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Matthew Hall

Christian Turner

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# THE NATURE OF STANDING

Matthew Hall and Christian Turner\*

## INTRODUCTION

Most academic studies of standing have focused on restrictions on federal court jurisdiction drawn from Article III of the U.S. Constitution and related doctrinal schemes developed by state courts. These rules are constructed atop a few words of the Constitution: “The judicial Power shall extend to all Cases, in Law and Equity,” arising under various circumstances.<sup>1</sup> The Supreme Court has interpreted these words to require federal courts to assess whether a plaintiff has suffered an injury in fact that is both fairly traceable to the actions of the defendant and redressable by a favorable ruling before proceeding to the merits of a case.<sup>2</sup>

States, however, are not limited by Article III’s grant of the federal judicial power, and many have developed versions of standing that differ from federal doctrine.<sup>3</sup> Although every state has a standing doctrine of some sort, state courts often impose looser requirements for standing than do the federal courts.<sup>4</sup> And even in federal courts, there are fault lines in various areas of the doctrine.<sup>5</sup> Although Article III justiciability doctrines are described as jurisdictional in nature, numerous exceptions challenge the usual doctrinal model.<sup>6</sup>

We propose to understand these doctrinal differences and the related jurisdictional controversies through a far broader conception of standing, expressed in basic institutional mechanics and context-specific cooperative goals. Rather than focusing minutely on standing as an idiosyncratic jurisdictional and prudential doctrine, we aim to analyze its place in the larger world of agenda-control rules—that is, rules that

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\* Associate Professors, University of Georgia School of Law.

<sup>1</sup> U.S. CONST. art. III, § 2, cl. 1. While this provision is often called the “Case or Controversy Clause,” the word “Cases” is used to refer to disputes arising under federal law, treaties, and admiralty and between ambassadors and other “public ministers.” Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 447–50 (1994). “Controversies” is used separately to refer to diversity cases and certain cases involving the states and the federal government. *See id.* While justiciability and jurisdictional doctrines assign no significance to this fact, Robert Pushaw has argued that 18th century practice reveals an expectation that courts would declare legal obligations in “cases” and act as non-precedential arbitrators of disputes in “controversies.” *Id.*

<sup>2</sup> *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>3</sup> Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836, 1838 (2001).

<sup>4</sup> *See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

<sup>5</sup> *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).

<sup>6</sup> *See infra* Part I.

institutions such as courts employ to regulate how they decide whether to decide. From this taxonomic and institutional calculus, the federal standing rules follow as a possible application, their debatable content a consequence of disagreements over federal judicial mechanics and objectives. More importantly, though, this model enables us to uncover and analyze some coherent foundational principles in the diversity of standing and standing-like doctrines that are often ignored by scholars and practitioners.

The origin of our inquiry is this: all decision-making institutions, not just courts, must decide what questions they will answer. Those decisions construct an agenda, whether described explicitly or implicitly and whether agenda-setting is rule-governed, ad hoc, or something in between.

After taking account of federal and state standing doctrines and their controversies in Part I, we turn to a taxonomy of agenda control rules in Part II. We identify two broad categories of such rules: (a) those that are applied *ex ante*, which are used to evaluate whether a proposal should be added to the agenda, and (b) those that are applied *ex post*, to incentivize or disincentivize agenda proposals through rewards or punishments after an agenda item is entertained. Within the first category, *ex ante* rules, we identify *procedural*, *membership*, and *subject-matter* rules that evaluate whether an item should be added to the agenda based, respectively, on how the issue was raised, who raised it, and what its contents are.<sup>7</sup> *Mixed rules* combine two such types, where the rule cannot be expressed as a composition of two independent rules of different types.<sup>8</sup> *Standing rules* are a type of mixed rule, where an agenda item is evaluated based on some relation between the entity raising the issue and the substance of the issue.<sup>9</sup>

Standing can therefore be understood more universally as a social institution's conclusion that an entity should have the power to place a particular item on the agenda. In its general aspect, then, standing before an institution is a quality that may or may not be possessed by an entity with respect to an issue. Can *this* person raise *this* issue? An entity has standing on an issue before an institution when it has the power to force the institution to decide the issue. So put, it is apparent that all institutions reach standing conclusions, whether they discuss them or not. While agenda rules in legislatures have been an object of study across disciplines,<sup>10</sup> standing has not often been conceived as a species of the same institutional dynamic, despite its obvious kinship.<sup>11</sup>

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<sup>7</sup> See *infra* Section II.A.1.

<sup>8</sup> See *infra* Section II.A.2.

<sup>9</sup> See *infra* Section II.A.3.

<sup>10</sup> See, e.g., Jesse M. Crosson, *Stalemate in the States: Agenda Control Rules and Policy Output in American Legislatures*, 44 LEGIS. STUD. Q. 3, 3–4 (2019); Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161, 168–70 (1989); Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 564 (1977).

<sup>11</sup> Among the interesting exceptions is a recent article exploring the treatment of private petitions in the early Congress. See generally Maggie McKinley, *Petitioning and the Making*

Having located standing rules within a taxonomy of agenda-control rules, we turn in Part III to an account of the institutional reasons for governing the judicial agenda with the different sorts of rules we have described, and standing rules in particular. Standing rules, like agenda rules generally, serve two purposes. On the one hand, they promote intra-institutional efficiency by limiting who may impose decision costs on the institution and participation costs on others (for example, the defendant in a lawsuit).<sup>12</sup> The former costs are obvious: The institution will invest time and other resources into deliberation and enforcement.<sup>13</sup> As to the latter, finding standing means that the institution may reach a collective decision that would marshal collective resources to attempt to compel at least one individual to do that which he or she does not want to do. Thus, recognizing standing imposes a risk of erroneous coercion on such party and thereby incentivizes the payment of defense costs—either in the form of advocacy or settlement. These costs may be lumped in with the collective resources that are commandeered by an entity whose standing to raise an issue has been recognized. All told, a standing rule must evaluate when it is worth paying such costs. One of us has argued that the law will generally look to various competencies of an entity and evaluate whether it is likely to be in a good position relative to others to make this sort of evaluation.<sup>14</sup>

But another function of standing rules is to coordinate *inter*-institutional objectives by constraining the agenda of an institution vis-à-vis other institutions. Standing is not the only doctrine to serve this allocative purpose.<sup>15</sup> Other agenda rules may bar consideration of various issues entirely or may narrow what can be decided when reaching an issue, both out of concern for the prerogatives of other institutions within the system. Standing, again, is a doctrine that filters for entity-issue pairings. It may nonetheless be crafted to shape an institution's power—for example by permitting decision on an issue only when a particular entity can demonstrate a need that is not more properly addressed by another institution.

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*of the Administrative State*, 127 YALE L.J. 1538 (2018). Her article reveals the adjudicative character of Congress in its early administration of the private petitioning system. *Id.* at 1563. At a time when the public was empowered to make and have considered requests to add to the congressional agenda, Congress would sometimes reject private petitions on jurisdictional grounds, rather than on a presumed legislative privilege simply to ignore petitions as part and parcel of an unfettered power to construct its own agenda. *See, e.g., id.* at 1556 (“Rather than take issue with the race of the petitioners, the southern congressmen raised a procedural objection [to a petition to enforce the Slave Trade Act against a slave market in Guinea]: petitions to Congress were to be rejected as improperly filed when the petition prayed for a remedy that fell outside of Congress’s jurisdiction.”).

<sup>12</sup> *See infra* notes 118–22 and accompanying text.

<sup>13</sup> *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 323 (2008).

<sup>14</sup> Christian Turner, *Law’s Public/Private Structure*, 39 FLA. ST. L. REV. 1003, 1018–21 (2012).

<sup>15</sup> *See* Levine & Plott, *supra* note 10, at 563.

We will discuss three implications of these twin aims. First, standing rules will be responsive to the institution's purposes, and disputes about standing rules will commonly be rooted in disagreements about those purposes. Second, standing rules consider the competencies of a petitioning entity to evaluate the costs and benefits of a decision to decide an issue. Third, standing rules will attempt to situate the institution relative to other institutions given the issue-entity pair and the system's overall normative purposes.

In the final Part, we consider the ecology of standing rules within a specific doctrinal area: land-use law. By comparing approaches in a single area, we can focus closely on how the rules take account of the sociological setting of disputes and governmental objectives. In land-use disputes, we identify several particular values, including land's supposed uniqueness for some individuals, pacification within a community of ongoing interactions, and avoiding public choice problems. We show how these values dictate that in fights among neighbors and local officials over land use, there is pressure for the agenda-setting power to be more widely available than it is for other private disputes.<sup>16</sup> Indeed, one jurisdiction permits appeals of local decisions to courts so long as the petitioner participated in the decision at the local level,<sup>17</sup> a type of involvement radically different from usual notions of injury in fact.

Ultimately, we argue, appreciating standing as a species of a broader suite of agenda control rules makes better sense of the doctrine's endemic controversies, its variations, and its analogues in nonjudicial settings. This Article is a first effort toward this broader understanding.

## I. VARIATIONS IN THE AMERICAN LAW OF STANDING

### A. Federal Standing

Modern standing doctrine comprises a set of jurisdictional rules familiar to nearly all law students and lawyers. In a nutshell, it restricts access to federal courts to those plaintiffs who have a concrete injury, traceable to the defendant's conduct, that could be redressed by a favorable ruling.<sup>18</sup> Standing originated as a largely prudential doctrine aimed at controlling the judicial agenda by excluding collusive suits and attempts to invoke the judicial power to resolve abstract questions of law.

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<sup>16</sup> See *infra* Section IV.A.

<sup>17</sup> See OR. REV. STAT. § 197.830(2) (2019).

<sup>18</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (stating that “the standing question in its Art. III aspect ‘is whether the plaintiff has “alleged such a personal stake in the outcome of the controversy” as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (citation omitted))); see also *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

The earliest justiciability cases in federal courts applied standing and other justiciability doctrines as purely discretionary doctrines,<sup>19</sup> employed in pursuit of policy goals including conservation of judicial resources,<sup>20</sup> ensuring that claims were brought by sufficiently motivated advocates,<sup>21</sup> and penalizing litigants for collusion or other bad conduct.<sup>22</sup>

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<sup>19</sup> See, e.g., *Allen v. Georgia*, 166 U.S. 138, 140 (1897) (“[W]e have repeatedly held that we *would not* hear and determine moot cases . . .” (emphasis added)); *Smith v. United States*, 94 U.S. 97, 97 (1876) (“[W]e are *not inclined to hear* and decide what may prove to be only a moot case.” (emphasis added)). Until the latter part of the 20th century, federal courts also treated mootness and ripeness as discretionary doctrines. See *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (“[I]t seems very doubtful that the earliest case I have found discussing mootness, *Mills v. Green*, 159 U.S. 651 (1895), was premised on constitutional constraints; Justice Gray’s opinion in that case nowhere mentions Art. III.”); *Poe v. Ullman*, 367 U.S. 497, 502–04 (1961) (describing the ripeness doctrine as one of a series of rules developed by the Court for its own prudential governance); see also Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 567–73 (2009) (contrasting the nineteenth century “nonmandatory” doctrine of mootness with its twentieth century recharacterization as a constitutionally mandated jurisdictional bar); Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175, 228–29 (2010) (“[P]rior to the 1970s, ripeness was generally considered a matter of prudential concern, which could be shaped and applied flexibly as individual cases warranted.”).

<sup>20</sup> See, e.g., *United States v. Johnson*, 319 U.S. 302, 304–05 (1943) (per curiam). Scholars and judges have noted standing’s role as a judicially administered docket control device. See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 471 (2008) (“Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake.” (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000))); Eugene Kontorovich, *Posner’s Pragmatic Justiciability Jurisprudence: The Triumph of Possibility over Probability*, 86 U. CHI. L. REV. 1117, 1131 (2019) (noting Judge Posner’s view that standing “is essentially a flexible tool for the allocation of judicial resources, an overtheorized docket management device”); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 670–74 (1973) (noting that standing functions as a means for the judiciary to control who may place an issue on the judicial agenda).

<sup>21</sup> See, e.g., *S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892) (concluding, on the appeal of an action between two corporations that came under the control of the same person after judgment was rendered in the lower court, that “litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one”); *Waite v. Dowley*, 94 U.S. 527, 534 (1876) (“This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it.”).

<sup>22</sup> See, e.g., *Johnson*, 319 U.S. at 305; *Smith*, 94 U.S. at 97 (dismissing a criminal defendant’s appeal from conviction when the defendant had refused to subject himself to the court’s judgment by escaping from prison); *Lord v. Veazie*, 49 U.S. (1 How.) 251, 253 (1850) (holding “[t]hat a fictitious suit, or a feigned issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, is a contempt of court, and will be dismissed on motion”).

From these prudential origins, the standing doctrine has evolved into a jurisdictional doctrine founded in Article III's limitations on "the judicial power of the United States."<sup>23</sup> In a series of cases in the mid-twentieth century, the Court began to constitutionalize the principal requirement of modern standing doctrine: "injury in fact."<sup>24</sup>

The doctrine of standing now applied in federal courts is thus of relatively recent vintage, built over a few decades on cases interpreting the cases and Controversies clause of Article III.<sup>25</sup> It is now well-established, however, that federal standing doctrine represents a jurisdictional limit on federal court authority—that is, that federal courts lack the power to hear cases in which the plaintiff lacks standing.<sup>26</sup>

## B. State Court Standing

### 1. In General

The Court has stated that standing doctrine is "built on a single basic idea—the idea of separation of powers."<sup>27</sup> But, as Heather Elliott and others have noted, the separation of powers rationale that is said to underlie Article III standing doctrine actually encompasses at least three distinct goals for the courts: "(1) hearing only cases possessing sufficient concrete adversity to make them susceptible of judicial resolution; (2) avoiding questions better answered by the political branches; and (3) resisting . . . Congress's conscription of the courts—to monitor the compliance of the executive branch with the law."<sup>28</sup> The vision of the judicial power on which

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<sup>23</sup> U.S. CONST. art. III, § 1, cl. 1. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 183–86 (1992).

<sup>24</sup> See *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (noting that "justiciability . . . doctrine has become a blend of constitutional requirements and policy considerations," and remarking on "uncertain and shifting contours" between policy-driven rules of judicial self-governance and constitutionally mandated jurisdictional limitations); see Sunstein, *supra* note 23, at 183–89 (discussing theories applicable to analyses of concrete "injury" and to standing decisions generally).

<sup>25</sup> For a history of the Court's transformation of standing into a jurisdictional limitation on federal court power, see Sunstein, *supra* note 23, at 183–86. See also Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1375–78 (1988) (marking cases in the early 20th century as beginning the doctrine's "surprisingly short history," noting the theory that the doctrine arose only to continue the common-law writ system's limitation to private rights cases, but responding with examples of public rights cases in the states and in the U.S. Supreme Court).

<sup>26</sup> See 13B CHARLES ALAN WRIGHT, RICHARD D. FREER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.1 (3d ed. 1998) (questioning the Article III model, but concluding that "[t]he Article III approach is nonetheless firmly entrenched, and must be reckoned the major foundation of current doctrine"). But see Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 827 (1969); Fletcher, *supra* note 5, at 229–34 ("Properly understood, standing doctrine should not require that a plaintiff have suffered 'injury in fact.'"); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1307–14 (1961).

<sup>27</sup> *Allen v. Wright*, 468 U.S. 737, 752 (1984).

<sup>28</sup> Elliott, *supra* note 20, at 459.

federal standing doctrine is based thus depends on certain features of the federal constitutional structure, including the relatively unitary structure of the federal executive branch, the difficulty of amending the Federal Constitution, and the insulation of federal judges from democratic accountability.<sup>29</sup> It is unsurprising, then, that state justiciability doctrines differ—often significantly—from Article III–based federal doctrine.

First, state courts draw their power not from Article III but from their state constitutions.<sup>30</sup> They are, therefore, not bound to apply federal constitutional law concerning limitations on the “judicial power.”<sup>31</sup> The U.S. Supreme Court has, accordingly, recognized that states are free to construct their own law of justiciability.<sup>32</sup>

States have exercised that authority to varying degrees. Some states have followed federal standing doctrine to the letter, while many others have adopted discretionary standing regimes that differ markedly from Article III standing doctrine.<sup>33</sup> In particular, many states permit courts to hear whatever cases may be warranted by the public interest<sup>34</sup>—a determination anchored in general policy considerations such as promoting

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<sup>29</sup> See *id.* at 462–63; Jaffe, *supra* note 26, at 1310 n.130.

<sup>30</sup> See William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 264–65 (1990).

<sup>31</sup> See *id.* at 263–65; see also Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1271–72 (2011).

<sup>32</sup> See, e.g., *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“[T]he 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 even when they address issues of federal law. . . .”); *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 8 n.2 (1988) (“[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The States are thus left free . . . to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual ‘case’ or ‘controversy’ be presented for resolution.”); *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983) (Marshall, J., dissenting) (“[S]tate courts need not impose the same standing or remedial requirements that govern federal-court proceedings.”); see also RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 154 (4th ed. 1996) (“Article III’s definition of judicial power applies only to the federal courts. The state courts are thus free to adjudicate federal questions even when there is no ‘case or controversy’ within the meaning of Article III . . .”).

<sup>33</sup> Hershkoff, *supra* note 3, at 1836, 1838.

<sup>34</sup> Some states, for instance, expressly recognize a “public interest exception” to their justiciability rules. In these states, courts will hear a case that is moot or in which the plaintiff would otherwise lack standing, if it is in the public interest to do so. See, e.g., *Cty. of Fresno v. Shelton*, 78 Cal. Rptr. 2d 272, 277 (Ct. App. 1998) (stating that California state courts have discretion to hear moot cases that pose issues of broad public interest that are likely to recur); *McBain v. Hamilton Cty.*, 744 N.E.2d 984, 987 (Ind. Ct. App. 2001) (stating that Indiana state courts may “review moot cases when they present questions of ‘great public interest’ that typically contain issues likely to recur”); *Gernstein v. Allen*, 630 N.W.2d 672, 677 (Neb. Ct. App. 2001) (stating that Nebraska courts will review moot cases that involve a matter of great public interest or when other rights or liabilities may be affected by the case’s determination); *Cobb v. State Canvassing Bd.*, 140 P.3d 498, 504 (N.M. 2006) (noting that New Mexico state courts will “review moot cases that present issues of (1) substantial



judicial efficiency, protecting judicial authority, and ensuring the sharp presentation of issues in a concrete factual setting.<sup>35</sup> As Helen Hershkoff has noted, in many states “the scope of the judicial function differs significantly from the current [Article III] federal paradigm. The courts of these states undertake and discharge functions that are conventionally deemed beyond the Article III power.”<sup>36</sup>

By way of example, in more than a dozen states, state courts provide advisory opinions—that is, opinions on important questions of law that are not binding judgments but rather that the other branches treat as persuasive authority.<sup>37</sup> This process permits a back-and-forth dialogue among branches and facilitates the smooth development of the law.<sup>38</sup> Similarly, many state courts routinely recognize the standing of taxpayers<sup>39</sup> or government officials<sup>40</sup> to test the constitutionality of some legislation,

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public interest or (2) which are capable of repetition yet evading review”); *City of Yakima v. Mollett*, 63 P.3d 177, 179 (Wash. Ct. App. 2003) (noting that Washington state courts will review moot cases that present “matters of continuing and substantial public interest” (quoting *in re Swanson*, 793 P.2d 962 (Wash. 1990))).

<sup>35</sup> See, e.g., *Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1096 (Alaska 1988) (“[C]ase or controversy’ is a term of art used to describe a constitutional limitation on federal court jurisdiction. But . . . [o]ur mootness doctrine . . . is a matter of judicial policy, not constitutional law.” (citation omitted)); *McCroskey v. Gustafson*, 638 P.2d 51, 54–56 (Colo. 1981) (en banc); *Salorio v. Glaser*, 414 A.2d 943, 947 (N.J. 1980) (“New Jersey State courts are not bound by the ‘case or controversy’ requirement governing federal courts. . . . This Court remains free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration.”); *City of Indianapolis v. Ind. State Bd. of Tax Comm’rs*, 308 N.E.2d 868, 869–71 (Ind. 1974).

<sup>36</sup> Hershkoff, *supra* note 3, at 1844.

<sup>37</sup> See generally *id.* at 1844–52 (discussing advisory opinion practices of the state courts of Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, North Carolina, Oklahoma, Rhode Island, South Dakota, and Texas).

<sup>38</sup> See *id.* at 1851–52; see also Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1714 (1998) (noting that “[a]dvice in judicial decisions acts as a compromise—such language does not have the binding force of a holding yet provides some guidance and predictability for the future while simultaneously undermining some of the reliance interests that would mandate future application of stare decisis”).

<sup>39</sup> See, e.g., *Comm. for an Effective Judiciary v. State*, 679 P.2d 1223, 1226 (Mont. 1984) (noting the judiciary’s “discretion . . . [to] grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance” (citation omitted)); *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 979 (N.M. 1974); 87 N.Y. JUR. 2D *Public Funds* § 70, Westlaw (database updated Feb. 2020) (noting that the state constitution and statute “provide that expenditures or refunds of state funds, without the audit of the state comptroller as required by law, is void and may be restrained by a taxpayer in a suit brought with the consent of the supreme court in appellate division and with notice to the Attorney General”); see also Hershkoff, *supra* note 3, at 1856–57; Susan L. Parsons, *Taxpayers’ Suits: Standing Barriers and Pecuniary Restraints*, 59 TEMP. L.Q. 951, 951–53, 962–66 (1986) (discussing taxpayer action provisions).

<sup>40</sup> See, e.g., *Hayes v. State Prop. & Bldgs. Comm’n*, 731 S.W.2d 797, 799 (Ky. 1987) (“In a practical sense, the parties who have a real interest are the people of this Commonwealth who have a right to a determination of whether the executive and the legislature have acted within the limitations of their constitutional power, the executive and legislative branches of

on the ground that permitting such suits enables vindication of the public interest. And state courts routinely perform non-adjudicative functions—work similar in kind to that performed by the federal regulatory bureaucracy<sup>41</sup>—which the federal judiciary has deemed outside the scope of the judicial function.<sup>42</sup>

In part, these different models of standing result from the different structure and needs of state governments. The concerns that have led federal courts to adopt strict limitations on standing include the federal regime of separation of powers, the anti-democratic nature of an unelected and otherwise unaccountable judiciary,<sup>43</sup> and the practical finality of judicial decisions on constitutional matters in light of the difficulty of amending the U.S. Constitution.<sup>44</sup> These considerations apply with less force or not at all in the context of state courts. State courts are free to depart from the federal conception of separation of powers;<sup>45</sup> most states provide for some degree of popular election of judges;<sup>46</sup> and state constitutions are generally much easier to amend, rendering the constitutional decisions of state courts less “final” than those of their federal counterparts.<sup>47</sup> It is thus unsurprising that most state courts

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government who sponsored and enacted the legislation, and Toyota, the industry induced to come to this Commonwealth.”); THOMAS R. MORRIS, *THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS* 132 (1975) (discussing Virginia’s practice); Hershkoff, *supra* note 3, at 1857–59 (discussing state legislative standing).

<sup>41</sup> See Hershkoff, *supra* note 3, at 1870–73.

<sup>42</sup> See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 409 (1792); see also Max Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281, 281 (1908).

<sup>43</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 750 (1984) (noting, “All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.” (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring))); see also Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 707 (1995) (“[B]ecause of their insulation from majoritarian pressure and the resultant threat to the workings of the democratic process, the federal judiciary has been expressly confined to the exercise of the traditional judicial function of case adjudication.”).

<sup>44</sup> See, e.g., Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 499, 502 (1982) (discussing “the seeming finality of a constitutional pronouncement by the Supreme Court”).

<sup>45</sup> *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (The Court held, “Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.”).

<sup>46</sup> Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 414 (1999) (“Thirty-nine of the fifty states presently provide a measure of political accountability for judges through some form of election.”).

<sup>47</sup> See Hershkoff, *supra* note 3, at 1888 (“Nor are state constitutional decisions ‘final’ in

to consider the matter carefully have adopted more flexible versions of justiciability doctrines.<sup>48</sup>

Oregon's recent justiciability decisions epitomize the predominantly functional approach to standing doctrine employed by state courts. In *Couey v. Atkins*, the Oregon Supreme Court reviewed English and colonial American history to conclude that the Oregon Constitution does not impose justiciability requirements like those of Article III.<sup>49</sup> Rather, the court held, Oregon state courts may hear cases raising significant public issues even where federal justiciability law would preclude litigation in federal court.<sup>50</sup>

The Oregon equivalent of the federal Article III is section 1 of article VII of Oregon's constitution, which reads: "The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law."<sup>51</sup> Unlike Federal Article III, Oregon article VII does not cabin the "judicial power" to "Cases" or "Controversies." The *Couey* court first noted that the English and early American courts distinguished between actions to vindicate public rights—for which no personal stake was required of the litigant—and actions to enforce private rights, which required that the private rights at issue be the litigant's own.<sup>52</sup> The court then reviewed early Oregon cases and concluded:

The foregoing examination of the historical context—of the 1857 constitution and, particularly, of the 1910 amendments—shows a complete absence of evidence that the framers would have understood the "judicial power" conferred in either 1857 or in 1910 to have been limited to what we now term "justiciable" cases.<sup>53</sup>

With this historical backdrop, the court in *Couey* proceeded to review more modern Oregon cases, which had come to be in some tension. One line of cases interpreted the

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the federal sense. Rather, the ease of state constitutional amendment through popular mechanisms and the availability of common law alternatives give state judicial decision-making a conditional quality that further attenuates countermajoritarian concerns." (citations omitted).

<sup>48</sup> See Hall, *supra* note 31, at 1271–72 ("Most state courts have retained the discretion to hear cases deemed significant regardless of justiciability, often by adopting a 'public interest exception,' under which cases that are [otherwise] nonjusticiable may be heard if the public interest warrants that result. Indeed, many states go further, explicitly reserving the right to render 'advisory opinions.'"); see also Hershkoff, *supra* note 3, at 1876 (noting that "[t]he alternative [justiciability] practices of these state courts challenge the federal system's basic understandings of the judicial function in terms of comparative institutional competence and separation of powers").

<sup>49</sup> *Couey v. Atkins*, 355 P.3d 866, 886–90, 898 (Or. 2015) (en banc).

<sup>50</sup> *Id.* at 901.

<sup>51</sup> OR. CONST. art. VII, § 1.

<sup>52</sup> *Couey*, 355 P.3d at 888 (citing *Pike Cty. Comm'rs v. People ex rel. Metz*, 11 Ill. 202, 207–08 (1849)).

<sup>53</sup> *Id.* at 895.

state constitution to require a personal stake to invoke the judicial power.<sup>54</sup> Another held that standing was a mere matter of legislative definition.<sup>55</sup> Pointing to the lack of historical or textual support for the constitutional view of justiciability, the *Couey* court overruled prior cases adopting that view and followed *Kellas v. Department of Corrections*, “in which the court abjured the constitutionalization of justiciability and concluded that matters of standing were properly left to the legislative branch.”<sup>56</sup>

The *Couey* court concluded:

[W]e hold that, based on the foregoing analysis of the text, historical context, and case law interpreting Article VII (Amended), section 1, there is no basis for concluding that the court lacks judicial power to hear public actions or cases that involve matters of public interest that might otherwise have been considered nonjusticiable under prior case law. Whether that analysis means that the state constitution imposes no such justiciability limitations on the exercise of judicial power in other cases, we leave for another day.<sup>57</sup>

The absence of a constitutional constraint on standing does not mean that every person has the power to litigate any issue in Oregon’s courts. Rather, the lack of rigid constitutionalization opens the door to specialized standing rules in particular legal and institutional contexts. One such context, in which Oregon has crafted a particularly interesting standing regime, is that of land-use disputes before the state’s Land Use Board of Appeals (LUBA).<sup>58</sup> LUBA offers lessons about both land-use regulation and standing doctrine more generally.

## 2. A Case Study of Specialized Standing Rules: Oregon’s Land Use Board of Appeals

LUBA is a specialized court tasked with hearing initial appeals from the final decisions of local governments on land-use matters.<sup>59</sup> LUBA’s stated purpose is to

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<sup>54</sup> *Id.* at 896–98 (discussing *Or. Creamery Mfrs. Ass’n v. White*, 78 P.2d 572 (Or. 1938); *Cummings Constr. Co. v. Sch. Dist. No. 9*, 408 P.2d 80 (Or. 1965); *Gortmaker v. Seaton*, 450 P.2d 547 (Or. 1969); *Hay v. Dep’t of Transp.*, 719 P.2d 860 (Or. 1986); *People for Ethical Treatment of Animals v. Inst. Animal Care*, 817 P.2d 1299 (Or. 1991); *Barcik v. Kubiacyk*, 895 P.2d 765 (Or. 1995); *McIntire v. Forbes*, 909 P.2d 846 (Or. 1996); *Yancy v. Schatzer*, 97 P.3d 1161 (Or. 2004)).

<sup>55</sup> *Id.* at 896, 898 (discussing *Perry v. Or. Liquor Comm’n*, 177 P.2d 406 (Or. 1947); *Dickman v. Sch. Dist. 62C*, 366 P.2d 533 (Or. 1962); *Kellas v. Dep’t of Corrs.*, 145 P.3d 139 (Or. 2006)).

<sup>56</sup> *Id.* at 898.

<sup>57</sup> *Id.* at 901.

<sup>58</sup> *See generally* OR. REV. STAT. § 197.805 (2019).

<sup>59</sup> *Id.* § 197.828 (tasking the Board with reviewing land-use decisions). The Board’s

decide land-use cases expeditiously and consistently.<sup>60</sup> As one would expect, its jurisdiction is restricted to the review of final decisions, and petitions are subject to an exhaustion requirement and various exceptions.<sup>61</sup> Appeals from the Board's decisions are to Oregon's intermediate appellate courts, putting it in an equivalent hierarchical position to that of Oregon's trial courts.<sup>62</sup>

The Board's enabling statutes provide that "a person may petition the board for review of a land use decision or limited land use decision if the person: [ ] [f]iled a notice of intent to appeal the decision . . . and [ ] [a]ppeared before the local government, special district or state agency orally or in writing."<sup>63</sup> There is no requirement in the text of LUBA's enabling statutes to demonstrate concrete, personal injury to bring an appeal, at least for those who gave notice and appeared before the local government.<sup>64</sup>

This brings us to the basic question of what Oregon requires of litigants who wish to bring a claim in the LUBA. Is it enough that the litigant "[a]ppeared before the local government," or must they also demonstrate extra-statutory interests as a matter of more general Oregon law?<sup>65</sup> In the early 2000s, the Oregon Court of Appeals grappled with this question. First, in *Utsey v. Coos County*, the court of appeals decided that litigant appealing a LUBA decision in the courts must have standing and that the Oregon Constitution demanded a showing that a decision would have "a practical effect on [the appellant's] rights."<sup>66</sup> "[A]n abstract interest in the proper application of the law is not sufficient."<sup>67</sup> This reasoning would suggest resort to an Ur-principle of standing—one not sensitive to collective purpose or institutional heterogeneity and thus not subject to displacement by mere statutes—that courts' agendas are constrained to disputes brought by parties with concrete injuries.

In later cases, though, the court of appeals held that showing a practical effect on rights was not required to bring a claim before the Board.<sup>68</sup> And a prevailing

members are governor-appointed and Senate-confirmed, and while term-limited, are guaranteed salary protection. *Id.* § 197.810(1).

<sup>60</sup> *Id.* § 197.805 ("It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review.").

<sup>61</sup> *Id.* § 197.825(2).

<sup>62</sup> *Id.* § 197.850(3)(a).

<sup>63</sup> *Id.* § 197.830(2). The statute provides different requirements in cases in which no hearing was held or for which notice was not provided, sometimes requiring petitioners in such cases to show they were "adversely affected." *Id.* § 197.830(3)–(4).

<sup>64</sup> See generally *id.* § 197.830.

<sup>65</sup> *Id.* § 197.830(2)(b).

<sup>66</sup> *Utsey v. Coos Cty.*, 32 P.3d 933, 947 (Or. Ct. App. 2001) (en banc).

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

<sup>68</sup> *Just v. City of Lebanon*, 88 P.3d 312, 315–20 (Or. Ct. App. 2004) (citing *Cent. Klamath Cty. Cmty. Action Team v. Klamath Cty.*, 41 Or. Land Use Bd. App. 524, 527 (2002)).

party before the Board could defend, as a respondent, an appeal of a LUBA decision in the courts.<sup>69</sup>

The upshot of Oregon state law appears to be that the legislature is free to define the public interest and empower private persons to add to the judicial agenda cases that implicate that interest. And thus the “anyone who cared enough to appear” standard in LUBA’s enabling statute<sup>70</sup> states the totality of the standing requirement.

## II. STANDING’S GENERAL ASPECT

The diversity yet similarity among standing doctrines in practice is apparent from the discussion thus far, but what explains this pattern? A general theory of standing in its many forms must first explicate the concept itself. We conceive of standing requirements as a species of a more general set of rules we call agenda-control rules.

Agenda-control rules are any rules that govern whether a question will be decided by an institution.<sup>71</sup> For example, a university committee may require that agenda items come from committee members and be submitted two weeks before the meeting. There may be a further and perhaps even unstated requirement that the item be germane to the committee’s charge. Parents may have rules for their children about what is appropriate conversation at the dinner table. And legislatures may have rules about who may propose legislation and whether and when proposals are considered.

To understand the uses of and considerations bearing on these rules, we begin by defining some categories of *ex ante* agenda-control rules based on the facts on which they turn. Our taxonomy includes procedural rules, subject-matter rules, membership rules, and mixtures of these.

In addition to these rules, institutions may use *ex post* rewards or punishments to encourage wise use of the agenda.<sup>72</sup> If a group member adds an item that turns out to be frivolous or driven by bad reasons, the institution may punish by returning a result that frustrates the member, whether monetarily, corporally, or reputationally. It may also bar the member from raising future items. On the other hand, the member may be rewarded in some fashion for adding meritorious items. Rewards may be essential when detailing and posing items for decision is expensive or when the member best positioned to do so would otherwise gain little. Our taxonomy here includes these various kinds of incentives and disincentives.

Our framework in this Article aims to bring a general description to a problem that goes by different names across and within social groups: What questions should

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<sup>69</sup> *Id.* at 320–21.

<sup>70</sup> See OR. REV. STAT. § 197.830(2) (2019).

<sup>71</sup> See Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1404 (2016) (discussing agenda-control rules and their place in the constitutional system).

<sup>72</sup> See *infra* notes 95–101 and accompanying text.

we decide? Groups use *ex ante* and *ex post* rules in different ways but for the same sorts of purposes. It is expensive and potentially disruptive to decide a question that will result in group changes. Simply by posing a question as one the group should answer, one exerts a key form of power. Indeed, the morals of a group can usually be found in what a group finds to be debatable. It is through the agenda that the group as a whole reveals its ethos. As a tool to understand these phenomena, we advance a formal model of agenda rules that will permit us to isolate the uses of and alternatives to standing rules in particular.

### A. Ex Ante Rules

#### 1. Procedural, Subject Matter, and Membership Rules

An agenda is composed of issues that an institution has decided to decide. That decision whether to decide, or the agenda decision, can be governed by rules or, in a more *ad hoc* manner, merely governed by reasons. For now, we assimilate rules and reasons and divide the considerations that generally govern agenda decisions into three basic types: considerations of procedure (“how and when”), considerations going to the substance of the issue being proposed for the agenda (“what”), and considerations concerning the identity of the agenda proponent (“by whom”).

*Procedural rules* turn on the form, time, and manner of the proposal.<sup>73</sup> A court, for example, will not agree to hear a dispute based solely on having read a news item, even if the report contains emotional and urgent appeals for a court to consider the case. If one wants a court to decide a dispute, one must file a complaint or other proper petition in a manner consistent with the court’s procedural rules.

*Subject-matter rules* turn only on the substance of the issue raised.<sup>74</sup> For example, the requirement in federal courts that a suit raise a federal question, unless it is permitted under some other rule, is a subject matter rule.<sup>75</sup> Its satisfaction does not turn on the entity raising the issue or on the manner in which it is raised, only on the nature of the issue itself. Similarly, a committee’s requirement that all agenda items must relate to the committee’s charge is a subject-matter rule.

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<sup>73</sup> See Michael B. Miller, *The Justiciability of Legislative Rules and the “Political” Political Question Doctrine*, 78 CALIF. L. REV. 1341, 1341–56 (1990) (discussing procedural legislative rules).

<sup>74</sup> See *Standard Oil Co. v. Montecatini Edison S.p.A.*, 342 F. Supp. 125, 129–30 (D. Del. 1972) (“Subject matter jurisdiction deals with the Court’s competence ‘to hear and determine cases of the general class to which the proceedings in question belong; the power to deal with the general subject involved in the action.’” (quoting *Noxon Chem. Prods. Co. v. Leckie*, 39 F.2d 318, 320 (3d Cir. 1930))). See generally Bradley Scott Shannon, *Reconciling Subject-Matter Jurisdiction*, 46 HOFSTRA L. REV. 913 (2018) (discussing the effects of subject-matter jurisdiction).

<sup>75</sup> See 28 U.S.C. § 1331 (2018).

*Membership rules*<sup>76</sup> concern only an entity's inclusion in or exclusion from an identifiable social category. Consider rules like, "a legislature may only consider proposals for legislation that are introduced by members," or, "a land use planning commission may only consider proposals for rezoning made by city residents." The satisfaction of such rules turns on the identity of the proponent as a member of a social category.

One possible objection to our initial classification is that it is indeterminate. If we define as a category the "class of all litigants raising a substantial federal question," then an agenda rule that requires the issue to raise a substantial federal question could be described as a subject matter rule (issues raising a federal question) but also a membership rule (people raising issues raising a federal question). For any issue category, one could define as a membership category the set of people raising such issues. While this particular move might be considered pedantic, it does point to a potential problematic looseness in our definition of membership rules. What is and what is not a social category?

This apparent definitional problem is neither surprising nor concerning. In distinguishing types of rules and institutions, we are always working from a social model, not from some underlying, clockwork-regular reality that admits of fine and sharp distinctions among essences.<sup>77</sup> Our two categories here, membership and issues, are sociologically dependent. That is, by conceiving of membership as membership in "identifiable social categories," we use the society's own understanding of such categories to gain some insight into what it thinks it is doing with such rules.<sup>78</sup> And by focusing on matters on which decisions could be made, subject-matter rules arise from a social understanding of what constitutes such a matter. Hard cases here, as elsewhere in law, involve situations in which these social understandings, here either of "groupness" or "issueness," are controversial or ill-formed. Our effort here is to understand the structure of agenda rules that a group of people wishes to employ but from the internal perspective of that group. This is how one can learn from agenda rules what theory of value and role within the larger system the decision-making institution embodies.

## 2. Mixed Rules

A fourth category of rules consists of those agenda rules that require some analysis of membership, subject matter, or procedure in combination with one another. Some such mixed rules are simply compositions of pure rules of the types we have already discussed. Compositions of unrelated rules are not very interesting. For example, a rule requiring that a complaint in a particular type of state court be filed on a specified size of paper and with specified margins could be composed with a rule recognizing

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<sup>76</sup> See discussion *infra* Section III.A.

<sup>77</sup> See Christian Turner, *Models of Law*, 2018 U. ILL. L. REV. 1293, 1310–14.

<sup>78</sup> See, e.g., Brian Z. Tamanaha, *Necessary and Universal Truths About Law?*, 30 RATIO JURIS 3, 16–19 (2017) (arguing that law is not itself a universal concept and that understanding a group's law requires studying its conventional identification of a social category as "law").



as valid agenda items those that raise substantial questions under state law. Very little, if anything, is gained by analyzing these two rules as a single rule. We therefore restrict our definition.

*Mixed agenda rules* are those that require simultaneous consideration of at least two of the following: procedure, subject matter, and membership; and where there is a relation between the considerations of the two types. For example, a rule that requires suits on unpaid debts to be raised during “debt collection sessions held on Tuesdays” is a mixed procedural and subject-matter rule, because the procedural rule is invoked on account of the subject matter identified by the subject-matter rule. While one could decompose this particular mixed rule into its component parts, those parts would always be applied together. As we will see, not all such mixed rules are even conceptually susceptible to decomposition.

We have now covered the scope of our model. All the rules an institution will apply to determine whether to add an item to the agenda either are pure rules or mixed rules. The agenda decision will require, for many institutions, the application of at least several such rules. By breaking down these types and separating the pure from the mixed varieties, we are in a better position to understand the special role of what is often called standing.

### 3. Standing Rules

A *standing rule* is a type of mixed-agenda rule that depends on both the substance of the issue raised and on the entity raising it. Such rules will grant or deny an entity the power to place an item on the agenda only on account of a combined analysis of the entity raising the item *and* the item’s contents. But because of the relation requirement of mixed rules, a standing rule cannot be created just by composing a membership rule with an arbitrary subject-matter rule.

There are two distinct types of standing rules. A *categorical standing rule* is a standing rule that can be represented as the composition of a membership rule and a subject matter rule. It therefore has the form: “A member of class X may raise an issue in class Y.” Categorical standing rules are not, however, *arbitrary* compositions of membership and subject-matter rules. Because a categorical standing rule is a standing rule, its membership class, *X*, and its subject matter class, *Y*, must depend on one another. A legislative rule that allows committee members to bring to the floor bills that received a majority vote in committee is such a categorical standing rule. There is a membership rule, “belonging to the set of all members of a particular committee,” and an issue rule, “belonging to the set of bills that have been approved by that committee.” The legislative agenda rule grants consideration to proposals that satisfy both of these rules. And it is easy to see that each rule is dependent on the other. Change the committee, and you get a different issue class—and vice versa. It is enough, though, to check the membership and subject matter constraint separately. Was the person on the committee? And then, did the committee approve the bill being brought to the floor?

In contrast, we define a *specific standing rule* to be those standing rules that cannot be written as compositions of membership and subject-matter rules consistently with the social model. That is, any attempted decomposition yields a membership class such that for any putative subject matter class, there will be some issues that some members cannot raise.<sup>79</sup> For there to be specific standing in a case, there must a specified connection between the particular entity raising the issue and the particular issue. The federal standing doctrine's requirement of an injury in fact is a paradigmatic example of a specific standing rule, as it requires an analysis of the particular plaintiff's relation to a particular incident.<sup>80</sup>

Other examples will make the difference between categorical and specific standing rules more obvious. Consider the categorical standing rule for legislation above: a member may bring a bill to the floor that has been approved by one of the member's committees. If we further conditioned the member's agenda power on the bill's having a direct and significant effect on the member's constituents, we would have a specific standing rule. First, this rule depends on both the issue raised and the entity raising it and so is a standing rule. But we must also analyze the relation the bill bears to the member's constituents. Doing so requires a specific analysis of the contents of the bill in question, which will be different from the effects of other bills with other contents and different from the effects of this bill in other members' districts. Whether the member has standing cannot be determined without an analysis of the connection of this *particular* member to this *particular* issue. That is the essence of a specific, rather than categorical, standing rule.

Consider another example. When is there standing to sue someone who negligently caused an automobile accident and its resulting injuries? We have several categories of potential plaintiffs arising from this incident: people injured in the accident, bystanders, next-of-kin, and offended members of the public, for example. And we have an issue category, *Y*, defined by "whether the public will direct compensation for injuries arising from an automobile accident." Given an instance *y* in this issue category, i.e., a demand for compensation arising from a *specific* accident causing injuries to various people, who may raise *y*? If we only want to recognize

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<sup>79</sup> Formally, *r* is a specific standing rule if for any social category of entities, *X*, there is no subject-matter rule, *s*, so that *r* is just the joint satisfaction of *s* and "membership in *X*." It follows that *r* requires for at least some pairs (*x*, *y*) of entity and issue an analysis of the relation between *x* and *y*. In contrast, for a categorical standing rule, the membership class *X* cannot depend on the details of a given instance of an issue in the subject matter class. If it did, then there would be an issue *y* in *Y* so that some *x* in *X* could not raise it. Our definition entails that any *x* can raise any *y*. A more formal account along these lines is possible for the rules discussed here, but one author threatened harm to the other unless such account was left for future work.

<sup>80</sup> See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–62 (1992); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 2–7 (2001).

plaintiffs who have a connection to a specific accident, then there is no way to define a membership class disconnected from the particulars of the accident. That is, we must analyze the relation between a particular entity and a particular accident, again the essence of a specific standing rule.

In contrast, a categorical standing rule for negligently caused auto accidents, could allow, say, any taxpayer to prosecute for an automobile accident. Or, perhaps, anyone injured in *any* accident could be allowed to prosecute (or force prosecution of) *this* accident. While there may indeed be some categories of issues as to which the general class of those who have suffered from those issues bears enough special, empathetic affinity that they should be able to stand for one another, it does not seem plausible in the case of automobile accidents. More realistically, we might allow public prosecutors to bring such actions: Is the entity a prosecutor? Is the issue within the category of violations that may be prosecuted by a prosecutor? The former, the membership rule, and the latter, the subject-matter rule, are obviously related to one another, but mere satisfaction of each separately is sufficient to hear the action. And so there is at least one plausible categorical standing rule we could define for negligently caused automobile accidents.

The distinction between categorical and specific standing rules is important for the light it sheds on some contested issues in modern federal standing doctrine. In particular, it follows the contours of some debates concerning organizational standing. The doctrine concerning when an organization can sue in federal courts on behalf of its members sets forth two disjunctive tests. First, the organization may sue if it meets the test for individual standing, based on its own injury in fact. Such injury may be found, for example, in the impairment of the organization's ability to carry out its mission.<sup>81</sup> Second, an organization may have standing to sue on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>82</sup>

For a national organization devoted to a cause, there are several ways to establish agenda power over categories of issues related to that cause. For example, a suit concerning environmental damage or wildlife habitat loss would easily fall within the set of issues germane to the Sierra Club's purpose, and the organization's size facilitates identifying a member who has a particular connection to the alleged harm.<sup>83</sup>

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<sup>81</sup> *Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric.*, 946 F.3d 615, 618 (D.C. Cir. 2020) ("To demonstrate injury in fact, an organization must allege a 'concrete and demonstrable injury to the organization's activities' that is 'more than simply a setback to the organization's abstract social interests.'" (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982))).

<sup>82</sup> *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also* Katherine Mims Crocker, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057, 2067–69 (2019).

<sup>83</sup> The Sierra Club states that it has 3.8 million members. *About the Sierra Club*, SIERRA

If an organization is large enough, there will be members who are harmed in the particular ways demanded by the injury-in-fact requirement for many of these issues. Similarly, an organization's mission defines a set of issues it can argue are within its agenda power because their resolution would protect its ability to pursue its mission.<sup>84</sup>

And so environmental groups can sue over environmental damages, and animal welfare groups can sue over administrative actions (or inactions) harmful to animal welfare. Even if that overstates the law, appropriate refinements would pair whole categories of organizations (defined by mission) with categories of issues (defined by generic harms). In this way, the organizational standing rules formally appear to be specific standing rules but may in fact be categorical standing rules. Our goal here is neither to attack nor defend the breadth of organizational standing, but to understand the debate itself. Opponents and proponents of broad organizational standing advocate for specific and categorical rules, respectively. And it is *that* distinction that is the subject of the deeper and more primitive debate concerning the federal judicial agenda.

After all, the specific/categorical distinction captures the clashing metaphors for legal actions that Steven Winter has identified between private actions, through common law writs like trespass, and public actions, through prerogative writs like mandamus.<sup>85</sup> In litigation over private rights, standing arises from a symmetrical relation between, as he puts it, the source, path, and goal of the events giving rise to the litigation and the litigation itself.<sup>86</sup> First, the defendant's action (the source), via a causal chain (the path), results in an injury to the plaintiff (the goal).<sup>87</sup> Then, remedial litigation mirrors the harm process: the plaintiff's injury, via proof of the causal chain, results in redress of the defendant's action.<sup>88</sup> This model of what litigation does is specific in character, deriving its legitimacy from the connection between *this* plaintiff and *these* actions of *this* defendant. In contrast, prerogative writs were structured around a part-whole metaphor, where "any *part* [of the public] could *stand for* the *whole*."<sup>89</sup> Membership rules and categorical standing rules identify appropriate agents to stand for the whole. Specific standing rules plumb more specific relations based on models, like the source-path-goal model to which Winter points.

In federal courts during the twentieth century, the private rights model of judicial agenda construction—and thus the resort to specific rather than categorical standing

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CLUB, <https://www.sierraclub.org/about-sierra-club> [<https://perma.cc/MH8B-TY2D>] (last visited Oct. 22, 2020).

<sup>84</sup> See *Am. Anti-Vivisection Soc'y*, 946 F.3d at 619 (analyzing an organization's broad mission of promoting and providing public education on the humane treatment of birds and the impairment of that mission by the USDA's failure to enact regulations that would govern such treatment).

<sup>85</sup> Winter, *supra* note 25, at 1391, 1395–98.

<sup>86</sup> *Id.* at 1388.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1398.

rules—became firmly entrenched through constitutionalization of the injury-in-fact and related requirements.<sup>90</sup> And yet, the attempt to confine courts' agendas to the strictures of specific standing rules, whether for ideological reasons or not, is both controversial and shot through with exceptions.<sup>91</sup> The debate between the remedial character of specific rules and the agency character of categorical rules lives on, even if it is apparently settled as a formal matter in favor of the former. That there is tension here should not be surprising, as agenda rules will reflect the purposes and priorities of the institutions that maintain them. To the extent the rules serve those purposes, contested purposes should yield contest over agenda rules. We explore the fit between rules and purposes in Part III.

#### 4. Manipulability and Illusions

The controversy over organizational standing points toward a useful addition to our model. Suppose there is a category of issues as to which some entities are governed by a specific standing rule. If those entities have the practical ability to choose to satisfy the rule for any issue arising from the category, then we say that the rule is *manipulable*. If those who can do so are a recognizable social category, then this specific standing rule may be, as a practical matter, a categorical standing rule. But, further, if there is no relation between the membership category and the issue category, then, again as a practical matter, there is no standing rule at all, only separate membership and subject-matter rules. If the cost of manipulating a specific standing rule in this way is low, we call the rule *illusory*.

The idea here is that a specific standing rule that members of a recognizable class can satisfy at will is either categorical or a mere membership rule from the point of view of the class members. They can seize agenda power if they choose to do so. Large, issue-based organizations that can identify members with standing to sue over any issue arising out of their ideological purview confront the organizational standing requirements as manipulable.<sup>92</sup> So too, for example, if we restricted Establishment Clause suits to taxpayers who also publicize their objection to an official act they believe in violation of the clause, then there would be taxpayer standing as a practical matter. The additional bar to standing would be manipulable, both in the ordinary sense and in the sense we have defined it here. Moreover, relative

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<sup>90</sup> See *id.* at 1452–57; see also Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 317–31 (2001) (tracing the origin of the constitutionalization of federal standing rules to the Burger Court in the 1970s and the increasing entrenchment of such rules through the 1990s).

<sup>91</sup> See, e.g., Gilles, *supra* note 90, at 339–40, 348–55 (discussing the Supreme Court's upholding standing for *qui tam* relators and discussing the potential for Congress more generally to enable citizen suits by conferring agency status on plaintiffs); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1480–81 (1988).

<sup>92</sup> See *supra* notes 81–85 and accompanying text.

to the cost of bringing an action, the cost of publicizing disagreement is trivial, and so this standing rule would also fairly be understood as illusory.

What about LUBA's "anyone who cared enough to appear rule"?<sup>93</sup> The rule is easily seen to be a specific standing rule, because we would need to know the specific issue, not just whether the issue belongs to a general class of land-use claims, to know whether the complainant appeared below to speak on the issue. The standing analysis depends, therefore, on an understanding of the relation between the particular complainant and the specific issue. But this relation is just as obviously manipulable. Anyone who wants to add the issue to LUBA's agenda need only appear before the local land-use decisionmaker to do so. Whether this rule is so manipulable as to be illusory is a more complicated question that we take up below.

### B. *Ex Post Rules*

The *ex ante* rules discussed thus far identify issues, entities, and combinations of both that an institution analyzes when deciding whether to decide. It should come as no surprise that these rules can suffer from the same defects as other sorts of rules, namely under- and overinclusiveness. In using them to constrain the agenda power to competent agents, we may be left with no entity with adequate motivation to litigate an important issue.<sup>94</sup> And contrariwise, reposing trust in agents creates a risk that the agents will use their powers in ways that undermine the very reasons their agency was recognized.

*Ex post* rules can address these sorts of problems. Just as judicial due process review can correct for some of the flaws of legislative agents despite their formal, *ex ante* compliance with legislative procedures, and just as unconscionability review can invalidate contracts as to which the parties satisfied the *ex ante* formation requirements, *ex post* agenda rules can ameliorate bad but formally valid agenda decisions. And just like other *ex post* rules, their looming presence creates *ex ante*

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<sup>93</sup> See *supra* note 63 and accompanying text.

<sup>94</sup> Some judicial standing rules could go so far as virtually to forbid any entity from raising an issue at all. If the purpose of such standing rules is not to create a subject matter exclusion, then they amount to an extreme example of underinclusivity. See, e.g., WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 696 (7th ed. 1994) ("If a local authority grants planning permission improperly, or licenses indecent films for exhibition, it does a wrong to the public interest but no wrong to any one in particular. If no one has standing to call it to account, it can disregard the law with impunity—a result which would 'make an ass of the law'. An efficient system of administrative law must find some answer to this problem, otherwise the rule of law breaks down."); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1176 (1993) ("A requirement of evidentiary proof of particularized injury in this recurring type of situation is functionally indistinguishable from holding that no one has standing to seek review of an agency action that injures everyone.").

incentives. They may either add encouragement to pose an issue to the institution, strengthening the agency already contemplated in the *ex ante* rules, or they may discourage it. In either case, the function of these rules is to tailor more finely the function of the *ex ante* system in the face of competing incentives on those deciding whether to pose a question to the institution.

We identify several types of *ex post* rules, divided among *incentive rules* and symmetric *disincentive rules*, meant to address the problem of too little agenda power or too much, respectively. Incentive rules may take many forms, some pecuniary, such as bounties, enhanced damages, or attorney's fees, and others intangible, such as public commendations and role-enhancements.<sup>95</sup> Disincentive rules provide punishments that mirror each of these rewards, such as damages or attorney's fees, or intangible sanctions such as embarrassments and disempowerments.<sup>96</sup>

Financial incentives include rules that award the agenda proponent a share of any spoils resulting from the decision. While ordinary tort or contract claims resulting in compensation are obvious examples, there are more exotic incentives. For example, the Federal False Claims Act grants private parties, or relators, who file suit alleging (essentially) that a defendant has defrauded the government anywhere from ten percent to thirty percent of the amount recovered by the government.<sup>97</sup> Attorneys' fees, to the extent they are imposed on another party by the institution and then awarded to agenda proponent, are another example.<sup>98</sup>

*Commendation* is a public acknowledgment that the agenda proponent performed a service to the group. Whether and the degree to which this is an incentive depends, more so than for bounties, on the sociology of the group and the proponent's psychology. We will not say much about *role-enhancements* here other than to note that they are a conceptually distinct possibility. Using agenda-setting power well could be rewarded with an enhanced future ability to add to the agenda, or another beneficial change in status relative to the institution.<sup>99</sup>

Disincentive rules are mirror images of the incentive rules, and include penalties, embarrassments, and disempowerments. *Penalties* compensate other entities for the costs imposed by the item's appearance on the agenda. Awards of attorneys' fees or other monetary sanctions, whether paid to other litigants or to the institution, are

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<sup>95</sup> See generally Clinton A. Krislov, *Scrutiny of the Bounty: Incentive Awards for Plaintiffs in Class Litigation*, 78 ILL. B. J. 286 (1990) (discussing various incentives that courts have to encourage certain suits).

<sup>96</sup> For example, Federal Rule of Civil Procedure 11 provides for various monetary sanctions as deterrence for frivolous suits. FED. R. CIV. P. 11. Rules governing professional conduct may provide embarrassment or disempowerments. *E.g.*, *In re Himmel*, 533 N.E.2d 790, 791, 796 (Ill. 1988) (finding that an attorney's failure to report and commence investigation of the wrongdoing of another attorney warranted suspension of practice).

<sup>97</sup> 31 U.S.C. § 3730(d) (2018).

<sup>98</sup> See, *e.g.*, OR. REV. STAT. § 197.830(15) (2019).

<sup>99</sup> Role-enhancements are uncommon in the adversary litigation setting, in comparison with their mirror-image disincentive. Future work may explore why.

an obvious example.<sup>100</sup> The inverse of commendation, *embarrassments* might just be considered a type of penalty, just as commendation could be viewed as a non-pecuniary bounty. But, like commendation, mere publication of the fact that the agenda proponent has wasted everyone's time or misused public resources can indeed serve as a disincentive to do so and more obviously requires analysis of the broader social situation to understand than do pecuniary punishments.

*Disempowerments* are also a form of social sanction but, again, might be understood better separately. Here, we refer to the institution's decision specifically to take away some or all of the entity's agenda power on account of its misuse. Such rules exist even in the context of federal litigation. For example, the Prison Litigation Reform Act detracts from, but does not eliminate, the agenda power of prisoners who have repeatedly brought non-meritorious claims:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding [*in forma pauperis*] under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it [was] frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.<sup>101</sup>

In summary, *ex ante* rules, like all rules, are imperfect. By providing benefits or consequences for having added an item to the agenda, *ex post* rules can ameliorate to some degree both the under-provision and over-provision of agenda proposals that would result from the *ex ante* agenda rules alone.

### C. The Use of Rules

Political scientists have long known that the power to set the agenda is real power and have attempted to model it.<sup>102</sup> Romer and Rosenthal have noted that simplistic models of majoritarian decision-making would have us conclude that policy power resides in the median voter.<sup>103</sup> But, they observe, real institutions only decide those issues that appear on their agenda, and monopoly agenda "setters" will not necessarily put up for a vote the median voter's preferred policy.<sup>104</sup> It is not at all obvious how to optimize the allocation of this agenda-setting power. Indeed, some efforts to

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<sup>100</sup> See, e.g., OR. REV. STAT. § 197.830(15) (2019).

<sup>101</sup> 28 U.S.C. § 1915(g) (2018).

<sup>102</sup> See, e.g., Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUB. CHOICE 27, 27–28 (1978).

<sup>103</sup> *Id.* at 27.

<sup>104</sup> *Id.* at 27–28.



constrain, enhance, or democratize agenda control may backfire. For example, Romer and Rosenthal argue that attempts to promote substantive review of federal agencies' activities and budgets by providing in advance for sunseting or zeroing out their budgets may actually increase the power of the agencies.<sup>105</sup>

Agenda governance by rule exists even in places we have become accustomed to believing no agenda governance is occurring. Consider the question whether to imprison a person that the police believe committed a robbery. A group could well decide to allow—and over time become used to—the direct and unreviewable imprisonment of accused criminals by the police. But in our system, all individuals so threatened with loss of liberty have a power to force a court, and often a jury, to decide whether their imprisonment should be permitted. In essence, *whether to punish* is always a question we will seek to debate, going so far as to afford some degree of equality in the presentation of the opposing sides of the issue.

The overwhelmingly dominant practice of plea bargaining and the charging power of prosecutors undercuts a defendant's agenda power, however. The defendant who exercises their agenda power faces, in fact, an *ex post* rule. Place your imprisonment on the agenda, and face more serious charges.<sup>106</sup> Here we see why taking account of the more complete ecosystem of agenda-control rules may provide more realistic insight into the functioning of an institution and its social effects.

While we will not in this Article delve further into the dynamics of systems in which competing or cooperating actors have different, but interacting agenda powers, we believe a model doctrinal framework—a description of the agenda governance toolkit—will help to illuminate this and other problems more clearly. To see how, we turn to the normative considerations involved in institutions' agenda decisions and how the doctrinal rules we have described might serve them.

### III. AGENDA CONTROL AND INSTITUTIONAL REASONS

Many institutions' purposes are to some degree or another contested. Those purposes are attained or not through decisions, and institutions only decide questions they first choose to consider. And so the agenda for what issues the institution will decide is often a major source of normative conflict. As Adrian Vermeule put it, “agenda decisions are typically value choices about how the institution's time is best

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<sup>105</sup> *Id.* at 39 (“The threat of a zero budget actually occurring for cases when this event would be a very bad outcome (a low-ranked status quo) may then work to the advantage of an expenditure-maximizing bureau . . .”).

<sup>106</sup> *See, e.g.*, Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1310 (2018) (“The ability to control a defendant's sentencing exposure by manipulating the charges against him—that is to say, the ability to charge bargain—is widely recognized by scholars as the core of prosecutorial power in the United States.”). As Crespo notes, because high sentences and additional charges are always available, the prosecutor's “leverage is typically overwhelming,” and thus “the prosecutor is able to control the defendant's incentive to plead guilty.” *Id.* at 1312.

spent, not judgments that we might label accurate or inaccurate.”<sup>107</sup> This being the case, agenda rules can be evaluated only with respect to the manifold interests of the associated community.

In this Part III, we identify some basic goals institutions have for agenda construction and begin the project of analyzing how those goals are advanced by the various kinds of rules in the agenda toolkit. Although these goals vary in nature and weight in different contexts, we propose that they principally take the following three forms:

- (1) Would the resolution of the issue be of *net benefit* to the community the institution serves?<sup>108</sup>
- (2) Is the entity *competent to raise the issue* in light of the entity’s position within the decision-making process?
- (3) Would the institution’s consideration of the issue interfere with resolution by *another* institution better suited to the task?

In short: (1) group benefit from decision, (2) entity competency, and (3) institutional competency.

Importantly, the framework itself is not normative but, rather, a description of the normative project of agenda construction. That is, we suggest that this analysis will likely point toward the particular agenda rules an institution actually adopts, because it is central to how agenda decisions will actually impact an institution over time. It thus provides an explanation for doctrine based on more fundamental considerations and, when the doctrine deviates from the expected, gives a clue that our understanding of an institution’s dynamics is likely to be incomplete.

#### *A. The Three Considerations and the Agenda-Rule Taxonomy*

Focusing on these desiderata, it becomes apparent how the types of rules we have defined could figure into the problems of agenda. We take our rule categories in turn. Membership rules focus only on the group-based identity of the entity raising the issue and, thus, could be used to distinguish competent from incompetent entities. In doing so, they choose whether to repose trust in an entity to make wise determinations regarding the institution’s resources. Membership rules either deputize agenda agents or bar members of particular groups from becoming such agents.

Subject-matter rules, unconcerned with the entity raising the issue, may be aimed at ensuring net benefit from decisions or at regulating the institution’s situation within

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<sup>107</sup> Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74, 95 (2005).

<sup>108</sup> A community may, of course, consider it beneficial to resolve an issue on account of its being important to an individual. That is, a community’s evaluation of the good may incorporate some purely private benefits on grounds that what is good for an individual is often good for the community.

a broader institutional system. These rules focus institutional resources on likely beneficial decisions arising in areas of institutional competency, the first and third of our considerations.

Subject-matter rules are *ex ante* determinations to decide certain types of questions and not others, rather than to assign that determination to general agents or to condition decisions on further judgments concerning the proposing entities.<sup>109</sup> When the importance of a question covered by a subject-matter rule is great enough (the first consideration) and bringing it to the attention of the institution is critical given its position with the institutional system (the third consideration), we should expect a subject-matter rule promoting agenda addition. And if raising such issues is costly, the need for *ex post* agenda incentives in support the subject-matter rule is plain.

Categorical standing rules identify classes of competent entities for particular categories of issues.<sup>110</sup> And so, with such rules, we create categories of entities that are trusted to be agenda agents only with respect to some of the issues that the institution is otherwise prepared to resolve. They thus create more granular and nuanced agency than do pure membership rules. As institutional prerogatives become more complex and wide-ranging, we should expect to find rules reflecting a judgment that some types of entities are competent to raise certain issues but not to raise others. Committed environmental groups can raise environmental issues. Members of a legislative committee can bring the committee's bills to the floor. Rather than deputizing any one entity as an agenda agent for all purposes, the categorical standing rule creates issue zones in which categories of entities are likely to be competent agents. Again, the more complex and varied the institution's potential decisions, the greater the likelihood of resort to categorical standing rather than membership to filter for entity competence.

Recall that categorical standing rules do not turn on the details of any issue-entity pair but, rather, on *a priori* judgments concerning the general competence of members of the category to drive the agenda on issues of the given subject matter. So if the question, "Can Jones raise an Endangered Species Act claim?" is governed by a categorical standing rule, that means it can be answered without knowing (a) anything about the particular details of the claim other than that it is an Endangered Species Act claim or (b) Jones' relation to the issue or claim other than his membership in the membership class specified by the categorical rule.

Finally, specific standing rules give an agenda decision to an entity only after an analysis of the relation between the particular entity and the particular issue raised. And so these rules must be concerned with entity competence on a more specific level than the other rules.

As a general matter, we can expect to find such rules in several circumstances. First, an institution may sometimes wish to act primarily because it is important to

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<sup>109</sup> See discussion *supra* Section II.A.1.

<sup>110</sup> See discussion *supra* Section II.A.3.

an entity, such as when an entity's end is the institution's end *because* it is the entity's end.<sup>111</sup> Such a motivation is premised on ascertaining both what the entity's end actually is and whether that end should be the institution's end. Identifying such issues requires knowledge of the relation between a particular entity and the issue being posed and, thus, a specific standing rule.

Another use of specific standing rules is to control the agenda when the epistemic problem of forecasting good agenda-makers for given issues is too complicated *ex ante*.<sup>112</sup> That is, even if we prefer the relative simplicity of categorical standing rules, which involve only checking class membership, we cannot adequately lay out categories of issues and decisionmakers that would do the job.<sup>113</sup> Here too, specific standing rules involve ad hoc judgments concerning decisional benefit and agent competency.

The third consideration, an institution's situation within the system, can be addressed, for example, by relatively stingy specific standing rules. While the categorical rules may restrict institutional prerogatives in light of those of other institutions (by providing blunt limits on the topics up for action or limiting agenda powers to preordained classes of people), specific standing rules, if not manipulable, are agenda-conservative in the sense that they may even bar topics that might otherwise be suitable for decision and from people otherwise competent to propose agenda items. These rules can be used to inject a necessity constraint into the agenda-construction process, the kind that may punt otherwise good questions that have been raised at the wrong time, with the wrong motivations, or with suboptimal stakes or presentation.<sup>114</sup>

These general observations show the fit of our taxonomy with typical agenda concerns represented in our three desiderata.<sup>115</sup> We now turn to a more detailed look at normative considerations imposed by each desiderata on agenda-rule construction.

### *B. Group Benefit*

The first question in the model framework, the group benefit of deciding an issue, appears to go primarily to subject matter. But taking stock of the group's values at stake in a disputed issue is also a crucial step in conducting the second and third inquiries, entity and institutional competency. For example, if the reason for resolving

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<sup>111</sup> This motivation is particularly evident in civil recourse theories of tort law. *See, e.g.*, Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 735 (2003) ("To afford a right of action to the victim of a tort is to recognize that the victim has a right of response to what the defendant did. In this respect, a right of action in tort, focused on the right to respond to a legal wronging in the past, may be compared to self-defense in the criminal law, which recognizes the right to preempt an anticipated wrongdoing by another.").

<sup>112</sup> *See supra* Part II.

<sup>113</sup> *See supra* Part II.

<sup>114</sup> *See, e.g.*, Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40, 42–44 (1961).

<sup>115</sup> *See supra* Part III (referring to group benefit decisions, entity competency, and institutional competency).

the particular dispute is to pacify private parties who would otherwise be inclined toward extra-legal self-help, then those private parties might be judged, for that reason, competent to invoke the decision-making power of the institution. The greater the potential harm from self-help, the more important effective institutional resolution becomes. And so, the social benefit of deciding informs the analysis of entity competency. This is a reminder that the three questions our framework poses are interrelated.

If we focus on group benefit, we must acknowledge that the question of whether to add an agenda item generally raises issues both of private and public importance. With respect to private effects, declining an agenda item can lead to demoralization costs—containing both immediate hedonic and forward-looking disengagement costs—and dignity harms.

The hedonic effects are intuitive. We may become unhappier when our group fails to consider our issue. Anyone who has ever tried and failed to get a group of friends or family to discuss a matter of personal importance will grasp this fact immediately.

The disengagement costs can come in the form of reduced cooperative effort generally and reduced effort in the specific private activities that the failure to decide devalues.<sup>116</sup> The disappointed proponent decides the group is not a fruitful place to devote efforts or, more specifically, “Why bother planting corn this year if the group will not decide whether to protect my corn from bandits or to devote needed resources to its harvest?” Additionally, parties may disengage from the structure of rules the institution administers, disillusioned over doubts that the institution will mediate disputes arising under them.<sup>117</sup>

Access to decisionmakers is also, for some issues, a matter of dignity.<sup>118</sup> For example, Gilat Bachar points to the dignitary interest in the public agenda:

[C]ivil litigation provides participants with an official form of governmental recognition. Even if a party loses her case, the fact that she can assert her claim and require both a government official and the person who has wronged her to respond is a significant form of recognition of her dignity.<sup>119</sup>

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<sup>116</sup> These are the costs famously identified by Frank Michelman in the circumstance in which government appropriation of private property goes unremedied. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation”* Law, 80 HARV. L. REV. 1165, 1214 (1967).

<sup>117</sup> See Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 984–85 (noting that inconsistent application of standing rules on appeal in administrative agency cases could chill parties from serving as a vital check on agency action in the future).

<sup>118</sup> See, e.g., Gilat J. Bachar, *Access Denied—Using Procedure to Restrict Tort Litigation: The Israeli-Palestinian Experience*, 92 CHI.-KENT L. REV. 841, 863–66 (2017) (discussing the nature of the dignitary harms by exclusion of Palestinians as a group from procedural hurdles to raising claims regarding loss of property).

<sup>119</sup> *Id.* at 867.

However, adding an agenda item may also impose costs (and, potentially, benefits) on others, including the cost of advocacy, the risk-adjusted cost of the various possible decisions, the costs of reaching a decision that are imposed on the deciding institution, and the influence on one's own planning with respect to the agenda. Andrew Hessick, for example, notes that litigation is expensive for both public institutions and private parties and that the federal "injury-in-fact" requirement might address this cost.<sup>120</sup> He concludes, however, that Congress, not courts, should weigh these resource impacts, a nod to the systemic, third consideration in our framework.<sup>121</sup>

With respect to the public importance of adding agenda items, we must consider the resources that will be consumed by deciding, the social friction or harmony that may be achieved during and after the decision process, the influence of the precedent that will be established by deciding to decide the issue (or not), and the likely effects of the ultimate decision. There is a role here for pure membership rules. If the institution's purposes are tied directly to a social group (or institutional subgroup), then some costs will arise merely from refusing to decide or agreeing to decide a group member's issue.

Pure subject-matter rules can identify beneficial or costly decisions. The minimum amount in controversy required for diversity jurisdiction is such a subject matter rule and focuses on the value demanded by a plaintiff.<sup>122</sup> It serves to restrict a certain class of claims, state-law claims between diverse litigants, to important matters, where the dollar amount at stake is a proxy for importance.

### *C. Entity Competency*

Next, we ask whether the party raising an issue is well-positioned to decide whether public resolution is a net good and, if so, to add an item to the agenda. This is a combined question of informational and motivational advantage relative to other potential agenda decisionmakers. In other work, one of us has described the analysis of an agent's decision-making competency as a compound of various "atomic" capacities, derived from the decomposition of a general social welfare function.<sup>123</sup> In particular, we ask whether an entity making a decision on behalf of others (a) is able to calculate the relevant private preferences, (b) is distributively fair in the sense that the agent weighs the preferences of others as heavily as her own, (c) takes account of any public values not accounted for adequately as a matter of private preferences,

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<sup>120</sup> Hessick, *supra* note 13, at 323.

<sup>121</sup> *Id.*

<sup>122</sup> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between [certain classes of litigants]." 28 U.S.C. § 1332(a) (2018).

<sup>123</sup> Christian Turner, *Law's Public/Private Structure*, 39 FLA. ST. U. L. REV. 1003, 1018–21 (2012).

(d) is able to weigh the relevant values consistently with the publicly preferred approach, and (e) has sufficient resources to effect the decision.<sup>124</sup>

Here, too, we take some first steps to understand the general implications of this consideration for agenda questions. When issues are particularly important to an entity, that entity is likely to have a private preference calculation advantage over other entities, as its preferences are most greatly affected *and* it is likely to know its own preferences better than others do. If resolving this particular entity's issue would have no great connection to the resolution of other issues (as in the case of an individual seeking compensation for physical injury under circumstances where compensation is usually awarded), then the aggregate of public and private values are likely aligned with the entity's own desire to seek public decision or not.<sup>125</sup>

There is, of course, another consideration. Such an individual is likely to discount severely the costs imposed on others, such as the defendant who is being asked to pay compensation and who would prefer not to add such an item to the agenda. How should such a defendant's voice, or the potential for such voices, contribute to the agenda decision?

First, note that in small, tightly knit groups, we might be more likely to trust the agenda preferences of a single individual than we would in larger more disparate ones, both because people in such small groups likely care about one another, and because they are more likely to be affected by, and responsive to, social sanctions.<sup>126</sup> In other words, we have greater faith in individuals' distributive competency and ability to take account of group values. In such groups, we would expect to find more frequent resort to membership rules and categorical standing rules than in more complex groups.

In complex groups, we expect to find agenda power reposed less often absolutely, or even categorically, in individuals. When the decision costs on others and on the group could be high, it will be necessary either to look more closely at the individual and the proposed agenda item, through specific standing rules, to create more complex membership or categorical standing rules, or to create *ex post* rules controlling or reallocating some of the distributive costs.

For example, we could grant agenda-setting authority to a group of those with relevant private interests, rather than granting unilateral power to individuals. Or, if we permitted unilateral standing, we could make efforts to control *ex ante* and *ex post* incentives. The institution could establish *ex ante* thresholds of harm, rules of evidence, and pleading requirements to disincentivize costly agenda items. *Ex post*, the institution could impose costs in the form of fines, fee-shifting, or other compensatory payments to others for raising issues that turned out to lack merit.<sup>127</sup> In

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<sup>124</sup> *Id.* at 1021–25.

<sup>125</sup> *Id.* at 1051–52.

<sup>126</sup> See ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 180–82 (1991).

<sup>127</sup> See discussion *supra* Section II.B.

ancient Athens, any male citizen had the equivalent of taxpayer standing to prosecute public wrongs, a very broad power by modern standards.<sup>128</sup> But this power was moderated by the threat of *ex post* sanction.<sup>129</sup> A private prosecutor was subject to a fine if he failed to convince more than one-fifth of the jurors to vote in favor of his case.<sup>130</sup> *Ex ante* standing rules and *ex post* controls may work in tandem to optimize an institution's agenda given the imperfect abilities of individuals to reach agenda decisions on behalf of the social group.

What about important issues that do not obviously affect individual entities in particular and distinct ways? One response is that there should be no individual power to add such items to the agenda, and that agenda control should instead be governed by aggregative techniques—perhaps through public voting or the visible decisions of accountable agents. But these public techniques have costs of their own. Adrian Vermeule has observed that for institutions that operate in public, an agenda power includes the ability “to throw information into the public domain” and therefore force some substantive accountability.<sup>131</sup> Vermeule's focus was on rules that give a minority of members of an institution the ability to compel consideration by the whole institution, for example, the Rule of Four that gives four justices the power to force consideration of a case in the Supreme Court and the one-fifth threshold for roll call voting in the House of Representatives.<sup>132</sup> But the power of a *single* individual to force a binding judicial decision is a rather awesome one and an extreme example of what Vermeule dubs “submajority rules.”

For these sorts of agenda decisions, ones as to which entities may have interests but where those interests are not obviously distinct from many other entities' interests, we cannot rely on a private-preference-calculation advantage to pick out the “right” entity to press the issue onto the agenda. Many might be equally suited to do so and, for that reason, the decision of one entity to invoke the decision-making process should not obviously count for more than the decisions of many others not to do so.

Several possibilities now arise. As above, we could create agenda-governance rules that aggregate the interests of all relevantly affected entities (e.g., a system of class action and objection).<sup>133</sup> But whether that is a reasonable course depends on the

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<sup>128</sup> Adriaan Lanni, *Public and Private in Classical Athenian Legal Enforcement*, in PUBLIC AND PRIVATE IN ANCIENT MEDITERRANEAN LAW AND RELIGION 37, 38 (Clifford Ando & Jörg Rüpke eds., 2015).

<sup>129</sup> *Id.* at 39.

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

<sup>131</sup> Vermeule, *supra* note 107, at 91. See also Kristian Skagen Ekeli, *Constitutional Experiments: Representing Future Generations Through Submajority Rules*, 17 J. POL. PHIL. 440, 451–52 (2009).

<sup>132</sup> Vermeule, *supra* note 107, at 90.

<sup>133</sup> See, e.g., James Rooney, *Class Actions and Public Interest Standing in South Africa: Practical and Participatory Perspectives*, 33 S. AFR. J. ON HUM. RTS. 406, 407–08 (2017) (describing the expansion of public interest and class action standing in South Africa under the 1993 Interim Constitution and the 1996 Constitution).



purposes our institution serves and its relation to other institutions within our cooperative system. If a large enough group is interested in the resolution of an issue that is otherwise important to resolve, then an institution designed to deliver agent-based representation of such large groups may be a preferable choice of decision-making institution. For example, we might make the classic observation that legislatures rather than courts may be better suited to resolve generalized grievances, averting to the third consideration of institutional situation.<sup>134</sup> Or, as South Africa did in 1996 and has been the practice in some states, we could permit standing in cases of public interest litigation without respect to individual injuries.<sup>135</sup>

#### *D. Relative Institutional Competency*

This brings us naturally to our third consideration: Is there another institution that either can (a) make the agenda decision better or (b) resolve the issue better if the issue is added to *its* agenda instead? In addition to this functional approach, the group might wish to limit the institution's agenda authority on particular questions to preserve the prerogative of other institutions within the system more generally, without regard to competence on those particular questions. These sorts of concerns can be heard from proponents of separation-of-powers-inspired standing theories.<sup>136</sup> In an influential article, Maxwell Stearns argues that federal judicial standing serves three purposes: (1) protection against litigant manipulation of legal doctrine through selection effects,<sup>137</sup> (2) separation of powers by giving courts the obligation to decide issues presented to them and legislatures the power *not* to decide until political consensus forms, and (3) distinctiveness of powers by encouraging courts to develop only what new law is needed to resolve real disputes.<sup>138</sup> Heather Elliott has deepened the "separation of powers" buzz phrase into a far more nuanced comparative institutional

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<sup>134</sup> See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992).

<sup>135</sup> See Rooney, *supra* note 133, at 410–11 (describing standing to raise claims lacking any personal interest that meet a twofold test: first that the litigation is in the public interest in the sense that it addresses an issue of broader effect than class actions would reach and, second, that it pursues remedies that would benefit the public generally).

<sup>136</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers. It is this fact which makes possible the gradual clarification of the law through judicial application."); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890–93 (1983); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1318–19 (1995).

<sup>137</sup> See Stearns, *supra* note 136, at 1318–20. The first function Stearns identifies goes to entity competency and points toward specific standing rules that are not manipulable. Because courts proceed case by case, if private parties are denied the ability to pose questions for the judiciary at will, they cannot exert outsized influence on law's content based on selection alone. See Huq, *supra* note 71, at 1436–38 (discussing *id.*).

<sup>138</sup> See Stearns, *supra* note 136, at 1318–20.

understanding of the role of courts and how standing doctrine is thought to define and protect that role.<sup>139</sup> These protective functions include: ensuring “concrete adversity,” promoting democracy by leaving policy questions and generalized grievances to elected officials, and refusing to be used by Congress to fight the Executive Branch through citizen suit provisions (but apparently not *qui tam* relators).<sup>140</sup> She argues, however, it would be better to confront these issues in cases directly and as a prudential matter, without resort to a single federal test for standing that serves the protective purposes poorly.<sup>141</sup>

Interestingly, to the extent we focus on our initial two questions above—relative institutional competency on the agenda decision and on resolving the substantive issue—we may arrive at different answers for a given issue. For example, a legislature may be better suited to reaching a decision on an issue in a manner that advances the public interest, but it may be at a disadvantage in terms of the ability to add the issue to its agenda in the first place. It might suffer from multiple, obscure veto points, or it may centralize agenda power in agents who face little pressure to act for publicly beneficial purposes. In this case, a system may work better if standing is recognized in the agenda-advantaged institution but if the issue is then resolved in a way that forces reconsideration of the issue to the issue-advantaged institution.<sup>142</sup>

The common case, however, is probably that these two considerations are similar. For example, a legislative body might be agenda-advantaged for the same reasons it is issue-advantaged: an issue would affect a wide swathe of a large public, and determining its effects and crafting a solution would benefit from legislative-style hearings, broad representation, and regulatory machinery more finely tailored than judicial remedies.<sup>143</sup>

There are instances, though, in which an issue of broad public interest is arguably better resolved by courts, despite the availability of a broadly representative legislature to resolve the same issue. Public choice theory teaches that certain patterns of policy demand and resistance result in poor legislative representation.<sup>144</sup> For example, when the costs of a policy would be concentrated on a small group and benefits widely dispersed, then, because interest groups would more readily form to represent the small, burdened group than the large and free-rider-filled, benefited group, legislation is unlikely to result—even if the policy’s benefits would greatly outweigh

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<sup>139</sup> Elliott, *supra* note 20, at 467–68.

<sup>140</sup> *Id.* at 468, 495–96.

<sup>141</sup> *Id.* at 510–16.

<sup>142</sup> See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163–66 (1982).

<sup>143</sup> See, e.g., *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 264–67 (1918) (Brandeis, J., dissenting) (describing the relative superiority of agencies and legislatures over courts in crafting regulations to govern technological change across a large industry operating in the public interest).

<sup>144</sup> See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276–77 (1988).

*its costs*.<sup>145</sup> William Eskridge has argued that courts may have an advantage in such cases on account of (a) the leveling of resource advantage in the adversary system because the sides are represented more equally and financing may sometimes be easier, (b) the disinterest of judges in what interest groups can typically offer legislators, (c) the tendency of judicial procedures and norms (lack of agenda control, availability of appeal, norm of stating reasons and deliberating) to prevent collusion with rent-seekers.<sup>146</sup> As Adrian Vermeule has put it, a “submajoritarian agenda rule . . . allows the minority to focus the majority’s attention by putting the decision under the most intensive form of scrutiny the institution affords . . . full public argument on the merits (in courts).”<sup>147</sup>

We do not purport to provide a calculus here. Rather, we suggest that conceiving of “standing” as a question of agenda control helps to frame the three central inquiries that rationally inform the question. This broader understanding will help make sense of standing’s diverse doctrinal forms. For an example, we turn to the odd case of standing in land-use cases and Oregon’s Land Use Board of Appeals in particular.

#### IV. EXAMPLE: STANDING IN LAND-USE DISPUTES

##### A. *The Agenda Economy of Land Use*

While it is true that all legal subjects are different from one another, land-use disputes and the legal machinery for resolving them are unusually distinctive. They involve neighbors with conflicting preferences concerning local life, centering on property that (a) is subject to high transaction costs to swap or alienate and (b) is unusually likely to be the target of idiosyncratic utilities and attachments.<sup>148</sup> Land-use disputes are resolved by local boards of representatives who wear many hats. And the resolution of these disputes, because the issue is hyperlocal, will govern individuals who come into repeat contact with one another and may live under the legacy of the dispute for an extended period.<sup>149</sup>

There are three key features of land-use disputes that suggest that liberal standing rules may be particularly appropriate in this context. They are: the unique and personal *values* of particular parcels of land, the unusual importance of *pacification* of land use disputants, and the *public choice* model’s prediction of courts’ relative advantage in what are often challenges to diffuse-cost, concentrated-benefit proposals.

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<sup>145</sup> See, e.g., *id.* at 285–95.

<sup>146</sup> *Id.* at 303–07.

<sup>147</sup> Vermeule, *supra* note 107, at 81.

<sup>148</sup> Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 735–37 (1973).

<sup>149</sup> Contrast this factual pattern with a general policy preference for clean breaks between disputants. Divorce, contract, and torts all have rules that aid resolving a dispute without fostering long-term entanglements.

*Values.* Land-use disputes arise from competing desires attached to ownership and use of location-specific resources. The built environment is expensive to create and to alter, and real estate transactions are notoriously costly. For this reason, the array of land uses that may be proposed in an area does not necessarily reveal the land-use preferences of any of the area's land users. The upshot is that values, injuries, and preferences with respect to land use are difficult to evaluate objectively.

Homes, and the land on which they sit, often combine as the most valuable family asset and homeowners are motivated to protect that asset.<sup>150</sup> But because those values are determined by location-specific externalities and amenities as much as by property maintenance, protection often entails political and legal activism. Land users may fight for exclusion, environmental protection, roads, sewers, development moratoria, or against all of these things. Land-use policy is an area in which people are constantly, and with some justification arising from real personal interest, up in each other's business.

*Pacification.* In a classic article, Carol Rose advanced a "negotiations" model of local land-use decision-making.<sup>151</sup> Rose suggests this model as a preferable alternative to the legislative and adjudicative models of what is and should be happening in city councils and planning commissions.<sup>152</sup> But her insight into the sociology of land-use fights has implications for standing in judicial bodies as well:

Anthropologists have often mentioned negotiation and mediation as processes for resolving conflicts, and have discussed the conditions that are most likely to bring about a conclusion satisfactory to the parties involved. Generally speaking, their work suggests that the decision making process should be opened up rather than narrowed; that the process should be fairly loose about such matters as who can talk, what sorts of issues they can raise, and what sorts of solutions they can suggest; and that it should include a whole range of possible tradeoffs instead of a flat "yes or no" decision. The idea here is to come to a resolution that satisfies or at least mollifies everyone, and not to arrive at the win-or-lose solutions typical of judicial decisions. The goal is to assure the interested parties' future ability to get along, and not their present victory or defeat.<sup>153</sup>

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<sup>150</sup> WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4 (2001); Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEG. STUD. 227, 231–33 (2014).

<sup>151</sup> Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1168–69 (1985).

<sup>152</sup> *Id.* at 1168–69.

<sup>153</sup> *Id.* at 1168.

Rose correctly focuses on the type of process that will leave parties, who will have to live together for years to come, feeling satisfied, if not happy.<sup>154</sup> She highlights the adequacy of the local process from a mediation standpoint, asking whether parties were allowed to talk about what was relevant to them, even if it was just “to let off steam.”<sup>155</sup> More substantively, the mediated land-use dispute process can turn on “standards . . . defined in a discourse of the community about things that matter to its members.”<sup>156</sup>

Under this view, perhaps liberal standing to challenge local land-use decisions in court threatens the discursive but inclusive path to legitimacy and discovery of values that the local process unlocks. Strict standing rules would preserve local compromises that might not satisfy the demand for rule-bound reasoning typically imposed by litigation.

Using our model, we would observe that net public benefit points in favor of membership rules at the local level, that people should be able to ask for settlement of a dispute before a board on any land-use issue in their community, the need for settlement being unusually high here and the institution well-designed to deliver it. But it would also argue in favor of strict, specific standing rules to appeal such settlements in courts. There is benefit in disturbing local settlements only when there has been a serious harm to an individual, not just an unwelcome decision, as the local board is in a better position to achieve global settlement.

On the other hand, perhaps we need not be so wooden in assuming a court considering an issue on appeal from a local government would broadly reopen the substance of such settlements. Liberal standing rules are distinct from the rules governing the review a court undertakes once jurisdiction is recognized. For example, Rose’s model could support engaging in weak substantive review and searching procedural review.<sup>157</sup> That could preserve well-reached compromises, while at the same time providing protection against corruption and secrecy.

Additionally, providing a second hearing before judicial officers might actually contribute to, rather than detract from, pacification, even if it constrains the substantive grounds on which locals might prefer to resolve some cases. The literature on the pacification of parties by judicial process is mixed. Older studies have suggested that perceptions of procedural fairness weigh more heavily in generating prospective respect for legal authority than do other factors, even those as important as award amounts, duration, and litigation expenses.<sup>158</sup> In particular, and unsurprisingly, the opportunity to present evidence produces feelings of procedural fairness.<sup>159</sup> Another

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1169.

<sup>156</sup> *Id.* at 1170.

<sup>157</sup> *See id.* at 1168–70.

<sup>158</sup> Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 437–39 (1992).

<sup>159</sup> *Id.* at 439–40.

key component in such perceptions is the apparent trustworthiness of the decision-maker, which is enhanced if the decisionmaker “explain[s] or account[s]” for her decisions and seems to consider the parties’ evidence.<sup>160</sup>

Recent studies have supported a theory that the pageantry of judicialism—its symbols, architecture, and general “officialness”—activates preexisting attitudes respecting the legitimacy of judicial authority (even if not they are not deeply considered) and leads to acceptance of disappointing decisions.<sup>161</sup>

If well-designed courts are the right institution for procedural review, or even for settling particularly controversial land-use battles at the local level, then we might opt to govern their agenda with a somewhat looser, specific standing rule. While we still may prefer not to open the courts to any resident on any issue (using a membership rule or a categorical standing rule), we could open appeal to people who demonstrated an interest in the outcome by showing up at the hearing or filing a protest. Such people, after all, demonstrated an interest in the process and may be thought to have a comparative entity advantage to contest the local process over people who did not show up at all. And they are the ones who have signaled a relatively greater need for pacification than those who did not show up.<sup>162</sup> This is an argument to create a manipulable standing rule. We would be interested in the judicial agenda proponents’ connection to this issue, but our interest in pacification suggests that highly motivated individuals should be free to take the steps that will ensure their connection is sufficient.

Whether and under what conditions more extensive opportunities for judicial review of land-use decisions will lead to greater acceptance and neighborliness should receive greater attention. If one believes that a core function of land-use law is to produce local harmony, then the ease of access to the judicial agenda should depend on whether such proceedings will contribute to that goal.

*Public Choice.* Finally, we consider the degree to which land-use disputes raise the problem of concentrated benefits on one side and diffuse costs on the other. To the extent that land-use disputes involve such patterns,<sup>163</sup> public choice models

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<sup>160</sup> *Id.* at 441.

<sup>161</sup> See, e.g., James L. Gibson et al., *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 L. & SOC’Y REV. 837, 858–59 (2014). Note that this study examined attitude toward the U.S. Supreme Court as to which one might expect a higher incidence of preexisting negative attitudes—which when activated enhance resistance. *Id.* at 860. We would expect resistance rather than acceptance to result less often from disappointing rulings of state courts.

<sup>162</sup> An important caveat is that possessing the time to prepare and show up may not be distributed equally by economic class.

<sup>163</sup> This may turn on whether William Fischel’s “homevoter hypothesis,” which predicts local officials act to satisfy risk-averse homeowners mainly concerned with maximizing home values, or Harvey Molotch’s “growth machine” theory, which predicts local officials act to please powerful campaign-contributing interests that ordinarily favor growth at the expense of poorer residents, is correct in a given community. See Been, Madar & McDonnell, *supra* note 150, at 231–34.

might predict under-protection against inefficiently high but diffuse costs. Again, the problem is the weak incentive to challenge or form interest groups to combat low costs and the concomitant incentive to free ride, even if these costs greatly exceed the benefits in the aggregate.

An immediate complication arises. Which side is which? One might think that the party pushing for greater use rights is the one seeking a concentrated benefit against the more diffuse interests of those who will lose out in terms of aesthetics and quality of life, the loss of other positive spillovers, or difficult-to-articulate and -identify externalities. But the housing crises in coastal cities has prompted many to see it differently. For example, Christopher Elmendorf has described homeowners banding together more and more firmly to protect the dizzyingly high home values.<sup>164</sup> It is existing and identifiable homeowners who have the concrete interests that are benefited by *non*-development. And it is those who would benefit from development, identifiable developers, sure, but also the would-be homebuyers and those who are forced to relocate, remain in suboptimal geographic areas, or commute long distances whose interests are diffuse and victims of public choice logic.

As discussed above,<sup>165</sup> if this story describes a substantial number of land-use disputes, then liberalizing access to judicial process would help to protect the public interest. NIMBYs may *already* benefit from access under a harm-centered standing regime. Housing activists and others who do not live in the immediate area of a housing development (after all, that very fact is their harm) might benefit from more liberal access to the judicial agenda. Indeed, Elmendorf reports that harsh specific standing rules have been replaced in limited fashion with categorical standing rules and *ex post* fee-shifting:

[R]ecent amendments to the [Housing Accountability Act] extend standing to sue to “housing organizations” and potential residents, and require defendants to pay the attorney’s fees of prevailing plaintiffs. Developers who have ongoing relationships with a local government may be wary of litigating, say, a modest reduction in the size of their project. The attorney’s fee and liberal standing provisions enable other parties to step in and make local governments follow their own rules.<sup>166</sup>

### *B. LUBA’s “Anyone Who Cared Enough to Show Up” Standard*

We believe that LUBA strikes an interesting and attractive balance by giving parties who cared enough to object locally a judicial platform to put land-use

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<sup>164</sup> Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L. REV. 79, 89–91 (2019).

<sup>165</sup> See discussion *supra* Section III.D.

<sup>166</sup> Elmendorf, *supra* note 164, at 121.

decisions to the test in a forum in which the disadvantages of being under-resourced are at least somewhat muted. In using a manipulable standing rule for access to the judicial agenda, LUBA is actually stingier with standing than the original Standard State Zoning Enablement Act, which used a pure membership rule for land-use suits. The model act permitted suit by, *inter alia*, “[a]ny taxpayer” to challenge illegal zoning decisions.<sup>167</sup>

While, indeed, we have examined the peculiar land-use-based reasons for greater access to courts than in the mine run of legal disputes, liberal standing is not without its costs. From empowering cranks to waste everyone’s time and money to providing a procedural weapon to angry neighbors to act vengefully rather than defensively, the power to subject someone else to legal process can be misused to cause great harm. And so, despite the general considerations favoring categorical or manipulable rules, there is, perhaps, much to fear from agenda cloggers.

As expected, *ex post* rules have an important role to play in deterring such socially undesirable litigation behavior. The LUBA regime does just this.<sup>168</sup> A party found to have brought a frivolous case may be required to pay its opponents’ attorneys’ fees: “the board . . . [s]hall award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position or filed any motion without probable cause to believe the position or motion was well-founded in law or on factually supported information.”<sup>169</sup> LUBA has interpreted this provision to charge fees when a party acted from bad motivations. This weak *ex post* constraint might be thought enough to secure the benefits of judicial review, available when a party cared enough to contest the decision below, while avoiding its worst vices.

#### CONCLUSION

We have illustrated the sense in which the increasingly fraught battles over standing are instances of the more general phenomenon of the struggle within an institution to decide on an agenda. To see standing as the recognition of agenda power in a particular institutional context is to awaken to its basic purpose. All institutions must manage their agendas, and all such efforts must contend with the costs of deciding and identifying which of its members is reasonably positioned to do so. Once we understand this as our problem, we can more wisely use *ex ante* agenda rules of various types, including the types we call standing, to focus our decision-making resources. And we can supplement these rules with *ex post* rules that further refine the incentives on those who would press us to decide.

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<sup>167</sup> U.S. DEPT OF COMMERCE, ADVISORY COMMITTEE ON ZONING, A STANDARD STATE ZONING ENABLING ACT (1926), <https://www.govinfo.gov/content/pkg/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873/pdf/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873.pdf> [<https://perma.cc/H539-DQGY>].

<sup>168</sup> See OR. REV. STAT. § 197.830(15) (2019).

<sup>169</sup> *Id.*



In this initial effort to map out the wider world of agenda rules, and the special place of standing, we have identified the basic types of rules, the general desiderata of agenda construction and their fit with these types, and their application in a special case, land use, in which some courts use “weird” standing rules. But much more is possible.

With our taxonomy and general analysis, future work can identify standing and other agenda rules in other institutional contexts: from international law to the corporate boardroom. Wherever there are people deciding together, there are people constructing an agenda together. Because all these contexts feature different presentations of the same underlying phenomena, they may have more to learn from each other than has been apparent.