

# States' Stances on Public Interest Standing

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*Standing requires a party to have a sufficient stake in a controversy before it can bring a lawsuit. The United States Constitution limits standing in federal courts to “cases” and “controversies,” requiring parties to have suffered an actual, concrete injury. State courts, unbound by the Federal Constitution, sometimes grant “public interest standing” to parties who have not suffered any actual injury. In those cases, courts grant standing in the name of the “public interest,” or when they raise important constitutional issues. This Note explains and analyzes public interest standing, concluding that its underlying rationales are insufficient to warrant bypassing standing’s requirement of an actual injury. State courts should instead define a clear standing doctrine and limit the use of public interest standing.*

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## I. INTRODUCTION

Same-sex couples everywhere rejoiced on June 26, 2013, when the Supreme Court declared part of the federal Defense of Marriage Act unconstitutional.<sup>1</sup> That same day, the Court also dismissed a lawsuit regarding California’s Proposition 8 gay marriage ban.<sup>2</sup> While this was a huge victory for same-sex couples in California, the Supreme Court declined to directly address the constitutionality of state same-sex marriage bans under the Fourteenth Amendment. Instead, the Court dismissed the case because the petitioners, proponents of Proposition 8, lacked standing in federal court.<sup>3</sup> While many believe the Supreme Court simply did not want to address same-sex marriage head on,<sup>4</sup> the decision in *Hollingsworth v. Perry* is grounded in one of the oldest concepts of the judiciary: standing.

<sup>1</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2675–76 (2013).

<sup>2</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667–68 (2013).

<sup>3</sup> *Id.* at 2668. The Proposition 8 proponents successfully intervened in the case because California officials, including the governor, attorney general, and various other state and local officials charged with enforcing California’s marriage laws, refused to defend the law or appeal the lower court’s decision. *Id.* at 2660.

<sup>4</sup> See, e.g., Todd Noelle, *Hollingsworth v. Perry: Taking a Stand on Standing in the California Prop 8 Marriage Equality Case*, OUTLAW (June 30, 2013), <http://sites.duke.edu/outlaw/2013/06/30/hollingsworth-v-perry-taking-a-stand-on-standing-in-the-california-prop-8-marriage-equality-case-2/>, archived at <http://perma.cc/KL2S-DREQ> (characterizing the decision as ending the Supreme Court session “with a whimper,” with the Court “seen to have ‘punted’ on the issue using arcane procedural grounds”); Jillian T. Weiss, *The Hollingsworth v. Perry Decision Explained*, BILERICO PROJECT (June 27, 2013, 10:00 AM), [http://www.bilerico.com/2013/06/the\\_hollingsworth\\_v\\_perry\\_decision\\_explained.php](http://www.bilerico.com/2013/06/the_hollingsworth_v_perry_decision_explained.php), archived at <http://perma.cc/LP7U-7Y4G> (“[T]he Supreme Court really didn’t want to have to decide the issues raised [in *Hollingsworth v. Perry*], and had to engage in some serious mental gymnastics to find a way to kick it out of court.”).

Standing, in layman's terms, answers the question of who should have access to the judicial system.<sup>5</sup> As defined by Black's Law Dictionary, standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right."<sup>6</sup> The Supreme Court has explained that the concept of standing addresses whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."<sup>7</sup> Accordingly, both state and federal courts include standing as one of the requirements of justiciability.<sup>8</sup>

In the federal court system, standing is founded on the "case or controversy" requirement of Article III of the Constitution.<sup>9</sup> Accordingly, federal courts confer standing only upon those parties who have a "concrete and particularized" injury<sup>10</sup> and completely reject standing based upon a generalized injury.<sup>11</sup> To that end, the Proposition 8 proponents were prevented from appealing in federal court because they suffered no particularized or concrete injury.<sup>12</sup>

Instead of identifying a particularized injury, the proponents of Proposition 8 argued that the State of California grants individuals standing "to appear and assert the State's interest" in the validity of Proposition 8 when the State refuses to do so.<sup>13</sup> This argument can be traced to another view of standing, different from the Supreme Court's interpretation, where parties are permitted to bring

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<sup>5</sup> See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008).

<sup>6</sup> *Standing*, BLACK'S LAW DICTIONARY 1536 (9th ed. 2009).

<sup>7</sup> *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). See *infra* Part IV for various state definitions of standing.

<sup>8</sup> Justiciability encompasses a number of doctrines that determine whether the court system will hear or dismiss a case. See Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 76–77 (2007) (discussing how Article III of the Constitution "impose[s] a constellation of constraints known collectively as doctrines of justiciability").

<sup>9</sup> U.S. CONST. art. III, § 2.

<sup>10</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984)).

<sup>11</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (quoting *Lujan*, 504 U.S. at 573–74) ("We have repeatedly held that such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing. A litigant 'raising only a generally available grievance about government—claiming 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—does not state an Article III case or controversy.'").

<sup>12</sup> See *id.* at 2663.

<sup>13</sup> The proponents of Proposition 8 put forth a number of arguments in support of standing, including statutory standing, associational standing, and representational standing. *Id.* at 2662–67. While these forms of standing are beyond the scope of this Note, the Supreme Court rejected each in turn and addressed the question of whether "a private party [may] defend the constitutionality of a state statute" without any personalized injury. *Id.* at 2668. The overarching theme of the Court's opinion, therefore, was a firm rejection of public interest standing in the federal court system. See *generally id.*

lawsuits in the name of the “public interest.”<sup>14</sup> This form of standing is commonly referred to as “public interest standing.”<sup>15</sup>

Adhering to principles of federalism, individual state court systems are not bound by the United States Constitution or the “case or controversy” requirement in deciding whether to confer standing upon a party.<sup>16</sup> Therefore, public interest standing has been used for decades in various state courts<sup>17</sup> despite the Supreme Court of the United States’ consistent rejection of the doctrine.<sup>18</sup> While some states use a standing doctrine similar or identical to the federal court system,<sup>19</sup> numerous others allow lawsuits in the public interest or for cases involving issues of great constitutional importance.<sup>20</sup> The common thread of these varying forms of public interest standing in state courts is the recognition of the public value of the lawsuit by the ruling court.<sup>21</sup>

Although this Note does not attempt to argue that public interest standing has no place in state court systems, it advocates a limited approach to public interest standing that is more consistent with the rationale underlying the federal treatment of standing. The focus of this Note is the “vastly understudied”<sup>22</sup> public interest standing models developed in state court systems.<sup>23</sup> This Note

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<sup>14</sup> See, e.g., *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011–12 (Cal. 2011) (“[W]here the question is one of public right and the object . . . is to procure the enforcement of a public duty, the [plaintiff] need not show that he has any legal or special interest in the result, . . . [w]e refer to this variety of standing as public interest standing.”) (internal quotation marks omitted).

<sup>15</sup> Public interest standing is also referred to as “public action,” “public duty,” “public importance,” “public right,” or “public significance” standing. See, e.g., *id.* (“public right/public duty exception”); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1079 (Ohio 1999) (“public action”); *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998) (citizen-taxpayer standing conferred in cases of “public significance”); *State ex rel. Clark v. Johnson*, 904 P.2d 11, 17–18 (N.M. 1995) (“public importance doctrine”). For purposes of this Note, the doctrine will be consistently referred to as “public interest standing.”

<sup>16</sup> See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . .”); see also *Hollingsworth*, 133 S. Ct. at 2667.

<sup>17</sup> See *infra* Part IV.

<sup>18</sup> See *infra* Part II.B.

<sup>19</sup> See *infra* Appendix, Table 1.

<sup>20</sup> This Note is exclusively concerned with the concept of public interest standing. As such, other alternative forms of standing, such as taxpayer standing, are beyond its scope and examined fully elsewhere. See sources cited *infra* note 134.

<sup>21</sup> John DiManno, Note, *Beyond Taxpayers’ Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639, 644 (2008) (“In these cases, it is often not necessary for a litigant to show that his or her interest is protected by some positive law, but rather it is sufficient that the interest he or she represents is recognized as a public value by the court.”).

<sup>22</sup> *Id.*

<sup>23</sup> Indeed, the literature on standing is heavily focused on federal standing requirements. See, e.g., Hessick, *supra* note 5, at 276–78 (criticizing the use of the standing doctrine and the “injury-in-fact” requirement in private rights cases); Evan Tsen Lee &

provides an intensive case study that investigates whether and to what extent each state allows public interest standing.<sup>24</sup> Additionally, it critically evaluates the reasoning underlying the various forms of public interest standing.<sup>25</sup>

Part II provides an analysis of federal standing requirements, particularly the case-or-controversy requirement, to establish the arguments supporting a limited standing doctrine. Part III discusses the concept of public interest standing, exploring the inapplicability of the federal case-or-controversy requirement in state courts as well as policy reasons that could support a more expanded view of standing. Part IV provides the results of an examination of the standing doctrine in each state to identify the major frameworks (and underlying rationales) employed to confer public interest standing; it then provides a critical analysis that requires the rejection of the majority of these rationales. Finally, Part V proposes a limited view of public interest standing in the states, highlighting the necessity of a clear public interest standing doctrine and advocating the use of a very limited view of public interest standing.

## II. PUBLIC INTEREST STANDING (OR LACK THEREOF) IN FEDERAL COURTS

“Lawyers will sue *anyone* for *anything*.” Every attorney (and law student) has heard endless variations of this statement—generally leveled as an accusation—as one of the multitude of complaints aimed at the legal profession. It is a common media narrative, brought forth regularly when a lawsuit seems speculative or contrived, or when the party bringing the lawsuit is particularly unsympathetic.<sup>26</sup> Often, public sentiment is not far from the truth, as stories of frivolous lawsuits are commonplace.<sup>27</sup>

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Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 175 (2012) (analyzing the federal standing doctrine where Congress has explicitly relaxed standing requirements in “procedural rights” cases); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1132–35 (2009) (identifying and explaining past instances where the Supreme Court relaxed standing requirements in cases of the public interest). And, to the extent research has turned to standing in state courts, the majority of the literature examines systems in specific states or advocates extending public interest standing to very specific areas of the law. See, e.g., Gregory Bradford, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065, 1096–1100 (2011); Kenneth Charette, *Standing Alone?: The Michigan Supreme Court, the Lansing Decision, and the Liberalization of the Standing Doctrine*, 116 PENN ST. L. REV. 199, 205–07 (2011) (examining relaxed standing requirements in Michigan); DiManno, *supra* note 21, at 665–77 (examining public interest standing in Alaska, New Mexico, Ohio, and Utah).

<sup>24</sup> See *infra* Appendix, Table 1.

<sup>25</sup> See *infra* Part IV.

<sup>26</sup> For example, a pimp recently brought an action against Nike alleging that the company was liable for failing to provide clear warning that shoes made by the company could be classified as a “deadly weapon” after he was charged for beating a man with his shoes. Aimee Green, *Portland Pimp Sues Nike for \$100 Million for Lack of Warning Label After Beating Victim with Jordans*, OREGONIAN, [http://www.oregonlive.com/portland/index.ssf/2014/01/nike\\_sued\\_by\\_portland\\_pimp\\_for.html](http://www.oregonlive.com/portland/index.ssf/2014/01/nike_sued_by_portland_pimp_for.html) (last updated Jan. 13, 2014, 3:07

The general result in these situations is public outrage, first at the plaintiff but quickly turning to the “greedy” attorneys willing to file these lawsuits.<sup>28</sup> The underlying sentiment is that some things should be decided by the court system, while others should not. Although this usually manifests itself in the general public through notions of fairness, the debate as to what issues the legal system can (and should) decide is one that the United States Supreme Court has addressed regularly for decades.

### A. *Standing in Federal Courts and the Case-or-Controversy Requirement*

Standing, as a threshold question of justiciability, addresses “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”<sup>29</sup> Federal courts are restricted by the United States Constitution to hearing only those claims constituting a “case” or “controversy.”<sup>30</sup> This prevents federal courts from adjudicating any and all disputes; instead, they can only adjudicate those “historically viewed as capable

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PM), *archived at* <http://perma.cc/TJ28-9W4X>. Elsewhere, a California Little League baseball coach sued one of his fourteen-year-old players after the player threw his helmet in the air to celebrate a game-winning run, only for the helmet to strike the coach and (allegedly) sever his Achilles tendon. Ben Rohrbach, *Coach Suing 14-year-old over Little League Baseball Celebration*, YAHOO! SPORTS (Jan. 15, 2014, 3:41 PM), <http://sports.yahoo.com/blogs/highschool-prep-rally/coach-suing-14-old-over-little-league-baseball-204100538.html>, *archived at* <http://perma.cc/S82H-AAUN>.

<sup>27</sup> See, e.g., *Top Ten Most Ridiculous Lawsuits of 2012*, FACES OF LAWSUIT ABUSE, <http://www.facesoflawsuitabuse.org/2012/12/top-ten-most-ridiculous-lawsuits-of-2012/> (last visited Apr. 12, 2015), *archived at* <http://perma.cc/H645-7S4S>.

<sup>28</sup> See Chris Jones, *Blame Predatory Attorneys, Not ADA*, TIMES-STANDARD, [http://www.times-standard.com/guest\\_opinion/ci\\_24776139/blame-predatory-attorneys-not-ada](http://www.times-standard.com/guest_opinion/ci_24776139/blame-predatory-attorneys-not-ada) (last updated Dec. 22, 2013), *archived at* <http://perma.cc/96JA-ZXUG> (“Businesses should be not [sic] forced to close because of frivolous lawsuits . . . . Attorneys who prey on small businesses are predators. They have no desire to fix the problems. It seems that they are just looking for a quick buck resulting in small businesses [that are] already struggling, being forced to close.”); Jonathan Pollard, *Frivolous (Trade Secrets) Lawsuits and Greedy (Big Firm) Plaintiff’s Lawyers: A Recent Case from Minnesota*, NON-COMPETE BLOG (Nov. 13, 2013), <http://thenoncompeteblog.com/2013/11/13/frivolous-trade-secrets-lawsuits-and-greedy-big-firm-plaintiffs-lawyers-a-recent-case-from-minnesota/>, *archived at* <http://perma.cc/H7H9-9DQT> (“I’m not singling out this one case, this one plaintiff, or this one [law] firm. This is widespread.”). *But see* Leigh Jones, *“Hot Coffee” Shows Other Side of “Frivolous” Lawsuits*, REUTERS (June 27, 2011, 1:47 PM), <http://www.reuters.com/article/2011/06/27/us-hotcoffee-idUSTRE75Q54320110627>, *archived at* <http://perma.cc/47BT-VQXE>.

<sup>29</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Supreme Court has gone so far as to suggest standing is “the most important of these doctrines.” *Allen v. Wright*, 468 U.S. 737, 750 (1984).

<sup>30</sup> U.S. CONST. art. III, § 2; see *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

of resolution through the judicial process.”<sup>31</sup> In essence, standing is “the key that opens access to the federal courts.”<sup>32</sup>

The basic tenets of traditional standing are well settled in federal courts.<sup>33</sup> Article III of the Constitution imposes three requirements upon a party before they are adjudged to have standing: (1) they must have suffered an “injury in fact”;<sup>34</sup> (2) the injury must be fairly traceable to the conduct of the defendant; and (3) the injury is likely<sup>35</sup> to be redressed by a favorable judicial decision.<sup>36</sup> In every case, the plaintiff bears the burden of meeting these requirements before the court is permitted to reach the merits of the case.<sup>37</sup> Where the plaintiff fails to carry this burden, federal courts must dismiss the case.<sup>38</sup> The requirement most often failed, and the one public interest standing nullifies, is the “injury in fact.”<sup>39</sup> Despite consistent attempts to relax federal standing requirements and numerous opportunities for the Supreme Court to do so, the Court has continuously rejected public interest standing.

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<sup>31</sup> *Flast v. Cohen*, 392 U.S. 83, 95 (1968); see *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (“The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.”).

<sup>32</sup> James W. Doggett, Note, “Trickle Down” *Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 COLUM. L. REV. 839, 842 (2008).

<sup>33</sup> Compare *Hollingsworth*, 133 S. Ct. 2652 at 2668 (articulating standing requirements in 2013), with *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (articulating standing requirements in 1982).

<sup>34</sup> This requires that the injury be (1) “concrete and particularized” and (2) “actual or imminent,” rather than “conjectural or hypothetical.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000).

<sup>35</sup> It must be “likely” as opposed to “speculative” that a favorable decision will provide redress for the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 42–43 (1976).

<sup>36</sup> *Lujan*, 504 U.S. at 560–61.

<sup>37</sup> *Id.* at 561 (“The party invoking federal jurisdiction bears the burden of establishing these elements [of standing.]”); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (noting that “standing in no way depends on the merits of the plaintiff’s contention”) (citing *Flast v. Cohen*, 392 U.S. 83, 99 (1968)).

<sup>38</sup> See, e.g., *Hollingsworth*, 133 S. Ct. at 2668 (dismissing case for lack of standing). Moreover, these requirements must be met throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013); see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (confirming that standing requirements “must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance”). Accordingly, in *Hollingsworth* the petitioners were granted statutory standing by the State of California in federal district court but lacked any further standing at the appellate level based on the absence of a particularized injury. 133 S. Ct. at 2659 (“Because we find that petitioners do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.”).

<sup>39</sup> See *infra* Part IV.

### B. The Supreme Court's Rejection of Public Interest Standing

The Supreme Court of the United States has been emphatic and consistent in its rejection of public interest standing.<sup>40</sup> The Court generally rejects cases requesting the conferral of public interest standing by finding that the plaintiff failed to establish an injury-in-fact.<sup>41</sup> This may mean the absence of any injury at all<sup>42</sup> or, more often, the absence of any injury distinct from injury to the general public.<sup>43</sup> In doing so, the Supreme Court has offered ample support for its stance against public interest standing.

The Supreme Court's refusal to permit public interest standing in the federal court system is founded on several principles,<sup>44</sup> the foremost of which is standing's essential role in ensuring the separation of powers.<sup>45</sup> Indeed, the Court has opined that standing follows naturally from the Constitution and our "common understanding of what activities are appropriate to legislatures, to executives, and to courts."<sup>46</sup> To that end, the Court rejects standing in cases

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<sup>40</sup> *Hollingsworth*, 133 S. Ct. at 2662 ("We have repeatedly held that . . . a 'generalized grievance,' no matter how sincere, is insufficient to confer standing."); *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree."); *Lujan*, 504 U.S. at 573–74 (opining that standing will not be conferred upon an individual "claiming 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"); *Allen v. Wright*, 468 U.S. 737, 754 (1984) (ruling that attempt to require government to act in accordance with the law, without injury, is insufficient to confer standing); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (stating that standing will not be conferred where plaintiff suffers "in some indefinite way in common with people generally").

<sup>41</sup> *See, e.g.*, *Diamond v. Charles*, 476 U.S. 54, 65 (1986).

<sup>42</sup> *Id.* at 71 (holding that a plaintiff lacked standing to defend constitutionality of statute because he lacked a personal injury in fact); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 209, 217 (1974) (holding that plaintiffs, in an action to prevent members of Congress from serving in the military reserves, lacked standing because they presented only an "injury in the abstract").

<sup>43</sup> *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (holding that plaintiffs lacked standing where action alleged government aid to religion in violation of the Establishment Clause because they failed to identify any injury separate from that to the public at large).

<sup>44</sup> The principles of federal standing explored here are not, by any means, exhaustive; rather, they are the principles best translated to state courts and most relevant to the subsequent discussion of public interest standing in state courts. *See infra* Part V.B.

<sup>45</sup> The Supreme Court is unmistakably clear in announcing the importance of separation of powers in decisions on the nature and scope of the standing doctrine. *See Hollingsworth*, 133 S. Ct. at 2659 ("[Standing] is an essential limit on our power: It ensures that we act as *judges*, and do not engage in policymaking properly left to elected representatives."); *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (reinforcing that standing doctrine represents an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere"); *Allen*, 468 U.S. at 752 ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.").

<sup>46</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992).



involving only generalized injuries because the judiciary is not to be used “as a forum in which to air . . . generalized grievances about the conduct of government.”<sup>47</sup> Rather, the proper route to redress generalized grievances is through the political process.<sup>48</sup> Standing, therefore, “serves to prevent the judicial process from being used to usurp the powers of the political branches,” leading to the Court’s conclusion that public interest standing has no place in federal courts.<sup>49</sup>

Next, standing is intended to ensure that federal courts settle only those disputes that are truly adversarial in nature. The Supreme Court strictly adheres to this principle, which is reflected in the Court’s refusal to issue advisory opinions.<sup>50</sup> In turn, the general disdain for advisory opinions can find its roots in the historical role of the judiciary—to resolve actual, concrete disputes.<sup>51</sup>

Finally, disallowing public interest standing serves the very practical function of promoting judicial efficiency. Beyond the heavy caseload facing most courts,<sup>52</sup> the standing doctrine creates uniform requirements for all litigants in a vast federal court system.<sup>53</sup> One can imagine the chaos that would result if every federal court were permitted to create its own standing doctrine; already exhaustive jurisdictional battles would multiply as would-be plaintiffs lined up to sue in those courts allowing public interest standing.<sup>54</sup> With these considerations in mind, the Supreme Court has rejected an expanded view of

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<sup>47</sup> *United States v. Richardson*, 418 U.S. 166, 174 (1974) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

<sup>48</sup> *Id.* at 179; see Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. PITT. L. REV. 351, 357 (1993) (“Because the judicial branch is less accountable to the people than are the Congress and the President, it should avoid making pronouncements of public policy unless personal rights are at stake.”).

<sup>49</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013).

<sup>50</sup> *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (“[A] federal court [lacks] the power to render advisory opinions.” (internal quotation marks omitted)); *Flast*, 392 U.S. at 96 (explaining that federal courts have firmly established as a prevailing pillar of justiciability the rule against advisory opinions). *But see* Siegel, *supra* note 8, at 117–19 (noting the advent in recent times of declaratory judgment actions and the inherent conflict with the Court’s negative view of advisory opinions).

<sup>51</sup> *Baker v. Carr*, 369 U.S. 186, 204 (1962) (explaining that the purpose of standing is “to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions”). This is further related to the rule that federal courts “will not entertain friendly suits or those which are feigned or collusive in nature.” *Flast*, 392 U.S. at 100 (citations omitted).

<sup>52</sup> See generally *Federal Judicial Caseload Statistics 2014*, U.S. CTS., <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014.aspx> (last visited Apr. 12, 2015), archived at <http://perma.cc/DM94-4T34>.

<sup>53</sup> Beyond the Supreme Court, the federal court system encompasses ninety-four judicial districts and thirteen courts of appeals. *Courts of Appeals*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtOfAppeals.aspx> (last visited Apr. 12, 2015), archived at <http://perma.cc/7DTD-SDUK>. As such, there is much to be gained from—if not an absolute necessity for—a uniform standing doctrine at the federal level.

<sup>54</sup> See *infra* Appendix, Table I.

standing, even in cases (such as *Hollingsworth*) where state courts have initially applied a broad view of standing.<sup>55</sup>

### III. STANDING IN STATE COURTS: THE LACK OF THE CASE-OR-CONTROVERSY REQUIREMENT AND POLICY CONSIDERATIONS SUPPORTING AN EXPANDED VIEW OF STANDING

Despite the widespread concern expressed by the Supreme Court about the perils of public interest standing, the doctrine is pervasive in state court systems.<sup>56</sup> Those state courts permitting public interest standing focus not only on the inapplicability of the United States Constitution, but also on numerous other differences between the federal and state court systems.<sup>57</sup> Collectively, these differences are offered to justify deviation from the federal framework of standing by allowing several alternative forms of standing.<sup>58</sup> However, irrespective of these differences and the numerous forms of alternative standing in state courts, public interest standing stands alone in offering no relation to an injury-in-fact.

State courts almost uniformly begin any standing analysis by highlighting the inapplicability of the case-or-controversy requirement outside federal courts.<sup>59</sup> This is simply one of a plethora of major differences scholars highlight between state and federal court systems,<sup>60</sup> and many of these differences have been used as support for public interest standing. The most common is political accountability, as most state judges are elected rather than appointed.<sup>61</sup> Additionally, state constitutions are considerably more malleable than the Federal Constitution, suggesting that state law is (and should be) more fluid

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<sup>55</sup> Similar concerns have been addressed by several states whose courts have rejected public interest standing. *See infra* Appendix, Table 1.

<sup>56</sup> *See infra* Appendix, Table 1.

<sup>57</sup> *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844, 1886–91 (2001).

<sup>58</sup> These alternative forms of standing include statutory standing, representational standing, taxpayer standing, and, of course, public interest standing. *See infra* note 134.

<sup>59</sup> This holds true regardless of the state's position on public interest standing. Where courts find in favor of public interest standing, they emphasize the lack of the case-or-controversy as making public interest standing permissible. *See, e.g., State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 979 (Ind. 2003) ("Unlike the language of Article III, Section 2 of the United States Constitution, the Indiana Constitution contains no 'case or controversy' requirement."). Similarly, even where courts reject the notion of public interest standing, they often do so by explicitly choosing to extend and apply the case-or-controversy requirement despite being under no obligation to do so. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444–45 (Tex. 1993).

<sup>60</sup> *See* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 688 (2011).

<sup>61</sup> Nearly 90% of state court judges hold their position as the result of some form of election. Dale Carpenter, *Four Arguments Against a Marriage Amendment that Even an Opponent of Gay Marriage Should Accept*, 2 U. ST. THOMAS L.J. 71, 76 (2004).

than federal law.<sup>62</sup> The collective force of these considerations has led to the conclusion that many of the concerns attached to public interest standing in federal courts are absent in state courts.<sup>63</sup>

### *A. Constitutional Differences and the Absence of the Case-or-Controversy Requirement*

Nearly every state court begins an analysis of standing with a variation of the following statement: “Unlike the federal system, the judicial power of the state . . . is not constitutionally restricted by the language of Article III of the United States Constitution requiring ‘cases’ and ‘controversies,’ since no similar requirement exists in the [state’s] Constitution.”<sup>64</sup> This is an unquestionable tenet of state law, and one firmly supported by the Supreme Court of the United States.<sup>65</sup> Many state courts view the absence of this requirement as liberation from the constraints of traditional standing.<sup>66</sup> And, charged with “jurisdiction over a single state, not the entire nation,”<sup>67</sup> state courts often decide to fill the gap left by the absence of Article III with public interest standing.

Moreover, differences between the Federal Constitution and state constitutions do not end with the case-or-controversy requirement. State constitutions are notoriously long,<sup>68</sup> and often resemble “super legislation”

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<sup>62</sup> Sutton, *supra* note 60, at 690 (“[T]he majoritarian nature of the states’ amendment procedures invites rather than discourages alteration . . .”).

<sup>63</sup> See DiManno, *supra* note 21, at 658–59.

<sup>64</sup> Gregory v. Shurtleff, 299 P.3d 1098, 1102 (Utah 2013) (granting public interest standing); see Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs. in Ariz., 712 P.2d 914, 919 (Ariz. 1985) (“[T]he question of standing in Arizona is not a constitutional mandate since we have no counterpart to the ‘case or controversy’ requirement of the federal constitution.”).

<sup>65</sup> ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do no apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . .”).

<sup>66</sup> See, e.g., Fernandez v. Takata Seat Belts, Inc., 108 P.3d 917, 919 (Ariz. 2005) (en banc) (“[W]hen addressing questions of standing we are confronted only with questions of prudential or judicial restraint.” (internal quotation marks omitted)).

<sup>67</sup> Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1632 (2010).

<sup>68</sup> By one count, state constitutions are, on average, almost four times longer than the Federal Constitution. Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 74 & n.57 (1982). As an extreme example, the Alabama Constitution is nearly 350,000 words long; in contrast, the Federal Constitution contains only 4,543 words. H. Bailey Thomson, *Constitutional Reform in Alabama: A Long Time in Coming*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 113, 114 (G. Alan Tarr & Robert F. Williams eds., 2006).

rather than “sacred texts.”<sup>69</sup> State constitutions’ length often results from the enumeration of positive rights, and courts interpret these rights as an invitation to engage broader substantive areas.<sup>70</sup> State courts have accepted this invitation and, in the case of public interest standing, use it to forego the injury-in-fact requirement.<sup>71</sup>

### B. *Accountability: The Difference Between an Appointed and an Elected Judiciary*

Another oft-cited difference between the federal and state court systems is that all federal judges are appointed, whereas in most states judges are elected.<sup>72</sup> Therefore, proponents of public interest standing argue that state judges should (or must) play a more active role in government.<sup>73</sup> State judges are “experts in the law and politics of their state,”<sup>74</sup> and therefore are more likely to respond to local issues.<sup>75</sup> Judicial elections encourage judges to take a more active role in shaping the law, particularly because the threat of removal from office is omnipresent for judges who fail to satisfy the desires of their constituents.<sup>76</sup>

An elected judiciary also benefits from its democratic legitimacy. Judicial elections provide “plenary” authority to state courts,<sup>77</sup> whereas federal courts aside from the Supreme Court of the United States only possess jurisdiction as authorized by Congress.<sup>78</sup> As such, an elected judiciary allows the people to respond to judicial decisions the electorate disfavors<sup>79</sup> and establishes accountability amongst elected judges that may not apply to life-term judges.<sup>80</sup>

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<sup>69</sup> Devins, *supra* note 67, at 1642 (quoting Lawrence Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 35 (1988)).

<sup>70</sup> See Hershkoff, *supra* note 57, at 1889–90 (“[B]ecause state constitutions often include positive rights and regulatory norms, their texts explicitly engage state courts in substantive areas that have historically been outside the Article III domain.”); see also DiManno, *supra* note 21, at 661 (stating that positive rights in state constitutions “encourage and often depend upon judicial involvement for their interpretation and enforcement”).

<sup>71</sup> See, e.g., *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 83 P.3d 419, 424 (Wash. 2004) (explaining that Washington grants standing in cases without an injury-in-fact where the “controversy is of substantial public importance”).

<sup>72</sup> See Sutton, *supra* note 60, at 700–02 (exploring judicial elections in various states).

<sup>73</sup> See DiManno, *supra* note 21, at 660–61.

<sup>74</sup> Devins, *supra* note 67, at 1632.

<sup>75</sup> See generally Hershkoff, *supra* note 57.

<sup>76</sup> See Devins, *supra* note 67, at 1659–60.

<sup>77</sup> Hershkoff, *supra* note 57, at 1888.

<sup>78</sup> “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

<sup>79</sup> See John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 488 (1999).

<sup>80</sup> This represents one side of an ongoing debate, as “[t]he choice between appointment and election is often presented as a choice between judicial independence and judicial accountability . . .” Michael DeBow et al., *The Case for Partisan Judicial Elections*, 33 U.

Against the backdrop of re-election, the logical incentive for state court judges is to retain their position and advance their preferred legal policy.<sup>81</sup> The plenary authority of state courts thus encourages a more activist role in shaping public policy.<sup>82</sup> This view of the judiciary's role in individual state courts is readily compatible with public interest standing, as it provides judges more freedom to influence public policy than the more restrictive injury-in-fact view of standing.

### C. Malleability of State Law

Finally, the fluidity of state constitutions implies that state standing doctrine need not be as rigid or formalistic as its federal counterpart. The evolution of state constitutions stands in stark contrast to the Federal Constitution: only one of the original thirteen states (Massachusetts) maintains its original constitution; over thirty states have adopted multiple constitutions;<sup>83</sup> and states have amended their constitutions thousands of times.<sup>84</sup> In light of the expansive nature of state constitutions,<sup>85</sup> the judiciary must take on a more active role.<sup>86</sup> Thus, state judiciaries can use public interest standing as a vehicle to fulfill the role of interpreter of vast state constitutions.

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TOL. L. REV. 393, 396 (2002). The federal system has clearly answered this question in favor of judicial independence, deeming it desirable that judges be independent “in the sense that they will apply the law fairly and without favoritism” while still being accountable “in the sense that they do not exercise their power arbitrarily, or in ways that undermine the judicial and political systems they have sworn to uphold.” *Id.* While states are decidedly mixed in their use of judicial elections, these elections create their own host of problems that may or may not justify their use. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 317–24 (2008) (examining the costs judicial elections exact on democracy).

<sup>81</sup> See Pozen, *supra* note 80, at 318 (observing that the “basic premise” of objection to judicial elections is that they “inject populist incentives into the branch of government that is meant to be most immune from them” because “elected judges will have to become more careful not to offend majority sentiment if they want to keep their jobs”); see also Devins, *supra* note 67, at 1659.

<sup>82</sup> See, e.g., Hans A. Linde, *The State and Federal Courts in Governance: Vive La Différence!*, 46 WM. & MARY L. REV. 1273, 1286 (2005).

<sup>83</sup> See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 248–49 tbl.1 (Sanford Levinson ed., 1995).

<sup>84</sup> See G. Alan Tarr, *Introduction to STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY*, *supra* note 68, at 1, 2. Alabama warrants another mention, as it has amended its constitution 740 times. *Id.*

<sup>85</sup> See *infra* Part III.A.

<sup>86</sup> See Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972) (noting the wide range and variety of non-traditional disputes settled by state courts using alternative forms of standing).

#### IV. THE MANY FACES OF PUBLIC INTEREST STANDING: CRITIQUING THE UNDERLYING PREMISES APPLIED BY STATE COURTS TO CONFER STANDING

Although public interest standing can be examined as a singular doctrine, the concept is by no means uniform in its application in state courts.<sup>87</sup> Public interest standing, by definition, cuts against the traditional construction of standing, and thus courts employ a variety of rationales to justify its application.<sup>88</sup> Some state courts simply choose to confer standing to answer questions of great constitutional importance.<sup>89</sup> More specifically, after examining standing doctrine in every state, common rationales for public interest standing begin to emerge: (1) the necessity of standing when individuals without an injury seek to force elected officials to uphold and fulfill their duties; (2) a trend to confer standing upon the “most appropriate” party to a dispute, even where that party may lack an individualized injury; and (3) the “nominal injury,” where courts stretch the meaning of the term injury to broaden the scope of standing. However, critical analysis reveals each rationale is insufficient to warrant a drastic broadening of traditional standing doctrine.

##### *A. Rejecting the Enforcement of Public Duties and Challenges of Constitutionality: Separation of Powers*

One of the common themes used by parties seeking public interest standing is the enforcement of a public duty.<sup>90</sup> The core proposition is that every citizen suffers an injury when public officials fail to uphold the state constitution or fail to properly fulfill a public duty, and these failures allow any individual to have standing in court.<sup>91</sup> On its face, this consideration may seem to actually align with concerns of separation of powers. By allowing standing in actions to procure the enforcement of a public duty, the judiciary serves as a check on the other branches of government.<sup>92</sup> However, the delicate balance of a tripartite

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<sup>87</sup> See *infra* Appendix, Table 1 for the rationales employed by each state that applies public interest standing.

<sup>88</sup> DiManno, *supra* note 21, at 664, 670.

<sup>89</sup> See *Jolley v. State Loan & Inv. Bd.*, 38 P.3d 1073, 1077–79 (Wyo. 2002).

<sup>90</sup> See, e.g., *Tax Equity Alliance for Mass. v. Comm’r of Revenue*, 672 N.E.2d 504, 508–09 (Mass. 1996); *Daily Gazette Co., Inc. v. Comm. on Legal Ethics of the W. Va. State Bar*, 326 S.E.2d 705, 707 n.2 (W. Va. 1984); see also *infra* Appendix, Table 1 for those states using the enforcement of public duties as a basis for public interest standing.

<sup>91</sup> *Wells v. Purcell*, 592 S.W.2d 100, 103 (Ark. 1979) (“[W]hen . . . the proceedings are for the enforcement of a duty affecting not a private right, but a public one, common to the whole community, it is not necessary that the relator should have a special interest in the matter . . .”).

<sup>92</sup> See Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1296 (1961) (Standing “might be conceived in terms of demands for enforcement (1) of norms generally accepted as appropriate for the proper day-to-day

system of government results from each branch adhering to its proper role; allowing the judiciary to intentionally and unilaterally expand its role on its own could easily upset the balance.

There is an inherent danger in allowing the judiciary to create jurisdiction for itself as a way to check the other branches of government. When used to enforce a public duty, public interest standing functions as a mechanism to hold elected officials accountable to the people.<sup>93</sup> Such a function is redundant and unnecessary for one obvious reason: elected officials are accountable to citizens at the polls. Thus, for a general grievance harming all of the public, the public itself should be charged with holding officials accountable.<sup>94</sup> All state officials take an oath to uphold their state's constitution, and if citizens believe these officials fail in their duties, the next election provides an appropriate and adequate forum to voice their complaints.

Additionally, the malleability of state law actually runs counter to public interest standing in this area, because it allows voters to have a greater impact upon the functionality of the government.<sup>95</sup> The ease with which state constitutions can be amended provides citizens a clear avenue to make changes that public interest standing would instead leave to the judiciary. This preferable route of action was illustrated in Indiana in 2003, where an individual lacking any injury-in-fact sued to require the Indiana Department of Transportation to enforce a particular statute against railroads in the state.<sup>96</sup> Although the Supreme Court of Indiana reaffirmed the vitality of public interest standing and found the plaintiff to have standing to sue, the case itself was moot; the challenged statute had already been amended to ameliorate the problem.<sup>97</sup>

Even though the general application of this rationale is lacking, Ohio offers an example where it could be appropriate to confer public interest standing.<sup>98</sup> In

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conduct of government, or (2) of norms basic to the political and social process and to the citizen's participation in it . . .").

<sup>93</sup> See, e.g., *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011 (Cal. 2011) ("[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." (internal quotation marks omitted)).

<sup>94</sup> See Julie R. O'Sullivan, Book Note, 70 *CORNELL L. REV.* 380, 382–83 (1985) (reviewing MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982)) (observing that our society has a "commitment to democratic or electorally accountable decisionmaking," primarily because "[i]nterpretivists and noninterpretivists take as axiomatic the political principle that governmental policymaking . . . ought to be subject to control by persons accountable to the electorate" (internal quotation marks omitted)).

<sup>95</sup> See *supra* Part III.C.

<sup>96</sup> *State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 978 (Ind. 2003).

<sup>97</sup> *Id.* at 979. Unsurprisingly, the Indiana Supreme Court took the case "to acknowledge the availability of the public standing doctrine in Indiana courts" and spent almost the entire opinion discussing public interest standing before denying mandamus on grounds of mootness. *Id.* at 979, 985.

<sup>98</sup> *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

*State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, the Supreme Court of Ohio granted public interest standing in a mandamus action challenging the constitutionality of a legislative enactment amending rules related to torts and other civil actions.<sup>99</sup> The court thus found standing to enforce the performance of a public duty and went on to find the legislative enactment unconstitutional.<sup>100</sup> By doing so, the court presented perhaps the most appropriate use of public interest standing.

*Sheward* differs drastically from most instances of public interest standing in that the Supreme Court of Ohio granted standing to preserve the notion of separation of powers rather than encroach upon it. The court began its standing analysis with an invocation of separation of powers,<sup>101</sup> and found that the legislature had attempted to usurp the power of the judiciary.<sup>102</sup> Hence, the Supreme Court of Ohio conferred public interest standing to *protect*, rather than *expand*, its own authority.<sup>103</sup> Rather than violating separation of powers, *Sheward* can be viewed as actually supporting it.<sup>104</sup>

Nevertheless, *Sheward* does not answer the question of whether there were preferable alternatives to attack the legislature's action. As in *Cittadine v. Indiana Department of Transportation*, the enactment may have been amended or precluded by the people; in a more traditional approach, the people could elect a different majority in the legislature to overturn the enactment. Even more likely, many parties could have suffered an injury-in-fact as a result of the enactment in *Sheward*, and thus the case may have come before the court without the use of public interest standing at all. In fact, the Supreme Court of Ohio opened itself up to the potential for broader litigation through its decision in *Sheward*, as it is recently rejected a case where plaintiffs requested an expanded view of public interest standing using *Sheward* as the primary basis.<sup>105</sup> The solution, of course, would be to reject public interest standing on

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<sup>99</sup> *Id.* at 1084–85.

<sup>100</sup> *Id.* at 1084, 1102.

<sup>101</sup> *Id.* at 1081 (“These concerns become more acute where there may be an intrusion into areas committed to another and coequal branch of government.”).

<sup>102</sup> *Id.* at 1084 (“The people of this state have delegated their judicial power to the courts, and have expressly prohibited the General Assembly from exercising it.”); see OHIO CONST. art. II, § 32, art. IV, § 1.

<sup>103</sup> *Sheward*, 715 N.E.2d at 1085, 1104 (“The principle of separation of powers is embedded in the constitutional framework of our state government. The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of government. . . . Thus, [t]he legislative branch has no right to limit the inherent powers of the judicial branch of government.” (citations omitted) (internal quotation marks omitted)).

<sup>104</sup> See DiManno, *supra* note 21, at 669 (hypothesizing that “[t]he [*Sheward*] court may have acted more out of a fear of losing its power than out of a desire to vindicate the public interest”).

<sup>105</sup> See *ProgressOhio.org, Inc. v. JobsOhio*, 13 N.E.3d 1101, 1105–06 (Ohio 2014) (affirming dismissal of a challenge to legislation because plaintiffs lacked “a rare and extraordinary public issue” and limiting *Sheward* to original actions in mandamus and/or prohibition). Despite fervent requests to overrule *Sheward* as well, the Ohio Supreme Court instead chose to confirm—albeit in dicta—*Sheward*'s application to a certain “type of rare



the basis of enforcing a public duty altogether and to allow the political process to run its course.

*B. Rejecting the “Most Appropriate” Litigant: The Fallacy of Conferring Standing Because a Party Brought an Action Without It*

Perhaps the most prevalent rationale behind public interest standing is the idea that standing should be conferred upon the “most appropriate” party for issues of public significance.<sup>106</sup> This form of public interest standing often occurs in the context of challenges to the constitutionality of legislative or executive action.<sup>107</sup> Functionally, this means standing should be conferred if the party seeking standing—but lacking any actual harm—is at least as well-positioned as any other potential plaintiff.<sup>108</sup> The most common scenario, as described by the Supreme Court of Pennsylvania, is one where government activity would be unchallenged in the courts unless standing was conferred.<sup>109</sup>

The Supreme Court of Pennsylvania later emphasized the importance of judicial review as a basis for conferring public interest standing:

The ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers’ litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. . . . Such litigation allows the courts, within the framework of traditional notions of “standing,” to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.<sup>110</sup>

This strong desire for judicial review often prevails even though another party may be better positioned to bring the suit, so long as the party is unlikely to do so.<sup>111</sup> In particular, courts still rely on public interest standing if they

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and extraordinary public-interest issue.” *Id.* at 1106. While the decision did reject the notion “that citizens should be able to challenge any alleged constitutional violations, regardless of rarity or magnitude,” it still gives courts the ability to expand their own jurisdiction by deciding what qualifies as sufficiently “rare and extraordinary.” *Id.* at 1105.

<sup>106</sup> See *infra* Appendix, Table 1.

<sup>107</sup> See, e.g., *Baxley v. State*, 958 P.2d 422, 429 (Alaska 1998) (conferring public interest standing to challenge constitutionality of legislative enactment).

<sup>108</sup> See *Trustees for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987) (noting one criterion of public interest standing is that there cannot be another plaintiff “more directly affected by the challenged conduct in question who has or is likely to bring suit”).

<sup>109</sup> See *In re Biester*, 409 A.2d 848, 852 (Pa. 1979).

<sup>110</sup> *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988) (quoting *In re Biester*, 409 A.2d at 848, 851 n.5). Although this quote was originally offered in support of taxpayer standing, the Pennsylvania Supreme Court has come to use it to support its version of public interest standing. See *id.*

<sup>111</sup> See *Trustees for Alaska*, 736 P.2d at 330.

believe the best-positioned parties are unlikely to bring suit because they actually benefit from the governmental action.<sup>112</sup>

This rationale seems to beg the questions, “If not us, who? If not now, when?” Essentially, courts grant standing on the grounds that if standing is not conferred to the current plaintiff, no other plaintiff will come forward. The underlying logic is inherently flawed for two reasons. First, it assumes that the action in question *must* be challenged. Second, the party bringing the action is granted standing precisely because it initially brought the action *without standing*. Both arguments are dubious at best.

The first step state courts use to avoid traditional limits on standing for the “most appropriate litigant” is to start with the assumption that the constitutionality of the action in question *must* be subject to judicial review. In these cases, the common refrain uttered by state courts is that government action “would otherwise go unchallenged.”<sup>113</sup> Courts following this line of thinking unsurprisingly confer standing regardless of actual injury as a premise for applying judicial review to action taken by the other branches of government.<sup>114</sup> Thus, this rationale completely glosses over the heart of the concept of standing—whether an issue is justiciable and whether the judiciary is the proper forum for it to be decided—by automatically assuming that all government action should be subject to judicial review.

If all government action is subject to judicial review—as this line of reasoning invariably assumes—then state courts *must* confer standing in order to apply judicial review. This is a classic example of “shifting the goalposts”; having decided that the judiciary *should* rule on the merits, the court quickly passes by considerations of any actual injury to do so.<sup>115</sup> Courts have essentially moved the starting point of standing analysis so far in favor of judicial review that the outcome (granting public interest standing) is inevitable. However, such a view expands the role of the judiciary beyond the normal bounds of separation of powers. The idea that all action by government officials is automatically subject to judicial review must be rejected on its face; similarly, the notion that all action *should* be reviewed must be rejected.

All state officials take an oath to uphold their state constitution and are subject to electoral accountability at the hands of the voters.<sup>116</sup> Therefore, it is not the judiciary’s place to assume all actions taken by government officials

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<sup>112</sup> See, e.g., *Sprague*, 550 A.2d at 187 (conferring public interest standing where “the issue was likely to escape judicial review when those directly and immediately affected by the complained of conduct were beneficially affected as opposed to adversely affected”).

<sup>113</sup> *In re Biester*, 409 A.2d at 851 n.5 (citation omitted).

<sup>114</sup> For example, courts often take this approach when applying public interest standing for the enforcement of a public duty. See *supra* Part IV.A.

<sup>115</sup> See Randy E. Barnett, *The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights*, 22 WASH. U. J.L. & POL’Y 29, 43 (2006) (“In the end, the Court gets to decide how it wants to rule and then it can rule that way by how it chooses to [approach] the question.”).

<sup>116</sup> See *supra* Part IV.A.

must receive a judge's stamp of approval to achieve legitimacy. State courts should continue to view standing as a threshold matter that must be decided before reaching the merits of the case, rather than creating a blanket rule that all government action is subject to judicial review so long as one person decides to challenge it in court.

The second step courts employ to confer standing using the "most appropriate litigant" theory requires even more creativity. In these situations, the party bringing the action is (functionally) granted standing precisely because it initially brought suit *without standing*. In very simple terms, the potential plaintiff requests standing only because it lacks standing, and the court grants standing only because the potential plaintiff lacks it.<sup>117</sup> This is a circular and illogical argument that ignores the functional role of standing—as well as every concept encompassed in justiciability—as a threshold issue that must be satisfied before the actual merits of the case can be adjudicated.<sup>118</sup>

Standing properly informs potential plaintiffs of the type of action they can or cannot bring.<sup>119</sup> By applying the "most appropriate litigant" theory, courts reward those individuals who choose to ignore the doctrine of standing at the expense of those who adhere to it. For example, imagine a government action leaving a significant number of citizens (assume 100) unhappy. Furthermore, assume each discontented citizen approaches his or her attorney and expresses a desire to bring suit in state court to challenge the complained-of action. If none of these citizens have an actual injury, the common (and correct) answer given by attorneys will be that they cannot sue because of a lack of standing. In this scenario, the doctrine of standing will have fulfilled its role and prevented 100 lawsuits from being filed where no actual injury occurred.

However, imagine that a single attorney decides to recommend filing the lawsuit despite acknowledging the lack of standing. Surely, this attorney and plaintiff should not have their intentional disregard for the law rewarded by a court conferring standing. Surely, the fact that this one person chose to bring suit in the face of notions of justiciability should not be considered the "most appropriate litigant" only because he or she chose to ignore a basic tenet of the law. Yet, this is one of the driving rationales applied by courts in fashioning public interest standing. Combined, these two issues imply an expanded role for the judiciary and the potential for frivolous lawsuits by plaintiffs' attorneys who reap the benefit of every extension of the standing doctrine. Such an outcome is undesirable and should be rejected by state courts.

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<sup>117</sup> See Siegel, *supra* note 8, at 117–19.

<sup>118</sup> *Contra* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 639 (2006) ("[I]t is now commonplace that decisions about justiciability are often a form of decisions on the merits[,] and in particular, "[t]he penetration of merits judgments into justiciability determinations prominently occurs in standing analysis.").

<sup>119</sup> For example, in the federal system's more clearly-established standing doctrine, plaintiffs know they must be able to satisfy the case-or-controversy requirement. See *supra* Part II.

*C. Rejecting the Nominal Injury: Manufacturing Standing Where None Exists*

Perhaps the most questionable of all bases for public interest standing is the nominal injury, where state courts confer standing upon litigants with only a minor (nominal) injury-in-fact so long as it is coupled with an issue of great public importance.<sup>120</sup> In application, only a “slight private interest, added to and harmonizing with the public interest,” is sufficient to confer standing.<sup>121</sup> Generally, state courts applying this rationale acknowledge that “the law of standing . . . is construed liberally” before using the public interest to transform a nominal or slight injury into an injury-in-fact.<sup>122</sup> While state courts may grant public interest standing to offer redress for these nominal injuries, the actual impact is to allow “public importance” to create injuries where none exist.

Traditionally, standing is satisfied by the existence of a direct injury.<sup>123</sup> To require (or allow) courts to undertake a threshold analysis of the *severity* of an injury as a determinative factor for standing undermines the entire premise of standing. The law offers redress for injuries, so long as those injuries are capable of redress.<sup>124</sup> As such, all cases must fall into one of two categories: (1) the plaintiff has suffered (or alleged) an actual injury-in-fact; or (2) the plaintiff has not suffered an actual injury-in-fact. While a person may undoubtedly suffer a “slight” injury, a slightly injured person is injured nonetheless.<sup>125</sup> Clearly, then, there is no need to expand the standing doctrine to address a slight injury-in-fact.

In reality, state courts use the “nominal injury” as a creative mechanism to confer public interest standing on individuals who have suffered no cognizable harm. For example, in *McConkey v. Van Hollen*, the Supreme Court of Wisconsin conferred standing upon an individual challenging the process used to adopt a constitutional amendment against gay marriage.<sup>126</sup> The court felt that—at most—the plaintiff alleged an injury in common with all voters harmed

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<sup>120</sup> See *infra* Appendix, Table 1.

<sup>121</sup> N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm’n, 411 A.2d 168, 173 (N.J. 1980) (quoting Elizabeth Fed. Sav. & Loan Ass’n v. Howell, 132 A.2d 779, 786 (N.J. 1957)).

<sup>122</sup> *McConkey v. Van Hollen*, 783 N.W.2d 855, 860 (Wis. 2010); see *N.J. State Chamber of Commerce*, 411 A.2d at 173.

<sup>123</sup> The other requirements of standing must also be met, but as previously discussed, public interest standing is primarily intended to negate the injury-in-fact requirement. See *supra* Part II. Whether the injury is traceable to the conduct of the defendant or is capable of redress is a separate inquiry, and this Note assumes that the first requirement (injury-in-fact) is the only preclusion to standing.

<sup>124</sup> See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

<sup>125</sup> In Hawaii, for example, courts have granted standing for any manner of slight (but actual) injuries. See *Sierra Club v. Dep’t of Transp.*, 167 P.3d 292, 314–15 (Haw. 2007).

<sup>126</sup> *McConkey*, 783 N.W.2d at 858.

by an amendment improperly submitted to the people.<sup>127</sup> Furthermore, the court found it “difficult to determine the precise nature of the injury” and was “troubled by the broad general voter standing” implicated by the case.<sup>128</sup> Yet, despite these valid concerns, the court granted standing to adjudicate the claim.<sup>129</sup> In doing so, the court functionally implied that although the plaintiff was *not* injured, there was ample support to find public interest standing.

As if to illustrate the point, the court found support for its decision because it was “likely that if [plaintiff’s] claim were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit.”<sup>130</sup> Further, the court believed another plaintiff—presumably one with an actual injury—would not improve the court’s understanding of the issues.<sup>131</sup> The court actually went so far as to suggest that it was *preferable* to have a plaintiff without an injury.<sup>132</sup> If taken to its logical conclusion, this would imply that the first person to file a lawsuit will have standing so long as the controversy is sufficiently (and subjectively) “important” and the litigant zealously argues its side. Any question of injury would be removed from the analysis altogether—an outcome the Supreme Court of Wisconsin would surely want to avoid and one that cannot be used to justify public interest standing.

The nominal injury serves as a powerful representation of the entire concept of public interest standing. Essentially, each basis for public interest standing comes back to the same idea: the issue at hand is so important that the court should adjudicate it. Indeed, many courts dispose of any of these rationales and simply allow standing in matters of great public importance.<sup>133</sup> Having addressed these rationales, finding them lacking, and discovering they simply constitute different shades of the same concept, state courts should take a new approach when addressing the issue of public interest standing.

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<sup>127</sup> *Id.* at 860.

<sup>128</sup> *Id.*

<sup>129</sup> Ironically, the Supreme Court of Wisconsin neglected to actually identify the exact reasoning behind its decision to confer standing. *Id.* (“[W]hether as a matter of judicial policy, or because [plaintiff] has at least a trifling interest in his voting rights, we believe the unique circumstances of this case render the merits of [plaintiff]’s claim fit for adjudication.”). In other words, the court chose to hear the case because it was sufficiently important, irrespective of the existence or absence of standing.

<sup>130</sup> *Id.* at 861.

<sup>131</sup> *Id.*

<sup>132</sup> The court gave five reasons in total supporting standing: (1) the plaintiff zealously argued his case; (2) if the plaintiff’s claim was dismissed, another person who could meet standing requirements would almost certainly bring the case; (3) an individual who suffered an injury-in-fact would not enhance the court’s understanding of the issue; (4) analyzing the nature of the injury might require premature interpretation of the substance of the amendment (thus suggesting the court actually preferred an uninjured plaintiff); and (5) the important question of constitutional law at issue needed answered. *McConkey*, 783 N.W.2d at 860–61.

<sup>133</sup> *See, e.g., Baird v. Charleston Cnty.*, 511 S.E.2d 69, 75 (S.C. 1999) (“[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.”).

## V. A LIMITED VIEW OF PUBLIC INTEREST STANDING AND THE IMPORTANCE OF AN ANSWER

Public interest standing stands alone as the only time courts adjudicate matters lacking an injury-in-fact.<sup>134</sup> State courts often point to the absence of

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<sup>134</sup>Public interest standing, in addition to having numerous forms and rationales, is part of a subset of alternative standing doctrines utilized in state courts. These doctrines may be considered “alternative” because they deviate from the traditional (i.e., federal) form of standing in some way, shape, or form. *See generally* Nathaniel B. Edmonds, Comment, *Associational Standing for Organizations with Internal Conflicts of Interest*, 69 U. CHI. L. REV. 351 (2002) (examining associational standing); Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89 (2009) (examining statutory standing); Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263 (2012) (examining taxpayer standing).

Taxpayer standing is conferred upon an individual seeking to ensure (or force) the government to use his or her tax dollars in an appropriate manner. *See* Urquhart, *supra*, at 1272–77 (explaining the concept of taxpayer standing in federal and state courts). It generally requires a taxpayer to have paid taxes into a specific fund, at which point they have standing to sue with regards to the government’s use of the moneys in that fund. *See id.* Taxpayer standing exists in some form in nearly every state. *Id.* at 1276.

Associational standing allows organizations to litigate claims on behalf of their members. *See* *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). Associational standing (also referred to as “representational standing”) exists in both federal and state court systems. *See, e.g.,* *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557 (1996); *Int’l Union of Operating Eng’rs, Local 148, AFL-CIO v. Ill. Dep’t of Emp’t Sec.*, 828 N.E.2d 1104, 1112–13 (Ill. 2005) (applying the doctrine of associational standing); *see also* Edmonds, *supra*, at 357–58; Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 337–38 (2001); Tacy F. Flint, Comment, *A New Brand of Representational Standing*, 70 U. CHI. L. REV. 1037, 1037 (2003); Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations’ Associational Standing to Sue*, 157 U. PA. L. REV. 237, 251 (2008).

Additionally, statutory standing—which was one form of standing the petitioners in *Hollingsworth v. Perry* sought to use—can be a valid method of conferring standing without an injury so long as it is enacted by the legislature and the court system does not find it unconstitutional. *See* Pathak, *supra*, at 91. It represents a situation where the legislature has determined certain classes of persons must be allowed to seek redress in the court system. *Id.* While these doctrines are similar to public interest standing in their relaxation of federal standing requirements, even among these “alternative” doctrines, public interest standing stands alone because it is only effective in the complete absence of an injury-in-fact.

Despite often being grouped (or directly compared) to these alternative forms of standing, public interest standing is unique in three respects. First, public interest standing has no basis in, and cannot be traced to, a particularized injury-in-fact. *See supra* Part IV. Taxpayer standing involves the alleged misuse of tax dollars paid into a specific fund, and therefore includes a direct link between the injury (the misuse of tax dollars) and the party seeking standing (the party paid into that specific fund). *See* Urquhart, *supra*, at 1272. Similarly, when courts grant associational standing, the “representative” party has standing because the members of the association would have had standing based upon an injury-in-fact. *See* Heilman, *supra*, at 251. Accordingly, public interest standing deviates from the

the case-or-controversy requirement as justification for an expanded view of standing.<sup>135</sup> However, the absence of the requirement does not eliminate the sound reasoning behind it, nor should it encourage state courts to choose a drastically different path. Doing so ignores the basis of the case-or-controversy requirement and the numerous positive aspects it could bring to state courts.

State courts should adopt, or at least move toward, a more restrictive doctrine of standing by applying the reasoning used by the federal court system. The first step is for state courts to properly lay out the limits to their doctrine of standing. The federal court system, with the case-or-controversy requirement, provides notice to litigants as to what it will and will not adjudicate, thus improving the probability that most cases will be addressed on their merits. Then, by eliminating or limiting public interest standing, state courts would also adhere to the political process and separation of powers, considerations that do not (and should not) disappear simply because the case-or-controversy requirement does not strictly apply.

#### *A. Muddied Waters: The Need for a Clear Position on Public Interest Standing*

First and foremost among the positive aspects of the federal doctrine of standing is, coincidentally, the existence of the doctrine itself. Standing, as a component of justiciability, is a threshold matter that courts must dispense with before turning to the merits of any particular case.<sup>136</sup> Accordingly, it is in the

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principal characteristic of taxpayer and associational standing because both taxpayer and associational standing have a connection to an injury-in-fact, however tenuous it may be.

Second, public interest standing functionally equates to the judiciary unilaterally expanding its own authority. This implies a violation of the concept of separation of powers, and thus makes public interest standing fundamentally different from statutory standing, where the *legislature* expanded the power of the judiciary. *See, e.g.,* Cnty. of Cook *ex rel.* Rifkin v. Bear Stearns & Co., 831 N.E.2d 563, 565–66 (Ill. 2005). However, despite the attractiveness of statutory standing as more reflective of the political process, state courts have not always accepted a legislative grant of broader standing. *See id.* at 569–70 (finding a statute conferring standing upon a private party lacking an injury-in-fact unconstitutional because it usurped the state attorney's constitutionally derived power).

Finally—and perhaps most telling of all—public interest standing is applied only when no other form of standing can be found. This suggests that even those courts that confer public interest standing find it to be the weakest grounds for standing. Thus, to apply public interest standing, courts must go completely beyond both an injury-in-fact and the entire political process.

<sup>135</sup> *See, e.g.,* Sierra Club v. Dep't of Transp., 167 P.3d 292, 312 (Haw. 2007).

<sup>136</sup> However, as the Supreme Court recently noted, Article III requires that an “actual controversy” persist throughout *all* stages of litigation. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013). This means that, at least in federal court, parties must have both standing to bring an action and standing to appeal. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). This was illustrated in *Hollingsworth v. Perry*, where the Supreme Court found that petitioners did not have standing to appeal, thus effectively

best interests of any court to establish clear standing doctrine so that potential plaintiffs will know whether they can bring a particular action. By doing so, state courts can ensure that precious judicial resources are spent adjudicating cases on the merits, rather than trying to decide whether the case should be heard at all.

Nowhere is the problem of an unclear standing doctrine more evident than in the area of public interest standing.<sup>137</sup> Because public interest standing is only applied when no actual injury is present, an ambiguous public interest standing doctrine provides little indication to potential litigants whether they will have standing. This makes it more likely that, at least until courts give a consistent answer to public interest standing, they will spend more time making decisions on whether to hear cases at all instead of adjudicating them on the merits.<sup>138</sup> Colorado's approach to public interest standing illustrates the problems with an ambiguous standing doctrine.

Colorado appears to allow public interest standing, but two major cases, *Nicholl v. E-470 Public Highway Authority*<sup>139</sup> and *Barber v. Ritter*,<sup>140</sup> have created a confusing standard that blurs the line between traditional (injury-based) standing, statutory standing, taxpayer standing, and public interest standing. In *Nicholl*, and again in *Barber*, the Supreme Court of Colorado seemed to fully embrace public interest standing.<sup>141</sup> However, deeper analysis of the context of these decisions reveals that their holdings do little to answer the question of public interest standing.

The lineage of *Nicholl* strongly supports the existence of public interest standing in Colorado. In 1955, the Supreme Court of Colorado conferred standing upon an individual who challenged the validity of an amendment to the city charter that would change the method of electing city councilmen.<sup>142</sup> The court provided an eloquent explanation for its decision, one that looks very

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rendering the District Court's opinions as the final decision in the case. *See* 133 S. Ct. 2652, 2668 (2013); *see also* Weiss, *supra* note 4.

<sup>137</sup> *See* Hershkoff, *supra* note 57, at 1854–55 (noting that nearly every state confers some form of taxpayer standing).

<sup>138</sup> For example, the most recent litigation involving public interest standing in Ohio lasted almost three years without a single brief or argument on the merits. *See generally* ProgressOhio.org, Inc. v. JobsOhio, 13 N.E.3d 1101 (Ohio 2014); ProgressOhio.org, Inc. v. JobsOhio, No. 11CVH0810807, 2011 WL 12565593 (Ohio Ct. Com. Pl. Dec. 2, 2011) (original complaint filed Aug. 29, 2011).

<sup>139</sup> *Nicholl v. E-470 Public Highway Auth.*, 896 P.2d 859 (Colo. 1995) (en banc).

<sup>140</sup> *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008) (en banc).

<sup>141</sup> In both cases, the Court made the following statement in conferring standing: “[E]ven where no direct economic harm is implicated, a citizen has standing to pursue his or her interest in ensuring that governmental units conform to the state constitution.” *Barber*, 196 P.3d at 246; *Nicholl*, 896 P.2d at 866 (citing *Dodge v. Dep’t of Soc. Servs.*, 600 P.2d 70, 71 (Colo. 1979) (en banc)). This statement, on its face, would appear to demonstrate the existence of public interest standing in the form of challenging the constitutionality of government acts. *See supra* Part IV.C.

<sup>142</sup> *Howard v. City of Boulder*, 290 P.2d 237, 238 (Colo. 1955) (en banc).



familiar<sup>143</sup> as a tenet of public interest standing.<sup>144</sup> How, then, can such a clear and concise espousal of public interest standing, dating all the way back to 1955, not provide a clear answer as to Colorado's standing doctrine?

The answer, or lack thereof, is derived from Colorado's inconsistent framework of standing and its application in *Barber* and *Nicholl*. First, the actual framework of standing itself is confusing and inconsistent. The Supreme Court of Colorado generally employs a two-part test for standing: (1) the plaintiff must suffer "injury-in-fact," and (2) the injury must be to a "legally protected interest as contemplated by statutory or constitutional provisions."<sup>145</sup> Despite this standard, the *Barber* court simultaneously required an actual injury<sup>146</sup> while also (contradictorily) repeating the language from *Nicholl* supporting public interest standing without an injury-in-fact.<sup>147</sup> The best explanation for such inconsistency is that the Supreme Court of Colorado considers governmental violations of constitutional provisions as providing an injury-in-fact to all citizens of Colorado.<sup>148</sup>

Regardless, application of this framework to *Barber* and *Nicholl* does nothing to clarify public interest standing. In both cases, the Supreme Court of Colorado concurrently referenced an actual injury (traditional standing), a challenge to the expenditure or transfer of public funds (taxpayer standing), and a challenge to the constitutionality of government action as conferred by the state's constitution (statutory standing) before deciding to nominally grant public interest standing.<sup>149</sup> With so many theories of standing floating around, courts and potential litigators are left unsure as to whether Colorado truly allows public interest standing.<sup>150</sup>

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<sup>143</sup> See *supra* Part IV.

<sup>144</sup> *Howard*, 290 P.2d at 238 ("The interest and concern of plaintiff as a taxpayer is not primarily confined to himself alone, but is of great public concern; particularly so when it is apparent that the municipality and its officers have avoided doing anything that would raise the question of the validity of their acts . . . . If a taxpayer and citizen of the community be denied the right to bring such an action . . . then wrong must go unchallenged, and the citizen and taxpayer reduced to mere spectator without redress. We can think of none who have a better right.") (internal quotation marks omitted).

<sup>145</sup> *Barber*, 196 P.3d at 245 (quoting *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977)). Naturally, the existence of an actual "injury-in-fact" would seem to eliminate the need for public interest standing. See *infra* Part IV.

<sup>146</sup> *Id.* at 246 (explaining that an injury that is indirect or incidental will not convey standing).

<sup>147</sup> *Id.* ("[E]ven where no direct economic harm is implicated, a citizen has standing to pursue his or her interest in ensuring that governmental units conform to the state constitution.").

<sup>148</sup> "[W]e have interpreted *Wimberly* to confer standing when a plaintiff argues that a governmental action *that harms him* is unconstitutional." *Id.* at 246. (quoting *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004) (emphasis added)).

<sup>149</sup> See *id.* at 246–47; *Nicholl v. E-470 Public Highway Auth.*, 896 P.2d 859, 865–66 (Colo. 1995) (en banc).

<sup>150</sup> As if to drive this point home, the concurring opinion in *Barber* questioned the approach of the majority in merging these vastly different concepts of standing, as well as

Reading through the decision in *Barber*, it is nearly impossible to decide which form of standing the Supreme Court used as a backdrop for its decision. Taxpayer standing? Statutory standing? A general “public importance” doctrine? Such questions are, at present time, without a definitive answer. Unsurprisingly, at least one division of the Colorado Court of Appeals, clearly perplexed by *Barber*, concluded that Colorado’s standing doctrine still requires some injury or “nexus” between the plaintiff and the alleged conduct.<sup>151</sup>

The decision of the Colorado appellate court is likely to be a common outcome when state courts are unclear about the contours of standing. Without a clear indication of the limitations (or lack thereof) on public interest standing, various trial courts and appellate courts will attempt to follow the reasoning of the court of last resort with limited knowledge and insight, relying on assumptions regarding the highest court’s rationale. The ramifications of this outcome include the possibility of numerous inconsistent standards between courts in the same state,<sup>152</sup> an influx of lawsuits with tenuous grounds for standing, and general confusion for potential plaintiffs and litigants everywhere. With the ultimate goal of the judiciary to adjudicate disputes on the merits, the Supreme Court of Colorado, along with other states in similar situations, should establish a clear framework answering the question of whether it will allow public interest standing without an injury.<sup>153</sup>

The confusion of state courts’ use of the public interest doctrine stands in stark contrast to the federal court system’s jurisprudence on standing. While novel questions of standing still arise, the Supreme Court of the United States has maintained a consistent approach to public interest standing that can be seen

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the long-term impact of such a framework and decision. *See Barber*, 196 P.3d at 254 (Eid, J., concurring).

<sup>151</sup> *Hotaling v. Hickenlooper*, 275 P.3d 723, 726–27 (Colo. Ct. App. 2011) (reading *Barber* as applying taxpayer standing—and thus finding some form of actual injury—because “based on the context of the [decision] and the holdings of the cases on which the court relied, [] the court did not intend to dispense with the requirement that there be some nexus” between the plaintiff and the challenged government action). The *Hotaling* court made this conclusion despite the Supreme Court of Colorado’s clear statement in *Barber* that “when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision . . . such an averment satisfies the two-step standing analysis.” *Id.* at 726 (internal quotation marks omitted).

<sup>152</sup> For example, Colorado has sixty-four county courts, twenty-two district courts, and several divisions within the Court of Appeals. *See Colorado’s State Court System*, COLO. JUD. BRANCH, <http://www.courts.state.co.us/Courts/Index.cfm> (last visited Apr. 13, 2015), archived at <http://perma.cc/V6JR-E8D3>. Thus, there is a very real possibility that these various courts will interpret the Supreme Court of Colorado’s inconclusive standing doctrine in different ways, resulting in numerous standards of standing in the same state.

<sup>153</sup> The Colorado Court of Appeals concluded that the Supreme Court of Colorado made its decision in *Barber* based solely on taxpayer standing. *Hotaling*, 275 P.3d at 726. However, the language used by the Supreme Court of Colorado indicates that *if* it indeed intended to apply taxpayer standing, it stretched the concept so far as to make it analogous to public interest standing. *See Barber*, 196 P.3d at 246–47.

from its decisions and applied in future cases.<sup>154</sup> Although this consists of a complete rejection of the concept of public interest standing, the importance of an answer to the question of public interest standing cannot be overstated. Too many states lack a coherent approach to public interest standing, and the first step these states should take is to define whether they allow public interest standing.

### *B. Developing a Limited Model of Standing Grounded in Considerations of Separation of Powers and Judicial Efficiency*

Having established the absolute necessity for a coherent approach to public interest standing, state court systems should draw heavily from the federal system's approach to standing in fashioning their own individual frameworks. Those states without clearly-defined public interest doctrine should reject it in favor of traditional notions of standing, while those allowing public interest standing should curb the extent to which it applies.

The concept of federalism recognizes the differences between the federal government and state governments.<sup>155</sup> Inherent in this concept is an emphasis on sovereignty; the idea that states (and their courts) should construct identities distinct from federal influence.<sup>156</sup> However, this does not, and indeed should not, encourage state courts to apply different reasoning and rationale to the law simply because they are not bound by the Constitution or federal courts. Herein lies a key distinction, one often lost as state courts expand standing doctrine: the fact that the case-or-controversy requirement does not extend to state courts does *not* constitute an unimpeachable mandate to expand standing in whatever manner each state court sees fit. This is not to say that the case-or-controversy requirement should uniformly apply to state courts; rather, it is an acknowledgement of the strong history and policy considerations underlying federal standing requirements.<sup>157</sup> The reasoning underlying standing in federal courts offers a sound framework that state courts should incorporate, as both court systems share many of the same concerns and play similar roles in tripartite systems of government.

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<sup>154</sup> See *supra* Part II.

<sup>155</sup> See, e.g., Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2009) ("Federalism is a system that permits minorities to rule, and we are intimately familiar with its benefits: federalism promotes choice, competition, participation, experimentation, and the diffusion of power.")

<sup>156</sup> *Id.*

<sup>157</sup> Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) ("There is, I think, a functional relationship [between standing and separation of powers], which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.").

Two considerations underlying the federal standing doctrine are equally present in state courts, and should lead to a restriction of public interest standing. First, the concept of separation of powers and the proper role of the judiciary strongly support a more restrictive view of public interest standing. Second, the need for judicial efficiency and the current burden on the court system provide encouragement to state courts to limit or reject the application of public interest standing. Together, these considerations provide strong support for the limiting of public interest standing.

Separation of powers is one of the founding principles of the United States collectively, as well as the states individually.<sup>158</sup> The Supreme Court of the United States often references separation of powers as a primary reason for the existence of justiciability and for limiting standing doctrine.<sup>159</sup> The concept should, and can, be similarly persuasive in state courts to reign in the broad application of public interest standing.<sup>160</sup> Considering nearly every state draws heavily from federal law in its explanation and application of standing,<sup>161</sup> this is a simple extension of one of the best-supported principles in federal law.

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<sup>158</sup> See Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 472 (2011) (“The federal government and all state governments are structured around the principle of separation of powers.”). Unsurprisingly, the concept of separation of powers has been studied extensively at the federal level. See, e.g., Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 717–23 (1997); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1978–85 (2011). Although state courts rarely reference the concept when implementing public interest standing, considerations for separation of powers are nonetheless present in individual states as well. See, e.g., David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655, 665–81 (2011); John V. Orth, “Forever Separate and Distinct”: *Separation of Powers in North Carolina*, 62 N.C. L. REV. 1, 3–10 (1983).

<sup>159</sup> See *supra* Part II.B.

<sup>160</sup> However, this is not to suggest that federal and state court systems are identical or should be treated as such. See Hershkoff, *supra* note 57, at 1884–86 (“[The federal government system] does not adequately describe the diverse, redundant, overlapping, and often semiprivate governance structures of the fifty states. States are not required to adopt separation of powers, nor as Judge Posner explained, are they required to ‘imitate the separation of powers prescribed for the federal government.’ At their foundings, the states devised their institutions of government differently, and like most state constitutional arrangements, these provisions have often undergone significant amendment over the years. Separation of powers is thus not a stable concept, even within a single state. The variety of local governance structures further complicates the picture: local governments are also not required to conform to federal-style separation of powers and, for the most part, do not. In addition, the institutions of state government do not have the same capacities or structures as do the branches they parallel in the federal government. Although separation of powers shows marked variation in the fifty states, one can draw general distinctions between the state systems and the federal system that implicate justiciability and challenge many of the assumptions underlying federal doctrine as applied to state courts.” (footnotes omitted)).

<sup>161</sup> Even those states that explicitly allow public interest standing regularly apply the “traditional” view of standing in cases, relying on public interest standing only when there is no injury. See, e.g., *State ex rel. Cittadine v. Ind. Dep’t of Transp.*, 790 N.E.2d 978, 979

Public interest standing endangers the purpose of separation of powers because it essentially allows the judiciary to expand its own jurisdiction, and therefore its own power. In these circumstances, differences between state and federal governments<sup>162</sup> actually seem to support a stricter application of the standing doctrine. Particularly, judicial elections—and the implications of an elected judiciary—necessitate a limitation of public interest standing.<sup>163</sup> Of particular concern is the likelihood that majority opinion, private interests, or both will inappropriately influence judges.<sup>164</sup> When judges must stand election, they are likely to cater to their own interests, and a primary interest is reelection.<sup>165</sup> Thus, given the opportunity to weigh in on matters normally beyond the scope of the judiciary, judges have enormous incentive to do so by conferring public interest standing in cases that would be politically beneficial for reelection.<sup>166</sup>

These concerns flow directly into issues of judicial activism and judicial efficiency. If public interest standing, in its purest form, boils down to courts conferring standing because the case at hand is sufficiently “important,” the standard for standing will vary from judge to judge, court to court, and issue to issue. Simply put, where do we (or courts) draw the line between a case that is publicly “important” and one that is not? And won’t courts necessarily have to redraw that line time and again, depending on what issues are currently “important” to the public? It is hard to imagine a more subjective scenario arising from a concept originally meant to be limited to objective injuries-in-fact.<sup>167</sup>

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(Ind. 2003) (beginning an analysis of standing with traditional, injury-based standing before turning to public interest standing); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1081 (Ohio 1999) (same).

<sup>162</sup> See *supra* Part III.

<sup>163</sup> The malleability of state law also supports a rejection of public interest standing. It is much easier for the people to effectuate changes in state law than federal law through amendments to state constitutions. See *supra* Part III.C. Thus, there is a lesser need for the judiciary to take matters into its own hands to correct problems of state law when no injury has occurred because the people themselves—who, collectively, are theoretically those harmed in cases requiring public interest standing—have the ability to remedy the problem themselves through a constitutional amendment.

<sup>164</sup> Pozen, *supra* note 80, at 278, 290 (classifying these dual concerns as (1) the “majoritarian difficulty,” or how elections may influence judges’ decision making at a systematic level; and (2) “favoritism,” or how private interests may influence decision making at a particularized level).

<sup>165</sup> *Id.* at 283 (“If these unelected judges do not have life tenure—as they do in only one state—and do not face a scrupulously apolitical reappointment authority, they too may face majoritarian pressures related to the likelihood of retaining their post.” (footnotes omitted)).

<sup>166</sup> Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988) (“[T]he entire concept of the rule of law requires that judges decide cases based on their views of the legal merits, not based on what will please voters.”).

<sup>167</sup> Ironically, public interest standing requires the court to go beyond standing and debate, to some extent, the merits of the case itself. Although the court does not need to

Public interest standing will inevitably lead to litigation focusing solely on expanding standing doctrine, or bogged down for years in arguments over standing without ever reaching the merits. Perhaps the biggest complaint with the court system is the slow, drawn-out nature of litigation. Timetables are extended when lawyers spend years arguing whether an issue is “important enough” to warrant reaching its merits. Stricter standing requirements encourage judicial efficiency and limit frivolous lawsuits. It is surely no coincidence that as court dockets become more crowded, many state court systems have joined a trend of reeling in or limiting the bounds of public interest standing.<sup>168</sup> State courts should keep with this pattern, and follow the sound reasoning of the federal court system, in keeping with essential judicial principles such as separation of powers, judicial independence, and judicial efficiency.

## VI. CONCLUSION

Public interest standing is a compelling concept, one that appeals to plaintiffs’ attorneys, activist groups (and judges), and political parties, among others. Even more so, it appeals to notions of fairness and the public’s view that the court system exists to solve disputes. However, the inapplicability of the Federal Constitution to states should not be viewed as a directive to intentionally deviate from the contours of the federal court system’s approach to standing doctrine. The federal system adheres strictly to the case-or-controversy requirement, which limits federal courts’ jurisdiction to situations where parties have a genuine dispute and a specific injury so the courts can offer redress. Federal courts thus completely reject public interest standing, which by definition exists only in the absence of an actual injury.

Differences between federal and state court systems could support an alternative view of standing. States are not bound by the Federal Constitution, and most state constitutions do not have a similar case-or-controversy requirement. Additionally, judicial elections (and therefore judicial accountability), along with the malleability of state law, suggest that the judiciary should play a more active role in states’ tripartite system of government.

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actually rule on the merits to confer public interest standing, it does need to decide the magnitude the case’s impact—which requires some inquiry into the merits.

<sup>168</sup> See, e.g., *State ex rel. Reed v. Neb. Game & Parks Comm’n*, 773 N.W.2d 349, 355 (Neb. 2009) (“Other than challenges to the unauthorized or illegal expenditure of public funds[, i.e. taxpayer standing], our more recent cases have narrowed such exceptions to situations where matters of great public concern are involved.”). Compare *State ex rel. Howard v. Okla. Corp. Comm’n*, 614 P.2d 45, 52 (Okla. 1980) (allowing public interest standing to enforce public duty), with *Indep. Sch. Dist. No. 5 v. Spry*, 292 P.3d 19, 20 (Okla. 2012) (applying a more restrictive, traditional doctrine of standing to dismiss an action challenging the constitutionality of a legislative enactment).

However, upon closer examination, the rationales supporting public interest standing are unconvincing. The checks and balances of tripartite government, as well as the electoral accountability of the other branches (and, in certain states, the judiciary), demonstrate that adequate means already exist to ensure that public officials fulfill their duties. Similarly, the conclusion that the court must grant standing to a party without it just to ensure *somebody* can challenge an action incorrectly assumes all constitutional challenges are legitimate, and absurdly creates standing only because it does not exist in the first place. Finally, the concept of a nominal injury illustrates the true heart of public interest standing: by definition, a party has an injury or it does not, and nominal injuries are (as the adjective suggests) merely an excuse to grant standing in cases courts deem “important enough” to adjudicate.

State courts must address public interest standing head-on. Too many states remain silent or, more problematically, have inconsistent or contradictory jurisprudence on public interest standing. State courts should draw on principles from the federal system to either reject public interest standing entirely or curb its use. Specifically, the reasoning underlying the case-or-controversy requirement is transferable to state courts.

Public interest standing equates to the judiciary expanding its own power, often at the expense of the political process or another branch of government. Considering the political accountability of the other branches and the malleability of state law, the people have the power and the ability to enact changes and challenge government action without requiring (or allowing) courts to meddle. This aligns with the view of the Supreme Court of the United States, as well as numerous state supreme courts, that it is inappropriate for the judiciary to issue advisory opinions or serve as a forum for general grievances. Finally, limiting public interest standing furthers judicial efficiency, as more time will be spent litigating the merits of cases rather than attempting to identify which cases are “important enough” to warrant adjudication.

The pillars of public interest standing are tenuous at best, constituting the manifestation of courts with a disposition to activism and advisory roles. Although public interest standing is far too prevalent and common to be completely eliminated, the implications of its use are discomforting and the consequences upon a heavily-taxed and oft-questioned judiciary should lead state courts to revisit, reevaluate, and ultimately reign in their standing doctrine.

## APPENDIX

Table 1: *Fifty-State Survey of Public Interest Standing*

State	Form	Case(s)
Alabama	No Public Interest Standing	<i>Ex parte</i> Ala. Educ. Television Comm'n, 2013 WL 5394359 (Ala. Jan. 24, 2014)
Alaska	Most Appropriate Litigant	Baxley v. State, 958 P.2d 422 (Alaska 1998)
Arizona	Enforcement of Public Duties and Challenges of Constitutionality	Sears v. Hull, 961 P.2d 1013 (Ariz. 1998)
Arkansas	No Public Interest Standing	Springdale Sch. Dist. No. 50 v. The Evans Law Firm, P.A., 200 S.W.3d 917 (Ark. 2005)
California	Enforcement of Public Duties and Challenges of Constitutionality	Save the Plastic Bag Coal. v. City of Manhattan Beach, 254 P.3d 1005 (Cal. 2011)
Colorado	Enforcement of Public Duties and Challenges of Constitutionality	Barber v. Ritter, 196 P.3d 238 (Colo. 2008)
Connecticut	No Public Interest Standing	West Farms Mall, LLC v. Town of West Hartford, 901 A.2d 649 (Conn. 2006)
Delaware	No Public Interest Standing	Oceanport Indus., Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892 (Del. 1994)
Florida	No Public Interest Standing	Legal Envtl. Assistance Found., Inc. v. Clark, 668 So. 2d 982 (Fla. 1996)
Georgia	Enforcement of Public Duties and Challenges of Constitutionality	Rothschild v. Columbus Consol. Gov't, 678 S.E.2d 76 (Ga. 2009)
Hawaii	Nominal Injury	Sierra Club v. Dep't of Transp., 167 P.3d 292 (Haw. 2007)
Idaho	No Public Interest Standing	Young v. City of Ketchum, 44 P.3d 1157 (Idaho 2002)
Illinois	No Public Interest Standing	Cnty. of Cook <i>ex rel.</i> Rifkin v. Bear Stearns & Co., 831 N.E.2d 563 (Ill. 2005)
Indiana	Enforcement of Public Duties and Challenges of Constitutionality	State <i>ex rel.</i> Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978 (Ind. 2003)



State	Form	Case(s)
Iowa	No Public Interest Standing	Godfrey v. State, 752 N.W.2d 413 (Iowa 2008) (suggesting that, although the Supreme Court of Iowa has not yet done so, it would be willing to confer public interest standing)
Kansas	Enforcement of Public Duties and Challenges of Constitutionality	State <i>ex rel.</i> Morrison v. Sebelius, 179 P.3d 366 (Kan. 2008)
Kentucky	No Public Interest Standing	Bailey v. Preserve Rural Roads of Madison Cnty., Inc., 394 S.W.3d 350 (Ky. 2011)
Louisiana	No Public Interest Standing	State v. Williams, 94 So. 3d 770 (La. 2012)
Maine	No Public Interest Standing	Lindeman v. Comm'n on Gov't Ethics and Election Practices, 961 A.2d 538 (Me. 2008)
Maryland	No Public Interest Standing	Kendall v. Howard Cnty., 66 A.3d 684 (Md. 2013)
Massachusetts	Enforcement of Public Duties and Challenges of Constitutionality	Tax Equity Alliance for Mass. v. Comm'r of Revenue, 672 N.E.2d 504 (Mass. 1996)
Michigan	Most Appropriate Litigant	Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686 (Mich. 2010)
Minnesota	No Public Interest Standing	State <i>ex rel.</i> Humphrey v. Philip Morris Inc., 551 N.W.2d 490 (Minn. 1996)
Mississippi	No Public Interest Standing	City of Picayune v. S. Reg'l Corp., 916 So. 2d 510 (Miss. 2005)
Missouri	No Public Interest Standing	Manzara v. State, 343 S.W.3d 656 (Mo. 2011)
Montana	Enforcement of Public Duties and Challenges of Constitutionality	Comm. for an Effective Judiciary v. State, 679 P.2d 1223 (Mont. 1984)
Nebraska	Most Appropriate Litigant	State <i>ex rel.</i> Reed v. State, Game and Parks Comm'n, 773 N.W.2d 2349 (Neb. 2009)
Nevada	No Public Interest Standing	Heller v. Legislature of State of Nev., 93 P.3d 746 (Nev. 2004)
New Hampshire	No Public Interest Standing	Asmussen v. Comm's, N.H. Dep't of Safety, 766 A.2d 678 (N.H. 2011)

State	Form	Case(s)
New Jersey	Nominal Injury	Jen Electric, Inc. v. Cnty. of Essex, 964 A.2d 790 (N.J. 2009)
New Mexico	Enforcement of Public Duties and Challenges of Constitutionality	New Energy Economy, Inc. v. Martinez, 247 P.3d 286 (N.M. 2011)
New York	No Public Interest Standing	Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 573 N.E.2d 1034 (N.Y. 1991)
North Carolina	Nominal Injury	Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004)
North Dakota	No Public Interest Standing	N.D. Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551 (N.D. 2001)
Ohio	Enforcement of Public Duties and Challenges of Constitutionality	State <i>ex rel.</i> Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (1999)
Oklahoma	Enforcement of Public Duties and Challenges of Constitutionality	State <i>ex rel.</i> Howard v. Okla. Corp. Comm'n, 614 P.2d 45 (Okla. 1980)
Oregon	Enforcement of Public Duties and Challenges of Constitutionality	Kellas v. Dep't of Corrections, 145 P.3d 139 (Or. 2006) (public interest standing provided for by statute)
Pennsylvania	Most Appropriate Litigant	<i>In re</i> Hickson, 821 A.2d 1238 (Pa. 2003); Sprague v. Casey, 550 A.2d 184 (Pa. 1988)
Rhode Island	No Public Interest Standing	Haviland v. Simmons, 45 A.3d 1246 (R.I. 2012)
South Carolina	Enforcement of Public Duties and Challenges of Constitutionality	Sloan v. Wilkins, 608 S.E.2d 579 (S.C. 2005)
South Dakota	Enforcement of Public Duties and Challenges of Constitutionality	Stumes v. Bloomberg, 551 N.W.2d 590 (S.D. 1996)
Tennessee	No Public Interest Standing	City of Chattanooga v. Davis, 54 S.W.3d 248 (Tenn. 2001)
Texas	No Public Interest Standing	Andrade v. Venable, 372 S.W.3d 134 (Tex. 2012); Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547 (Tex. 2000)
Utah	Most Appropriate Litigant	Gregory v. Shurtleff, 299 P.3d 1098 (Utah 2013)

State	Form	Case(s)
Vermont	No Public Interest Standing	Franklin Cnty. Sheriff's Office v. St. Albans City Police Dep't, 58 A.3d 207 (Vt. 2012)
Virginia	Enforcement of Public Duties and Challenges of Constitutionality	Hertz v. Times-World Corp., 528 S.E.2d 458 (Va. 2000)
Washington	Most Appropriate Litigant	Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake, 83 P.3d 419 (Wash. 2004)
West Virginia	No Public Interest Standing	State ex rel. Billy Ray C. v. Skaff, 438 S.E.2d 847 (W. Va. 1993)
Wisconsin	Nominal Injury	McConkey v. Van Hollen, 783 N.W.2d 855 (Wis. 2010)
Wyoming	Enforcement of Public Duties and Challenges of Constitutionality	Jolley v. State Loan & Inv. Bd., 38 P.3d 1073 (Wyo. 2002)

