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**DOES THE SUPREME COURT IGNORE STANDING PROBLEMS  
TO REACH THE MERITS? EVIDENCE (OR LACK THEREOF)  
FROM THE ROBERTS COURT**

Heather Elliott\*

The Supreme Court is often accused of using standing doctrine to manipulate its docket. Critics frequently see dismissals for lack of standing not as legitimate decisions about jurisdiction (for example, a correct determination that a plaintiff suffered no cognizable injury, or that the suit seeks no remedy that will redress a claimed injury), but instead as the Court's avoidance of a sensitive merits decision or even as bias against a particular class of plaintiffs.<sup>1</sup> So, for example, the Court's recent dismissal for lack of standing of the marriage equality case, *Hollingsworth v. Perry*,<sup>2</sup> seems to be an effort to avoid issuing a merits decision that would have precluded further percolation of the marriage equality question among the states.

If standing is a method of docket manipulation, then we might also expect the Court to find standing present, despite standing problems, when it wants to reach the merits of a case. But the absence of a standing discussion is an example of manipulation only if there is no standing. Many cases lack standing discussions because such discussions are unnecessary (standing is obvious); in such cases, no manipulation has occurred. In other cases, the absence of a standing discussion may in fact reveal a Court ignoring standing to reach the merits—recent examples include the Affordable Care Act case, *NFIB v. Sebelius*,<sup>3</sup> and the affirmative action case, *Fisher v. University of Texas*.<sup>4</sup> If such manipulation is found to be widespread, it would mean that a

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\* Professor of Law, The University of Alabama School of Law. Many thanks to Robert Marshall, Penny Gibson, and Blake Beals of the Law School's library, who did the vast majority of the database work. Kudos to Tara Grove, who organized the panel, "Standing in the Roberts Court," for the 2014 Association of American Law Schools Annual Meeting. I am grateful for her invitation to me to participate, her peerless management of the details, and the opportunity to write this Essay. Thanks to my copanelists Dick Fallon, Vicky Banks, Steve Calabresi, and Annie Woolhandler, and to our moderator, Gillian Metzger, for a fascinating discussion. Thanks especially to Fred Vars, who gave me extremely helpful comments on a mature draft of this Essay.

<sup>1</sup> Professor Pierce, for example, studied cases in the environmental area and discovered that federal appellate judges appointed by Republican presidents were much more likely than those appointed by Democratic presidents to dismiss environmental plaintiffs for lack of standing. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

<sup>2</sup> 133 S. Ct. 2652 (2013).

<sup>3</sup> 132 S. Ct. 2566 (2012).

<sup>4</sup> 133 S. Ct. 2411 (2013).

majority of Supreme Court justices are regularly ignoring the constitution to exercise power that they do not have.

To see whether this is a common strategy for the Court, a more general examination of the docket is required. Professor Staudt, for example, took the approach of looking at all cases within a particular area (taxpayer lawsuits) and concluded that judges sometimes manipulate standing doctrine to reach favored results, but much less frequently than they were accused.<sup>5</sup>

The theme of this panel, “Standing in the Roberts Court,” presents an excellent opportunity to use a different method of empirical analysis. Chief Justice Roberts joined the Court for the October Term of 2005, and his eight terms as Chief offer a manageable sample of cases (a total of 638 merits opinions). Moreover, the Roberts Court is the *current* Court, meaning that conclusions drawn from this analysis are relevant to today’s litigants. As I discuss below in Part II, I have identified two primary sets of cases that would permit the accusation of manipulation: cases where the Court addressed standing, implausibly found it present, and reached the merits (what I will call the Implausible Cases); and cases where the Court failed to discuss standing, yet the court or courts below discussed standing extensively, suggesting that standing was at issue in the case (what I will call the Avoidance Cases).<sup>6</sup> These cases are particularly worth considering because a Court concerned about its dignity seems more likely to avoid than to include an implausible standing analysis.

I have identified only one case that I find clearly Implausible. I have identified eighteen Avoidance Cases, which fall into three categories. First, in fourteen of the cases, the lower courts seem to have gotten the standing question right, and the Court does not need to examine standing any further (though, given the Court’s repeated emphasis on the importance of determining standing before proceeding to the merits, one might expect the Court to drop a footnote agreeing with the analysis/es below). Thus, although these cases are technically Avoidance Cases, they are not *manipulative* Avoidance Cases. Second, in three cases, including the *NFIB* case, standing was probably present, but the Court should have proved it; the absence of a standing discussion may represent the Court’s preference to ignore standing and reach the merits, a mild example of manipulation.<sup>7</sup> Third, and finally, in only one case—the *Fisher* case—standing

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<sup>5</sup> Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004).

<sup>6</sup> This sample may be underinclusive. One might instead look at all cases where the Court failed to discuss standing, as did the courts below, yet the issue was sufficiently debated in the briefs to suggest that all of the courts ignored a real standing problem. It is also possible that the parties and the courts all overlooked a standing problem in order to reach the merits. I conclude—as I explain more fully below in Part II.B—that the alignment of interests that would lead to such cases make these outcomes unlikely.

<sup>7</sup> The avoidance of a standing discussion might also be an example of constitutional-question avoidance. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936). But avoiding a standing question would presumably mean assuming or hypothesizing jurisdiction, something that the Court forbade in *Steel Company*. See *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 94 (1998).

was probably not present, the absence of a standing discussion is highly irregular, and the Court has manipulated standing to reach the merits.<sup>8</sup>

Over eight terms, then, only one truly manipulative Avoidance Case and three further mild Avoidance Cases give meager evidence that the Court does in fact ignore standing doctrine when it wishes to reach the merits of a case. When combined with just one truly Implausible Case, *United States v. Windsor*,<sup>9</sup> the manipulation thesis (under which the Court implausibly asserts jurisdiction or improperly avoids a standing question to reach the merits) is not well supported by the cases issued during the Roberts Court. There remains the question of whether there are numerous cases where the Court appears to have *ducked* the merits by dismissing for lack of standing, and whether there is evidence in other terms for the Avoidance, Implausible, and Ducking aspects of the manipulation thesis.

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This Essay proceeds in four Parts. In Part I, I review the cases and literature that accuse the Court of using standing to manipulate the docket. Part II contains a description of the method I used to assemble the cases I have studied. I discuss the Implausible Cases in Part III; and I provide an analysis of the Avoidance Cases in Part IV.

## I. STANDING AS MANIPULATION

Standing doctrine, derived from the words “case[ ] or controvers[y]” in Article III of the Constitution,<sup>10</sup> requires a plaintiff to show that she has suffered, or will imminently suffer, an injury in fact; that this injury is at least partly traceable to the actions of the defendant; and that a judgment from the court will redress the injury, at least in part.<sup>11</sup> Standing is a threshold requirement for subject-matter jurisdiction, and the

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<sup>8</sup> *Fisher*, 132 S. Ct. at 2411.

<sup>9</sup> 133 S. Ct. 2675 (2013).

<sup>10</sup> Scholars debate whether the standing doctrine is consistent with the Founders’ understanding of Article III. Compare, e.g., Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 478 (1996) (“[T]he Court has properly emphasized that the Founders’ conception of separation of powers reflected their ‘common understanding’ about the nature of legislative, executive, and judicial power. The law of standing, however, frustrates this shared understanding.” (footnote omitted)), with Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (“We . . . argue that history does not *defeat* standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution’s meaning.”).

<sup>11</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). This test for constitutional standing under Article III is distinct from the question of “prudential standing,” which asks whether a party who *has* constitutional standing is further authorized by the relevant merits statute to proceed. See, e.g., *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). Prudential standing is beyond the scope of this discussion.

Court has, for several decades, emphasized its role in maintaining the constitutional separation of powers.<sup>12</sup> A case in which no party has standing to proceed must be dismissed, the Court emphasized, because there is no constitutional authority to proceed.

Despite the work of significant defenders,<sup>13</sup> the doctrine is widely criticized.<sup>14</sup> It has been called “incoherent,”<sup>15</sup> filled with “doctrinal confusion,”<sup>16</sup> “permeated with sophistry,”<sup>17</sup> lacking a historical basis,<sup>18</sup> and “a] . . . pointless constraint on courts.”<sup>19</sup> The Court itself has noted that “[s]tanding has been called one of the most amorphous [concepts] in the entire domain of public law,”<sup>20</sup> in part because the words “cases” and

<sup>12</sup> “[S]tanding is built on a single basic idea—the idea of separation of powers.” Allen v. Wright, 468 U.S. 737, 752 (1984). Some scholars have lauded this function of standing. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 56–57 (1994) (suggesting that standing plays an important role in reining in “the threat posed by the tenured and unaccountable Article III ‘Executive’ of the federal courts and the public interest bar”). Others have criticized it. See Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 438 (2009) (criticizing “jurisdictional barriers that limit [the court’s] ability to review Executive Branch actions”). For an argument that standing doctrine is ill-suited for serving separation of powers goals, see Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008).

<sup>13</sup> See, e.g., MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING* 282 (2000) (arguing that, given stare decisis and the existence of public choice problems with Court voting, standing helps the Court manage the flow of cases that create precedent); Steven G. Calabresi, *The Congressional Roots of Judicial Activism*, 20 J.L. & POL. 577, 590 (2004) (recommending that Congress codify *Lujan*’s standing doctrine to “strengthen the case or controversy limitations on judicial activism”); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 784 (2009) (noting that in suits against private individuals, or in which the real party in interest is a private individual, “standing doctrine protects individual liberty by shielding private parties from arbitrary exercises of private prosecutorial discretion”); Robert J. Pushaw, Jr., *Limiting Article III Standing to “Accidental” Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 82–105 (2010) (arguing that standing plays an important role in keeping cases that have been manufactured by would-be plaintiffs out of the federal courts).

<sup>14</sup> E.g., Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 15–16 (1984) (“Regrettably, it has long since become commonplace to begin any discussion of the doctrine of standing by decrying the confusion which persists in this area of the law. This conventional introduction remains appropriate today.” (internal citations omitted)).

<sup>15</sup> William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988).

<sup>16</sup> Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988).

<sup>17</sup> 4 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24.35 (2d ed. 1983).

<sup>18</sup> See, e.g., Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418–25 (1988).

<sup>19</sup> Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 75 (2007).

<sup>20</sup> *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 498 (1966) (statement of Professor Paul A. Freund)).

“controversies” “have an iceberg quality, containing beneath their surface simplicity submerged complexities.”<sup>21</sup>

More problematic, critics describe denials of standing as merits decisions costumed as threshold jurisdictional inquiries,<sup>22</sup> or normative decisions about the proper scope of government action hidden within technical jurisdictional language.<sup>23</sup> A number of scholars have said that standing doctrine is a form of substantive due process,<sup>24</sup> reflecting the Court’s importation of its own values into a mere phrase (here, “case[ or] controversies[y]”) in the Constitution.<sup>25</sup> Such criticisms are not limited to the academy. Members of the Court itself, in dissent, have accused majorities of using standing as a “cover,”<sup>26</sup> and have called the doctrine a “word game played by secret rules.”<sup>27</sup>

These latter criticisms accuse the Court of using standing to manipulate its merits docket.<sup>28</sup> Standing may be distorted to permit a court to avoid a case, as Justice Harlan contended had occurred in a 1976 case: “The Court’s treatment of injury in fact . . . threatens that it shall ‘become a catchall for an unarticulated discretion on the part of this Court’ to insist that the federal courts ‘decline to adjudicate’ claims that it prefers they not hear.”<sup>29</sup> Professor Fallon has noted this issue in the realm of remedy: if a court fears its remedy may cost too much or intrude too much on legislative spending

<sup>21</sup> Siegel, *supra* note 19, at 78.

<sup>22</sup> See, e.g., Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977).

<sup>23</sup> See, e.g., Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 70 (1984); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 305 (2002).

<sup>24</sup> See, e.g., Sunstein, *supra* note 16, at 1480; see also Fletcher, *supra* note 15, at 233; Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 167 (1992).

<sup>25</sup> Cf., e.g., Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 380 (1988).

<sup>26</sup> *Allen v. Wright*, 468 U.S. 737, 767 (1984) (Brennan, J., dissenting).

<sup>27</sup> *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

<sup>28</sup> Of course, today’s Supreme Court has extensive discretion over the contents of its docket because of the certiorari process. See 28 U.S.C. §§ 1250–1260. But because of the Rule of Four, which provides that certiorari is granted by a vote of four justices, cases may reach the docket of the Court over the objection of a majority of justices. EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 323–28 (9th ed. 2007). Sometimes the Court dismisses a petition as “improvidently granted,” (called DIGging the case), but such an outcome is rare and often criticized. See, e.g., Lyle Denniston, *Argument Recap: A Bad Way to Open a Term*, SCOTUSBLOG (Oct. 7, 2013, 1:56 PM), <http://www.scotusblog.com/2013/10/argument-recap-a-bad-way-to-open-a-term/> (discussing the disappointing first day of oral argument for the 2013 Term, involving a case ultimately DIGged). If not dismissed, the case is decided on the merits—unless the Court decides it lacks jurisdiction under, for example, the standing doctrine.

<sup>29</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 66 (1976) (quoting *Poe v. Ullman*, 367 U.S. 497, 530 (1961) (Harlan, J., dissenting)); see also Tushnet, *supra* note 22, at 664. See generally Pierce, *supra* note 1.

prerogatives, it may resort to arguments of justiciability to avoid the case.<sup>30</sup> Such avoidance is thought to be especially likely when the federal courts confront a case containing a controversial political issue.<sup>31</sup> (Of course, there is a vast number of cases involving controversial questions that the Court cannot reject on standing grounds.)<sup>32</sup>

At least two studies give empirical support to the thesis that standing is used to manipulate court decisions in favor of the political or policy preferences of judges. For example, Professor Pierce studied a set of thirty-three cases involving environmental plaintiffs and found that “a Republican judge was almost four times as likely as a Democratic judge to vote to deny an environmental plaintiff standing.”<sup>33</sup> Professor Staudt argues that judges act less on their political beliefs than Pierce and others have suggested, in part due to flaws in those studies,<sup>34</sup> but nevertheless finds, after reviewing almost 700 taxpayer standing cases in a statistical study constructed to remedy those flaws, that the more scope judges have for engaging in politically motivated standing decisions, the more likely such decisions are.<sup>35</sup>

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<sup>30</sup> See generally Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).

<sup>31</sup> For example, in *Allen v. Wright*, the Court rejected, on standing grounds, a claim that the IRS had failed to enforce nondiscrimination regulations against purportedly tax-exempt schools. *Allen*, 468 U.S. at 747–48 & n.16. The political facts behind *Allen* suggest that the Court may have been seeking to avoid a battle with the other branches. See *id.* Thus, the standing doctrine does not usefully sort cases into “controversial” and “uncontroversial” categories—a point which the Court has, in the past, recognized: “[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.” *Flast*, 392 U.S. at 99 (emphasis added). Other doctrines exist to sort issues suitable for judicial resolution: “[A] party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.” *Id.* at 100.

<sup>32</sup> E.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (filing by a woman prosecuted for possessing homegrown medical marijuana); *Lawrence v. Texas*, 539 U.S. 558 (2003) (filing by men arrested for homosexual sodomy); see also Siegel, *supra* note 19, at 96 (“[T]he justiciability doctrines, even if stringently enforced, still leave individuals empowered to litigate lawsuits . . . that affect all of society.”).

<sup>33</sup> Pierce, *supra* note 1, at 1760.

<sup>34</sup> See Staudt, *supra* note 5, at 614–15.

<sup>35</sup> Professor Staudt finds that if precedent is vague, or if a decision is likely to receive little scrutiny from a higher court, judges indulge their political preferences:

[D]istrict courts are subject to a high level of oversight and monitoring, and this works as a powerful deterrent to political decisionmaking. . . . In situations in which the appellate judges are reasonably sure the Supreme Court will not review their decisions, they will pursue their own political preferences irrespective of the existing legal precedent. . . . [T]he Supreme Court Justices, with little oversight or institutional constraints to inhibit them, make decisions that reflect their sincere policy preferences in certain contexts but engage in more strategic decisionmaking in others—all in an effort to ensure they get their favored outcome.

*Id.* at 669.

Accusations of manipulation are easy to make when a court *denies* standing in a case and thus refuses to reach the merits. Almost any case where an environmental or civil-rights plaintiff is denied standing leads to familiar complaints that the standing doctrine is being abused. Even the Supreme Court, which has virtually complete discretion in determining the cases that it hears, has been accused of using standing to get rid of cases that the majority wishes had not been taken on certiorari.<sup>36</sup>

Presumably, if courts manipulate standing to *avoid* the merits, they might also do it to *reach* the merits: they find standing present in cases where they actually should find jurisdiction lacking, in order to issue an opinion on the merits. As I show in Part II, I have attempted to identify the cases of the Roberts Court where standing might have been manipulated to allow the Court to *reach* the merits.

## II. FINDING IMPLAUSIBLE AND AVOIDANCE CASES

One might distribute cases along a spectrum from “standing” to “no standing” as follows (I use the singular “plaintiff” for simplicity’s sake, but of course many cases have multiple plaintiffs or involve the standing of defendants on appeal):

- A. Cases where no one would question the plaintiff’s standing (as in a suit claiming damages from a car accident that caused severe injuries to the plaintiff);
- B. Cases where the issue of the plaintiff’s standing might be raised, but precedent makes clear its existence (as in a citizen suit for pollution violations under the Clean Water Act by a plaintiff who regularly boats and fishes in the relevant body of water);
- C. Cases where the issue of the plaintiff’s standing is raised and seriously debated, and the outcome, whatever it is, remains debatable;
- D. Cases where the issue of the plaintiff’s standing is raised because precedent shows that it almost certainly is lacking (as in a suit by a federal taxpayer against federal spending that the taxpayer alleges violates any constitutional provision other than the Establishment Clause);
- E. Cases where no one would think that the plaintiff had standing (when the plaintiff is non-Hohfeldian—a pure private attorney general<sup>37</sup>).

To present the idea graphically:

A	B	C	D	E
Standing clearly present				Standing clearly absent

<sup>36</sup> See *supra* note 28.

<sup>37</sup> See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033 (1968).



A court that engaged in a standing analysis and then denied standing in an A or B case, or found standing present in a D or E case, would be manipulating the standing analysis to achieve some external goal (avoiding a merits question that it really should address, or reaching a merits question that it really lacks jurisdiction to hear). The former cases (denying standing in an A or B case) are beyond the scope of this Essay; the latter cases (finding standing in a D or E case) are what I call Implausible Cases.<sup>38</sup>

A court could also manipulate standing by ignoring it. A court that failed to engage in any standing analysis whatever, when the case is a C, D, or E case, is ignoring an obvious question about its subject-matter jurisdiction, a question it must address (*sua sponte*, if necessary) before proceeding to the merits. I call these cases Avoidance Cases.

#### A. Implausible Cases

We<sup>39</sup> ran a search of the Westlaw Supreme Court database for the term (standing /40 “article iii” “art. 3” “article 3” “art. III” injur! trace! caus! redress!) on the assumption that any case engaging in a standing analysis would be found by that search. The search was date-limited to the Roberts Court and it found fifty-nine cases as of March 21, 2014. This search found some cases where the majority did *not* discuss standing, but a dissenting justice did, and I reclassified those as potential Avoidance Cases. I then eliminated any false positives (cases where, despite the limitations in the search term, “standing” was used in its nonjurisdictional sense),<sup>40</sup> any cases where the real issue was prudential standing,<sup>41</sup> any cases where the standing discussion was really a side issue,<sup>42</sup> and any cases in which the Court did not reach the merits.<sup>43</sup> I then

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<sup>38</sup> A court that squarely faces the standing issues in a C case cannot fairly be accused of manipulation, because the outcome is debatable. Such a court may, of course, be influenced by politics and policy preferences in how it decides the standing question; it may even tilt toward or away from finding standing depending on the judge’s views of the merits. But unless the standing analysis is bogus, the case is best treated as what C cases generally are: hard cases under standing doctrine, and not instances of manipulation.

<sup>39</sup> I relied heavily on the University of Alabama’s excellent law librarians for identifying the universe of cases that I then analyzed.

<sup>40</sup> *E.g.*, *Stanton v. Sims*, 134 S. Ct. 3, 4 (2013) (“*Sims* herself was *standing* behind the gate when it flew open. The swinging gate struck *Sims*, cutting her forehead and *injuring* her shoulder.” (emphasis added)); *see also* *Florida v. Jardines*, 133 S. Ct. 1409, 1425 (2013).

<sup>41</sup> *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012); *Bond v. United States*, 131 S. Ct. 2355 (2011); *Thompson v. N. Am. Stainless, LP.*, 131 S. Ct. 863 (2011); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1 (2010). As noted above, *see supra* note 11, prudential standing is not the same as Article III standing and is beyond the scope of this Essay.

<sup>42</sup> *E.g.*, *Davis v. United States*, 131 S. Ct. 2419, 2434 n.10 (2011); *Nevada Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011).

<sup>43</sup> This category includes cases where another threshold issue prevented the Court from reaching the merits, *see, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2029–30 (2011) (finding

read the remaining cases and identified those that I believed reflected an effort to overcome serious standing problems in order to reach the merits. That determination is, of course, subjective.

### *B. Avoidance Cases*

Suspecting that it would be easier to work forward (from appellate cases discussing standing that then went up to the Supreme Court on certiorari) than backward (looking at every nonstanding Supreme Court case to see if standing had been an issue below), we ran a search in the Westlaw database of federal<sup>44</sup> appellate decisions. The search was limited to reported cases<sup>45</sup> after January 1, 2001 (a date range that was, we hoped, overinclusive, to capture cases that were in the pipeline leading to potential certiorari in the Roberts Court) that satisfied the search term (standing /40 “article iii” “art. 3” “article 3” “art. III” injur! trace! caus! redress!).

We then identified the cases that were subject to a grant of certiorari by the Roberts Court. We eliminated any cases that had a substantial discussion of standing (because cases with such discussions are, by definition, not Avoidance Cases). If there was a question about whether the discussion was substantial, the case was kept in the pool. This produced a group of thirty-five cases. I then eliminated any false positives (as above, cases where “standing” was used in its nonjurisdictional sense),<sup>46</sup> cases where the Court did not issue a merits opinion,<sup>47</sup> and any cases involving solely prudential standing.<sup>48</sup>

As noted above,<sup>49</sup> a few cases we found in the search for Implausible Cases were reclassified as Avoidance Cases because the majority ignored standing while the dissent mentioned it.

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standing present but finding case moot), and cases where standing was denied. This latter category includes several notable standing decisions. *E.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (denying standing to appeal decision striking down California’s constitutional ban on marriage between same-sex couples); *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138 (2013) (denying standing to challenge allegedly illegal wiretapping by the U.S. government); *see also* *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594 (2013) (dismissing writ of certiorari as improvidently granted, with Justice Breyer dissenting and noting that both mootness and standing problems had caused the Court to dismiss).

<sup>44</sup> Because state courts are not bound by Article III, see *ASARCO v. Kadish*, 490 U.S. 605 (1989), a search of state-court cases is much less likely to be productive. However, the search will be done in a future expanded version of this Essay.

<sup>45</sup> A subsequent review of Supreme Court cases in which the underlying opinions were *unreported* added no cases requiring discussion here.

<sup>46</sup> *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>47</sup> *Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960 (2009).

<sup>48</sup> As discussed above, see *supra* note 10, prudential standing is beyond the scope of this Essay. *E.g.*, *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006).

<sup>49</sup> *See supra* Part II.A.

This resulted in a group of eighteen cases. I then read the standing discussions in the lower courts and the merits opinions from the Court itself to determine whether the Supreme Court was ducking a standing issue in order to reach the merits. That analysis was, of course, subjective.

Other searches that could expand this universe will be pursued in a future project. I intend to repeat this process in the district court database to look for cases in which the district court addressed standing but the intermediate appellate court did not, and the Supreme Court subsequently granted certiorari and did not address standing. One could also seek cases in which the petitioners and respondents before the Supreme Court made standing arguments in their briefs but the Court does not address them.

Another possible expansion of the search would be to try to find cases where the parties vigorously debated standing but the lower courts did not address it. I have no plans to pursue this avenue in this or a future project because it is virtually boilerplate in contemporary litigation to challenge the standing of the plaintiff, at least where such a challenge can colorably be made. The payoff of such a search would seem small.

Naturally, the most manipulative of Avoidance Cases would be one where everyone—all the parties, all the judges, and all the amici—colluded to ignore a standing problem. Such a case would not be picked up by any search, because standing was not discussed in any of the reported cases. The only conceivable way to identify such cases would be to read every Supreme Court case for the last eight terms, including the full record below, trying to decide if a hidden standing issue was lurking. I have decided against this approach because, given our adversarial system and given the diversity of judges on the bench, I find it highly improbable that any such case could make it all the way to a Supreme Court judgment without *someone* mentioning the standing problem.<sup>50</sup>

### III. THE IMPLAUSIBLE CASES

The vast majority of the cases found under this search were uncontroversial: the Court either mentions standing solely as part of describing the lower courts' decisions,<sup>51</sup> or simply to note that standing is obvious.<sup>52</sup> Other cases certainly involve controversial issues, but the standing decision itself seems hard to argue with.<sup>53</sup> Other

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<sup>50</sup> In a future expanded version of this project, I plan to analyze a random sample of cases to see if I find any cases that disprove these assumptions.

<sup>51</sup> *E.g.*, *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2114 (2013).

<sup>52</sup> *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3163 n.12 (2010); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot.*, 560 U.S. 702, 729 n.10 (2010); *Horne v. Flores*, 557 U.S. 433, 445 (2009).

<sup>53</sup> *E.g.*, *Salazar v. Buono*, 130 S. Ct. 1803, 1815 (2010) (finding that the United States had waived its challenge to Buono's standing by failing to appeal in an earlier case and found standing in the instant case based on the existing injunction granted in the earlier case: "Based

cases involved a standing issue that certainly could have been decided either way, but the Court's decision seems entirely plausible. For example, in *Monsanto Co. v. Geertson Seed Farms*,<sup>54</sup> the Court found standing for conventional alfalfa growers to challenge the release of a genetically altered alfalfa plant; standing was premised on the additional costs the farmers would have to incur in testing their crops for genetic contamination.<sup>55</sup> While questions certainly could be raised about the imminence of the risk faced by the farmers, the Court's decision finding standing is not implausible.

Some critics<sup>56</sup> certainly would find *Massachusetts v. EPA*<sup>57</sup> and *AEP v. Connecticut*<sup>58</sup> implausible for their standing conclusions, but I do not. In the former case, the Supreme Court addressed the EPA's authority to regulate greenhouse gases related to global climate change after finding that Massachusetts had standing to sue.<sup>59</sup> The state had shown that it was losing shoreline on account of the rising sea levels caused by global warming. "Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner . . . Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars."<sup>60</sup> This kind of economic harm is, of course, at the core of injury in fact.<sup>61</sup>

Admittedly, the causation and redressability aspects of the case were more complicated: the regulations at issue would control only a small category of emissions, and gases emitted from China and India were likely to swamp any effect that the U.S. regulations would have.<sup>62</sup> But the majority responded plausibly: the majority held that Article III has never required *complete* redress, that the federal government should be free to take an incremental approach, and that the federal regulation, if implemented, would certainly slow the process of global warming.<sup>63</sup> I thus find the standing analysis within the bounds of plausibility.<sup>64</sup>

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on the rights he obtained under the earlier decree—against the same party, regarding the same cross and the same land—his interests in doing so were sufficiently personal and concrete to support his standing.”)

<sup>54</sup> 561 U.S. 139 (2010).

<sup>55</sup> *Id.* at 140.

<sup>56</sup> See, e.g., Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. ONLINE 75 (2007).

<sup>57</sup> 549 U.S. 497 (2007).

<sup>58</sup> 131 S. Ct. 2527 (2011).

<sup>59</sup> *Massachusetts v. EPA*, 549 U.S. at 504–05.

<sup>60</sup> *Id.* at 523 (internal citations omitted).

<sup>61</sup> See, e.g., *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (“While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms.”).

<sup>62</sup> See *Massachusetts v. EPA*, 549 U.S. at 542–47 (Roberts, C.J., dissenting).

<sup>63</sup> *Id.* at 523–25.

<sup>64</sup> Cf. Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 959 (arguing that the problem with *Massachusetts v. EPA* is not the conclusion the

I acknowledge that the case is controversial, however. It is burdened with a lengthy discussion of state sovereignty that ultimately has nothing to do with the actual standing analysis,<sup>65</sup> which is suspicious. Moreover, the same justices who found standing also clearly wanted to reverse the Bush Administration's refusal to assert regulatory authority over greenhouse gases. This case could thus be seen as an example of quasi-manipulation, where justices who wanted to reach the merits allowed that desire to influence their standing conclusion. Nevertheless, I find the standing analysis fairly straightforward and thus do not categorize this case as Implausible.

In *AEP v. Connecticut*,<sup>66</sup> the Court addressed the same standing issue, dividing evenly (with Justice Sotomayor recused) over whether several states, New York City, and some non-profits had standing to bring a nuisance suit under federal common law against electrical generating plants that emitted greenhouse gases.<sup>67</sup> Because the Court was evenly divided, the lower court's finding of standing provided the governing law, and the Court went on to the merits.<sup>68</sup> Even if the majority had received a fifth vote for standing (which Justice Sotomayor was likely to have provided if not recused), the case does not seem an obvious example of manipulation: it involved the question whether the federal environmental laws preempted the federal common-law nuisance action, and the Court found that it did.<sup>69</sup> Environmentalists—the constituency most associated with broad standing—would have strongly preferred the opposite conclusion. I thus conclude that this case is not even quasi-manipulative and certainly not Implausible.

The case I do find Implausible is *United States v. Windsor*,<sup>70</sup> not for its standing analysis in isolation, but for its standing analysis compared to *Hollingsworth v. Perry*.<sup>71</sup> To understand my conclusion I must first lay out each case.<sup>72</sup>

Edith Windsor, who survived her wife Thea Speyer, had to pay \$363,000 more in taxes after Speyer's death than a widow of a man would have paid, because the federal Defense of Marriage Act (DOMA) did not recognize the Windsor-Speyer marriage.<sup>73</sup> Windsor challenged DOMA under the federal Constitution and the United States (speaking through the Department of Justice) agreed with her. Rather than simply refusing to enforce what it saw as an unconstitutional law, however, the United States pursued the lawsuit through the federal courts to obtain a court determination

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Court reached, but the fact that the factual standing analysis was conducted for the first time on appeal, in front of judges who know nothing about fact-gathering).

<sup>65</sup> *Massachusetts v. EPA*, 549 U.S. at 518–20. The discussion is likely included to gain Justice Kennedy's vote (making five Justices in the majority to find standing present).

<sup>66</sup> 131 S. Ct. 2527, 2532 (2011).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 2535.

<sup>69</sup> *Id.* at 2537.

<sup>70</sup> 133 S. Ct. 2675 (2013).

<sup>71</sup> 133 S. Ct. 2652 (2013).

<sup>72</sup> For a more lengthy discussion of both cases, see Heather Elliott, *Further Standing Lessons*, 89 IND. L.J. SUPPLEMENT 17 (2014).

<sup>73</sup> *Windsor*, 133 S. Ct. at 2679.

that DOMA was unconstitutional.<sup>74</sup> The Court decided that, because Windsor had won below and was seeking to enforce the \$363,000 judgment, and because the United States would be harmed by paying that money, Article III standing was satisfied.<sup>75</sup> The lack of adversity raised a prudential, but not jurisdictional concern, and the prudential worries were overcome because an intervenor (the Bipartisan Legal Advisory Group of the House of Representatives) was defending DOMA rather than the United States.<sup>76</sup> Thus the Court had Article III jurisdiction over the dispute and proceeded to find DOMA unconstitutional.<sup>77</sup>

In *Hollingsworth*, two gay couples brought a federal constitutional challenge to California's constitutional ban on marriage between those of the same sex, a ban added to the California Constitution by ballot initiative.<sup>78</sup> As in *Windsor*, the government officials (then-Governor Arnold Schwarzenegger and then-Attorney General Jerry Brown) agreed with the plaintiffs that the law was unconstitutional.<sup>79</sup> As in *Windsor*, intervenors (the proponents of the original ballot initiative) participated to defend the law. Despite the strong similarities with *Windsor*, despite the strong claim that standing for the intervenors was necessary to vindicate the workings of California's initiative system, and despite the fact that at least one justice thought standing in *Hollingsworth* was *more* obvious than in *Windsor*,<sup>80</sup> the Court found the appellants lacked standing.<sup>81</sup> The Court found that the intervenors had not suffered the individualized harm sufficient to justify Article III standing,<sup>82</sup> and that California had not appointed them as agents (in the traditional principal-agent sense).<sup>83</sup>

Individually, these cases may make some sense. After all, BLAG is different from the California initiative proponents, and a tax-refund order is different from an injunction against enforcement of a state constitutional ban. However, it is hard to resist the conclusion that the Court was manipulating standing to produce the political

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<sup>74</sup> For an excellent discussion of whether the Executive Branch even has the authority to pursue such a lawsuit, see Tara Leigh Grove, *Standing Outside Article III*, 162 U. PA. L. REV. 1311 (concluding it does not have such authority).

<sup>75</sup> *Windsor*, 133 S. Ct. at 2686.

<sup>76</sup> *Id.* at 2688.

<sup>77</sup> *Id.* at 2696.

<sup>78</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659–60 (2013).

<sup>79</sup> *Id.* at 2656.

<sup>80</sup> *Windsor*, 133 U.S. at 2712 (Alito, J., dissenting) (“Whether [BLAG] has standing to petition is a much more difficult question. It is also a significantly closer question than whether the intervenors in *Hollingsworth* . . . have standing to appeal. It is remarkable that the Court has simultaneously decided that the United States, which received all that it had sought below, is a proper petitioner in [*Windsor*] but that the intervenors in *Hollingsworth*, who represent the party that lost in the lower court, are not. In my view, both the *Hollingsworth* intervenors and BLAG have standing.” (internal citations omitted)).

<sup>81</sup> *Hollingsworth*, 133 S. Ct. at 2688.

<sup>82</sup> *Id.* at 2662–63.

<sup>83</sup> *Id.* at 2665–67.

result it wanted: (1) through *Windsor*, DOMA is gone, so that states wishing to provide marriage equality can now do so, but (2) through *Hollingsworth*, the Court has issued no constitutional ruling on state marriage bans, so that the states are free to continue their political processes. Moreover, the arguments for standing in *Hollingsworth* were, I believe, considerably stronger than those in *Windsor*.<sup>84</sup> Thus I place *Windsor* squarely within the Implausible category.

#### IV. THE AVOIDANCE CASES

I conclude that fourteen of the eighteen Avoidance Cases show no evidence of manipulation, but instead are cases where the Court's lack of standing discussion is perfectly innocent; the remaining four cases deserve an accusation of manipulation, though only one (*Fisher*) is strongly manipulative. I divide the cases into three categories: fourteen cases where the lack of standing analysis is innocent; three cases where the standing question was close enough that the Court should have discussed it, even if it agreed with the lower court's standing determination; and one case, *Fisher*, where the Court failed to discuss standing even though it was probably lacking.

##### *A. Cases Where Standing Was Almost Certainly Present and It Is Unsurprising That the Court Did Not Discuss It*

Fourteen of the Avoidance Cases do not involve manipulation.<sup>85</sup> They were included as Avoidance Cases because the courts below raised and resolved a standing issue, and the Court subsequently addressed the merits with no reference to the standing question. However, these thirteen cases are A and B cases on the spectrum provided above.<sup>86</sup> For example, in *Ricci v. DeStefano*,<sup>87</sup> a case where several white and one Latino firefighter challenged a promotion examination alleging reverse discrimination, the district court (relying on Second Circuit precedent) quickly found standing for the plaintiffs.<sup>88</sup> The Second Circuit Court of Appeals, however, did not even use the

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<sup>84</sup> See *supra* notes 70–83 and accompanying text; see also generally Elliott, *supra* note 72.

<sup>85</sup> *Agency for Intern. Dev. v. Alliance for Open Society Intern., Inc.*, 133 S. Ct. 2321 (2013); *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120 (2013); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013); *McBurney v. Young*, 133 S. Ct. 1709 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008); *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2008); *Crawford v. Marion Election Bd.*, 553 U.S. 181 (2008); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196 (2008); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

<sup>86</sup> See *supra* notes 37–38 and accompanying text.

<sup>87</sup> 557 U.S. 557 (2009).

<sup>88</sup> See *Ricci v. Destefano*, 554 F. Supp. 2d 142, 160–61 (Conn. 2006) (finding standing based on unequal treatment based on race (citing *Comer v. Cisneros*, 37 F.3d 775, 791 (2d Cir. 1994))).

word standing, much less discuss the presence or absence of standing;<sup>89</sup> the Supreme Court used the word standing, but only in nonjurisdictional senses.<sup>90</sup> The Supreme Court presumably failed to discuss standing for the same reason that the Second Circuit did: they agreed with the district court's two-sentence reliance on precedent.

This seems uncontroversial. The Court need not address standing in these cases when there is no real question whether standing is present. It is conceivable that the Court could adopt a rule that it always has to state why standing is present, but, as I discuss below, this might highlight the problems in cases where the Court truly is ducking a standing problem to reach the merits.<sup>91</sup>

Even the most controversial case in this group, *District of Columbia v. Heller*,<sup>92</sup> is not a case that involved standing manipulation. This case, which famously struck down portions of D.C.'s gun control laws by finding an individual right to bear arms under the Second Amendment,<sup>93</sup> involved a serious question regarding standing—one that implicates a circuit split, one on which some parties sought certiorari, and one on which the Court denied certiorari.<sup>94</sup> However, one plaintiff was unaffected by this split (he had standing regardless), and the Court could reach the merits with only this plaintiff as a party before it. This is not manipulation.

The one case that I think is a close call, and perhaps falls in the next section rather than this one, is *Agency for International Development v. Alliance for Open Society International, Inc.*<sup>95</sup> The case is relatively controversial: it involved the First Amendment rights of non-governmental organizations fighting HIV/AIDS and other health problems with funding under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003.<sup>96</sup> The courts below discussed standing extensively, while the Supreme Court's majority opinion does not even use the word

<sup>89</sup> 530 F.3d 87 (2d. Cir. 2008) (“standing” does not appear in the opinion when text is searched).

<sup>90</sup> See *Ricci*, 557 U.S. at 567, 571, 599 (using the word “standing” only in the sense of “standing alone” or “long-standing”).

<sup>91</sup> See *infra* Conclusion.

<sup>92</sup> 554 U.S. 570 (2008).

<sup>93</sup> *Id.* at 592.

<sup>94</sup> The *Rockwell* case also featured a petition over the propriety of certain parties' ability to proceed. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007). However, the question on cert was not one of standing: it involved whether the relator provisions of the False Claims Act violate Article II's Appointment and Take Care Clauses. The Court has previously noted this Article II problem but has not addressed it. *Vt. Agency of Nat'l Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (“[W]e express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the ‘take Care’ Clause of § 3.”). The Court refused to grant cert here, too. Because the Court has previously held that *qui tam* relators have Article III standing, however, and because the lower courts relied on this clearly established precedent, I conclude that the Supreme Court's failure to discuss standing is innocent.

<sup>95</sup> 133 S. Ct. 2321 (2013).

<sup>96</sup> 22 U.S.C. § 7601.



“standing.” It is thus possible that the majority is avoiding a standing question in order to reach the merits of an important case. I have ultimately concluded, however, that this is not an avoidance case. I am swayed by Justice Scalia’s dissent, which is vehement on the merits but which does not challenge the implicit finding of standing made by the majority. It is simply too likely that Justice Scalia would have taken the majority to task for every mistake it made; if he does not complain about the failure to discuss standing, there is probably not a problem.

*B. Cases Where Standing Was Probably Present, but It Is Nevertheless Surprising That the Court Did Not Discuss It*

Three Avoidance Cases raised significant standing problems that were resolved in favor of jurisdiction by the intermediate appellate courts; the Court’s failure to discuss standing in its review of those cases could be seen as a *sub silentio* agreement with the lower court analyses.<sup>97</sup> I placed these cases in this section rather than the previous section, however, because the standing questions were close, and one of the cases (*NFIB*) changed in its standing posture after the lower court opinions were written. I thus conclude that, for these Avoidance Cases, the Court’s failure to discuss standing in these cases is at least a mild example of manipulation.

Most notably, the Court failed to discuss standing in *NFIB v. Sebelius*,<sup>98</sup> the challenge to the Patient Protection and Affordable Care Act (PPACA).<sup>99</sup> PPACA (particularly its “individual mandate”)<sup>100</sup> was challenged in scores of lawsuits,<sup>101</sup> and standing was an issue in many of those lawsuits.<sup>102</sup> *NFIB* itself was a case in which the Obama Administration had already conceded the plaintiff’s standing (although, because Article III is a constitutional restriction on the federal court’s powers, no parties can confer standing by concession).<sup>103</sup> Even when the named plaintiff declared bankruptcy and a new plaintiff had to join the case, the Administration supported the motion to substitute that party.<sup>104</sup>

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<sup>97</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012); *Nat’l Aeronautics and Space Admin. v. Nelson*, 131 S. Ct. 746 (2011); *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>98</sup> See generally *NFIB*, 132 S. Ct. at 2566.

<sup>99</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

<sup>100</sup> Affordable Care Act § 1501. The so-called individual mandate is the provision of PPACA that requires most Americans—with exceptions for those below certain income levels—to purchase health insurance or face a penalty.

<sup>101</sup> Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 552, 575 n.159 (2012).

<sup>102</sup> *Id.* at 575–78.

<sup>103</sup> Brief for Appellants at 6 n.1, *Florida v. United States Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021, 11-11067), 2011 WL 1461593.

<sup>104</sup> Brief for Petitioners at 16 n.5, *Dep’t of HHS v. Florida* (Jan. 6, 2012) (No. 11-398), 2012 WL 37168. The Government had challenged standing below and at the certiorari stage but did not renew those arguments after the Court had taken the case.

Despite this drama surrounding the standing of the lead plaintiff, neither the majority nor Justice Ginsburg in concurrence mentions the issue of standing.<sup>105</sup> This omission is surprising: given the problems with standing both below and at the Supreme Court, one would expect at least a brief discussion of the issue.

That the PPACA case is an Avoidance Case gives at least mild evidence for the manipulation thesis. To be sure, a number of factors support the Court's implicit conclusion that a proper party with standing was present. The Government conceded standing, the standing issues were fairly ordinary (involving the common-or-garden variety of standing, economic harm), and the Court had ordered no specific briefing on standing.<sup>106</sup> However, the need for a last-minute substitution of parties makes clear that standing before the Court was not simply a matter of implicitly approving a lower court's findings—there had been no lower court findings on that party's standing.

Moreover, the merits of the case give rise to the suspicion that the Court would *want* to reach the merits regardless of standing. The country was clamoring for a decision on PPACA, and the Court itself was split along political lines on how to resolve the merits question. Given these facts, and the common perception that standing doctrine is manipulated so that courts can reach or avoid the merits as they choose,<sup>107</sup> the Court probably should have addressed the standing question, even if only in a footnote. Its failure to do so gives rise to the suspicion that, if they looked too hard, they would find a problem with standing that would preclude a merits decision.

### *C. Cases Where Standing Was Probably Not Present, but the Court Reached the Merits Anyway, Without Addressing the Standing Question*

I have identified only one case in which the Court does not discuss standing, even though there is the strong possibility that standing was lacking. That means that the Court may well have lacked subject-matter jurisdiction and nevertheless reached the merits. This is the strong case of manipulation, representing the worst of what scholars have accused courts of doing with the standing doctrine. The fact that I could find only one case in eight terms, however, shows that this kind of strong manipulation is rare.

This case is *Fisher v. University of Texas*.<sup>108</sup> The word “standing” appears nowhere in the Court's opinion, but it had been an issue in the Fifth Circuit (which found that the plaintiffs had no standing to pursue injunctive relief)<sup>109</sup> and in the briefs (the University of Texas suggested the plaintiffs had no standing for any form of relief).<sup>110</sup>

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<sup>105</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). The Chief Justice does address one threshold jurisdictional matter: whether the Anti-Injunction Act bans the suit. *Id.* at 2581–84.

<sup>106</sup> *Id.*

<sup>107</sup> See *supra* notes 12–31 and accompanying text.

<sup>108</sup> 133 S. Ct. 2411 (2013).

<sup>109</sup> *Fisher v. University of Texas*, 631 F.3d 213, 217 (5th Cir. 2011).

<sup>110</sup> Brief for Respondents at 16–17 n.6, *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) (No. 11-345).

On remand, the Fifth Circuit asked for further briefing on standing.<sup>111</sup> The University argued that Fisher lacked standing to pursue her claims.<sup>112</sup> In its ultimate remand opinion, the Fifth Circuit noted its concern that Fisher lacked standing but concluded that the Supreme Court's remand required it to reach the merits.<sup>113</sup>

Several commentators have already suggested that the Court lacked jurisdiction over the case because Fisher lacked standing.<sup>114</sup> Erwin Chemerinsky calls the Court's failure to discuss standing and other jurisdictional issues "inexplicabl[e]."<sup>115</sup> Yet the Fisher Court's avoidance of standing is explicable if it is manipulative avoidance: the Court wanted to address the merits of affirmative action, did not want to be prevented from doing so by a standing problem, and did not want to be embarrassed by what would have been an extremely implausible standing analysis.

To be fair, *Fisher* may reflect less the Court's manipulation to reach the merits as much as the Court's avoidance of a quagmire. Even if the Court had addressed standing, it would have been faced with one of the most confused areas of standing doctrine.<sup>116</sup> The Court's affirmative action standing doctrine has long been viewed as convoluted and inconsistent with standing doctrine more generally (and, given the criticisms of standing doctrine more generally, this is saying something).<sup>117</sup> It is thus

<sup>111</sup> Letter from Lyle W. Cayce, Clerk, U.S. Court of Appeals for the Fifth Circuit, to Counsel, *Fisher v. Texas* (Sept. 12, 2013), <http://www.utexas.edu/vp/irla/Documents/2013.9.12.Scheduling.Order.pdf>.

<sup>112</sup> Supplemental Brief for Appellees at 6–19, *Fisher v. University of Texas*, 758 F.3d 633 (5th Cir. 2014) (No. 09-50822).

<sup>113</sup> *Fisher v. University of Texas*, 758 F.3d 633, 638–41 (5th Cir. 2014) ("Fisher's . . . scores were [such that] she could not have received an offer of admission to the Fall 2008 freshman class. If she had been a minority the result would have been the same. This reality together with factual developments since summary judgment call into question whether Fisher has standing. [B]ut in our view the actions of the Supreme Court do not allow out reconsideration [of Fisher's standing]. The Supreme Court did not address the issue of standing, although it was squarely presented to it. Rather, it remanded the case for a decision on the merits." (footnotes omitted)).

<sup>114</sup> E.g., Erwin Chemerinsky, *The Court Affects All of Us: The Supreme Court Term in Review*, 16 GREEN BAG 2D 361, 363 (2013) ("I strongly believe that the Court did not have jurisdiction to hear the case" due to lack of standing, as well as Eleventh Amendment issues); Danielle Holley-Walker, *Defining Race-Conscious Programs in the Fisher Era*, 57 HOW. L.J. 545, 555–56 (2014) ("One issue that has become a focus on rehearing, and may ultimately impact the outcome of the case, is whether Abigail Fisher has standing to continue . . .").

<sup>115</sup> Chemerinsky, *supra* note 114, at 364.

<sup>116</sup> See Ryan H. Nelson, *Injury in Fiction*, 66 VAND. L. REV. 153, 162–63 (2013).

<sup>117</sup> E.g., F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 304 (2008) (noting that the Court, in the affirmative action context, "has recognized injuries that are a far cry from the 'concrete' and 'palpable' injuries that the Court purports to require"); Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1201–02 (2014) (noting that the injuries accepted as sufficient for standing in affirmative action cases are not acceptable in other substantive contexts); see also, e.g., Ashutosh Bhagwat, *Injury Without Harm: Texas v. Lesage and the Strange World of Article III Injuries*, 28 HASTINGS CONST. L.Q. 445, 448–51 (2001); Harvard Law Review Association, *Leading Cases: Standing to Challenge Affirmative Action Programs*, 107 HARV. L. REV. 144, 303–12 (1993).

possible that the Court was simply avoiding a confrontation with the reality of its affirmative action standing jurisprudence.

Some, however, have contended that affirmative action standing is more than confused: it is intentionally (or unconsciously) warped to the benefit of racial majorities and other privileged groups.<sup>118</sup> On this latter view, the Court's failure to evaluate Fisher's standing to sue returns this Avoidance Case into the malign category of manipulation.

I cannot help but find *Fisher* manipulative. The Court had many options: it could have dismissed the case as improvidently granted, it could have taken on the standing analysis and found that Fisher lacked standing, or it could have engaged in what would likely have been an Implausible analysis and proceeded to the merits. That it took none of these path and instead decided the merits without even a reference to the standing problem is, I think, evidence of the strong (and reprehensible) form of manipulation.

#### CONCLUSION

I attempted to identify every case during the tenure of Chief Justice Roberts in which the Court should have addressed standing before reaching the merits but did not, or addressed standing and reached an Implausible result on standing in order to reach the merits. In those eight terms, I identified only one case that I feel strongly is Implausible, only one Avoidance Case in which the Court probably lacked jurisdiction to issue its merits opinion, and three further mild Avoidance Cases. This is a very small number when compared to the 538 merits opinions issued by the Roberts Court. This is not evidence upon which to base any strong accusations that the Court has a strategy of ignoring or stretching Article III standing doctrine when it wishes to *reach* the merits of a case.

The manipulation thesis is therefore not supported by the cases issued during the Roberts Court. There remains the question of whether there are numerous cases where the Court appears to have *ducked* the merits by dismissing for lack of standing, and whether there is evidence in other terms for the Avoidance, Implausible, and Ducking aspects of the manipulation thesis. Those questions are left for another day.

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<sup>118</sup> Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 309, 311–12 (2002) (arguing that “the toughest issue in standing law arguably is determining when the injury requirement will be taken seriously and when it will be ignored” and contending that it is ignored to the benefit of white challengers of affirmative action programs); Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119 (2011).