constitutional basis for the doctrine. Both Justice Stevens, writing for the
Court in Elk Grove Unified School District v. Newdow, and Justice
O'Connor, writing in Devlin v. Scardelletti, clearly classify it as
prudential, lumping it in with third-party standing and the zone-of-
interests tests as one of a troika of prudential standing hurdles. Thus,
the Court has affirmed the deconstitutionalization of the doctrine
effected by Akins. In fact, Justice Stevens goes out of his way to point out
in Elk Grove that the doctrine is not constitutionally compelled, quoting
the Court's statement in Warth that prudential doctrines are "closely
related to Art. III concerns but essentially matters of judicial self-
governance." This indicates that Justice Scalia has definitively lost the
constitutionalization argument, at least for now.
While there is nothing in these cases that advances, clarifies, or
upsets anything in Akins, they do indicate that the Court is continuing to
follow the doctrinal path that Justice Breyer laid out. Any elaboration of
the doctrine, particularly with regard to the still-troublesome issue of
widely shared harms, must wait for another high court case that squarely
presents the issue or must come from the lower courts.

B. APPLICATIONS BY COURTS OF APPEALS

A number of circuit courts have dealt with issues related to the
generalized grievances doctrine since Akins was decided. I classify the
resulting cases into one of two broad categories: those analyzing the
source of the legal interest at stake, and those addressing the relevance
of the widely shared nature of the harm. The legal interest cases indicate
that the lower courts have adopted Akins' definition of concreteness and

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224. Id. (quoting Hays, 515 U.S. at 745).
    U.S. at 7 (quoting Allen, 468 U.S. at 751).
226. Elk Grove, 542 U.S. at 12 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).
228. Id.
229. See, e.g., Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton, 422 F.3d 490,
    496 (7th Cir. 2005); Am. Canoe Ass'n, Inc. v. City of Louisa Water and Sewer Comm'n, 389 F.3d 536,
    545-46 (6th Cir. 2004); Baur v. Veneman, 352 F.3d 625, 629, 633-36 (2d Cir. 2003); Pye v. United
    States, 269 F.3d 459, 469 (4th Cir. 2001); Becker v. Fed. Election Comm'n, 230 F.3d 381, 389-90 (1st
    Cir. 2000); DeMando v. Morris, 206 F.3d 1300, 1303 (9th Cir. 2000).
are evaluating claims based on the presence or absence of statutory or common law rights. Those dealing with the widely-shared issue show that courts are not abusing the leeway *Akins* allows them in interpreting that term.

*American Canoe Ass’n v. City of Louisa Water and Sewer Commission* contains the most detailed analysis among the cases addressing the legal interest issue. The Sixth Circuit held that plaintiff environmental groups had standing when they claimed that their organizational interests were injured by defendants’ failure to comply with the monitoring and reporting requirements of its Clean Water Act permit. In doing so, the court distinguished between concrete and abstract injury, as in *Akins*. It explained that the plaintiffs’ injury was concrete because the monitoring and reporting requirements constituted “information that the defendants are allegedly under a legal obligation to provide.” Because the claimed injury was based on the defendants’ violation of this specific statutory requirement, it was not abstract, but concrete, and constituted an Article III injury in fact.

In contrast, the court in *Becker v. Federal Election Commission* denied standing to voters who claimed that certain Federal Election Commission regulations violated the Federal Election Campaign Act. It held that the plaintiffs’ claim of injury based on “corruption of the political process allegedly caused by” the Commission’s violations was a generalized grievance because, unlike the claim in *Akins*, it was not grounded on a specific statutory right to sue. Such a claim, the court found, was “of an abstract and indefinite nature.”

Both of these cases are correctly decided under *Akins’* concrete/abstract distinction. The case for concreteness in *American Canoe* was not quite as strong as in *Akins*. The statute in *Akins* explicitly provided for a right of action for a denial of information, while the Clean Water Act, at issue in *American Canoe*, does not provide such a right. Still, the court properly looked to the statute for a right whose violation could constitute injury, and finding a right to information under the

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230. 389 F.3d at 546.
231. Id.
232. Id. at 545–46.
233. Id. at 545.
234. Id. at 545–46.
236. Id.
237. Id. at 390.
statute, allowed the claim under the Act’s general citizen suit provision. The plaintiffs in Becker, conversely, could not allege the violation of any statutory or common law right, and thus, the court properly denied their claim.

The Seventh Circuit’s decision in Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton is typical among recent cases that employ the widely-shared concept. An Indian tribe had brought an Administrative Procedure Act challenge to an Indian Gaming Compact, arguing that by entering into the compact the Secretary had violated a fiduciary duty to treat all tribes equally. The government argued that because the alleged harm was shared equally by all tribes in the state, it was not sufficiently particularized to constitute a valid injury in fact. The court rejected this argument, finding that the alleged harm was concrete though widely shared, like the injury in Akins, because each tribe could allege economic harm to itself from the Secretary’s actions. The case therefore represents a fairly straightforward application of Akins’ principle that widely shared harms “may count as an ‘injury in fact.’”

Baur v. Veneman involves a much more widely shared harm and subtly modifies the holding of Akins. Baur claimed injury in fact based on an increased risk of mad cow disease allegedly resulting from Department of Agriculture rules regarding the use of “downed” cattle for food. The court acknowledged that the harm was widely shared. Everyone in the country who ate beef could potentially claim the same injury. But it also noted that “[t]he fact that many other citizens could assert the same injury, by itself, is not sufficient to defeat standing.” Because Baur “allege[d] a discrete, individual risk of personal harm,” his injury was “sufficiently concrete and particularized” rather than abstract, and the court held that he had standing. This language may be significant. Justice Breyer did not say in Akins that a harm is not widely shared if it is both “concrete and particularized.” The majority opinion in Akins certainly discusses the concrete concept, but as Justice Scalia scornfully pointed out in his Akins dissent, it does not even mention the

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239. 422 F.3d 490, 492–94 (7th Cir. 2005).
240. Id.
241. Id. at 496.
242. Id. at 496–97.
244. 352 F.3d 625, 628 (2d Cir. 2003).
245. Id.
246. Id. at 635.
247. Id. at 635 n.9.
248. Id. at 635.
250. See id.
word "particularized."\textsuperscript{251} By bringing particularity into the discussion, the Baur court actually introduced another hurdle into the standing calculus for the plaintiff to overcome: for his widely shared injury to be valid, the court seemed to require Baur to show that his injury was not just concrete, but also particularized.\textsuperscript{252} Perhaps the court simply failed to choose its words correctly. But if the "particularized" reference was intended to be taken seriously, we can explain it by reference to the breadth of the injury Baur was asking the court to recognize. Before it granted standing that could potentially extend to all beef eaters, the court may have wanted to be sure that the name plaintiff had a strong personal interest in the matter. On the other hand, the case also makes sense from a public values perspective. The court found that the statute at issue was intended to protect the public from unsafe food.\textsuperscript{253} Baur's claim, therefore, asked the court to allow the use of the courts to vindicate the majoritarian policy goal of making the meat supply safer, and the court did so.\textsuperscript{254} As in Akins, granting standing to a widely shared harm served to give effect to the congressional intent behind the relevant statute.

Overall, these examples suggest that the courts of appeals have applied Akins' articulation of the generalized-grievances doctrine carefully and with good judgment. The results in each case are not only consistent with Akins itself, but also with common sense ideas of basic justice. Thus far, at least, the courts do not appear to have misused the discretion that the prudential doctrine under Akins allows them.

**CONCLUSION**

Although certain important details of the generalized-grievances doctrine remain unresolved, Akins allows us a reasonably good understanding of the doctrine at its core. On the one hand, it allows some widely shared harms to be justiciable; on the other hand, it prohibits "abstract" claims not grounded in a common law or statutory right. And it is not constitutionally compelled.

To the extent that it is still unclear when judges may use their discretion to deny standing to a widely shared harm, it is admittedly possible that some courts may in the future "employ the rhetoric of 'standing'" in a "dissembling enterprise" to serve their own personal policy preferences.\textsuperscript{255} Results-oriented judging may in fact be particularly

\textsuperscript{251} See id. at 35 (Scalia, J., dissenting) ("What is noticeably lacking in the Court's discussion of our generalized-grievance jurisprudence is all reference to two words that have figured in it prominently: 'particularized' and 'undifferentiated.'").

\textsuperscript{252} See Baur, 352 F.3d at 635.

\textsuperscript{253} Id. at 634 (citing 21 U.S.C. § 602 (2003)).

\textsuperscript{254} Id. at 635.

\textsuperscript{255} Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.,
likely to occur in standing cases. The "elusive nature of all justiciability issues" leaves greater room for judicial discretion in this area of law regardless of whether the rule is flexible or strict. So when standing rules are flexible, the inherent subjectivity involved in all standing decisions magnifies the potential for subjective interpretation that results from the flexibility of the rule.

Still, results-oriented judging does not appear to be causing a problem in the context of contemporary generalized grievances doctrine. The lower courts have implemented *Akins* in a consistent and principled manner, considering the ambiguity intrinsic in the case. Given this outcome, hindsight suggests that the prudential generalized-grievances doctrine as outlined in *Akins* is serving the public well, even though it incidentally leaves more room for results-oriented judging than a doctrine that errs on the side of reliability by excluding some deserving claims. Predictability and consistency are important values underlying doctrines such as stare decisis. But an overemphasis on stability, particularly in the standing context, may lead to stagnation, and occasionally to injustice. Until and unless federal judges prove themselves incapable of applying *Akins* even-handedly, we should not shun a generalized-grievances rule that allows for some judicial discretion. As Justice Breyer noted in reference to the overturning of *Plessy v. Ferguson* by *Brown v. Board of Education*, "[a] court focused on consequences may decide a case in a way that radically changes the law. But this is not always a bad thing."

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256. Logan, supra note 120, at 40.
257. See supra Part IV.B.
258. See supra note 142.
259. 163 U.S. 537 (1896).
261. BREYER, ACTIVE LIBERTY, supra note 161, at 119.