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## HOW TO MAKE SENSE OF SUPREME COURT STANDING CASES—A PLEA FOR THE RIGHT KIND OF REALISM

Richard H. Fallon, Jr.\*

It is a commonplace that the Justices of the Supreme Court routinely manipulate standing doctrine to promote their ideological goals, that the Court's pattern of decisions is therefore incoherent, and that seeking to make sense of standing doctrine is a fool's errand.<sup>1</sup> The elements of this indictment do not wholly lack foundation in fact. If they were utterly baseless, the familiar view would presumably not have achieved the prominence that it has.<sup>2</sup> But judges and lawyers cannot act on the

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<sup>1</sup> See, e.g., Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1154 (1977) (“[G]eneralized articulations of injury isolated from the claim invite charges of inconsistency, selectivity, and ad hoc decision-making; judicial expressions of skepticism about the merits, predictably commonplace in such standing decisions, provide further support for such charges.”); Abram Chayes, Foreword, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 59 (1982) (“[U]nder the current formula the decision whether to grant standing necessarily implicates the merits of the case to some degree.”); William A. Fletcher, *Standing: Who Can Sue to Enforce A Legal Duty?*, 65 ALA. L. REV. 277, 286–87 (2013) (arguing that recent standing decisions “respond to the Court’s perception of political reality” and find standing for individuals and groups with “increasing political influence”); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380 (1973) (“[T]he criteria [for standing] have become confused and trivialized.”); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68–69 (1984) (“Observers, with just cause, regularly accuse the Supreme Court of applying standing principles in a fashion that is not only erratic, but also eminently frustrating in view of the supposed threshold nature of the standing inquiry.” (internal footnote omitted)); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999) (“The doctrinal elements of standing are nearly worthless as a basis for predicting whether a judge will grant individuals with differing interests access to the courts. . . . In each [of five illustrative] case[s], the Justices divided either five-to-four or six-to-three on the standing issue. In each case, the ‘votes’ of the Justices were as easy to predict as the votes of their ideological counterparts in the legislature. Liberals voted to grant access to the courts to environmentalists, employees, and prisoners, but not to banks. Conservatives voted to grant access to banks, but not to environmentalists, employees, or prisoners.” (internal footnote omitted)); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (“[T]he law of standing lacks a rational conceptual framework. . . . Decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim.”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988) (“It is almost de rigueur for articles on standing to quote Professor Freund’s testimony to Congress that the concept of standing is ‘among the most amorphous in the entire domain of public law.’”).

<sup>2</sup> See Nichol, *supra* note 1, at 68–69.

premise that standing doctrine makes no sense—at least when they write opinions or briefs or argue to a court. Law professors have no similar obligation to portray standing as reflecting coherent categories or principles. In their role as seekers of truth, they are free to shout that the emperor has no clothes and that there is no law, only politics or disorder, insofar as standing is concerned.<sup>3</sup> But I believe that law professors err if they give up too easily on making sense of Supreme Court standing opinions. Much more often than not, it is possible to identify patterns or categories into which the Court’s decisions divide and to reach correspondingly defined predictions about their future implications.<sup>4</sup>

Using the Supreme Court’s most-analyzed standing opinions from its 2012 Term as test cases, in this short Essay I defend what I shall call “the right kind of Realism,” or more frequently “doctrinalist Realism,” as an approach to reading standing cases and finding coherence in standing doctrine. Legal Realist thought has many strands.<sup>5</sup> I have no interest in trying to trace all of them or in entering the debate about which is most central or important. Nevertheless, my thesis draws inspiration from the strand of Legal Realism that emphasizes the distinction between the forms of words that judges use in laying down and describing legal doctrine and the kinds of facts that actually drive judicial decisions. This form of Realism is not nihilist. It counsels the parsing of opinions to identify their operative facts against background patterns that could also facilitate predictions of results in future cases.<sup>6</sup> In my view, as I shall explain, Realist analysis of this kind could also bear on how judges should, and not merely would, make subsequent decisions. In seeking prescriptions for how judges should decide cases, Realism of the kind from which I draw inspiration is often open to the insights of social science.<sup>7</sup> But it also insists that the law, if rightly understood,

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<sup>3</sup> See sources cited in *supra* note 1.

<sup>4</sup> See Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1215 (2006).

<sup>5</sup> See, e.g., Brian Leiter, *American Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 249, 249–66 (Dennis Patterson ed., 2d ed. 2010) (discussing central strands of realism including the “idiosyncrasy wing” and the “sociological wing”); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 71–90 (2009) (surveying scholarship that calls itself “new legal realism” including “behaviorists,” “contextualists,” and “institutionalists”); William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 343 (1985) (arguing that “nearly all unqualified, nontrivial generalizations about Realism are false,” because the Realist Movement involved dozens of scholars and at least five different perspectives on Realism—as a theory of law, a theory of adjudication, a nihilistic critique of formalism, a search for alternatives to Langdellism, and a political or ideological interpretation of court opinions).

<sup>6</sup> See, e.g., Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Smith, *supra* note 4, at 1214–19.

<sup>7</sup> See, e.g., Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831–35 (2008) (contrasting “standard pattern” realism with the recent emphasis

typically makes sense in its own terms.<sup>8</sup> In figuring out what the law is, however, it insists that one should not be mesmerized by the bare words of judicial opinions, abstracted from the facts that evoked them.<sup>9</sup>

In suggesting that there is more order to the Supreme Court's standing decisions than meets the eyes of many contributors to the literature on standing, and in championing a doctrinal Realist strategy of reading the Court's opinions to identify operative facts and background patterns that the Court does not always expressly mark as such, I float a very large thesis that I shall not even attempt to develop fully in this short Essay. My approach is more suggestive than definitive. More precisely, my strategy focuses on the Court's three most important standing cases from the 2012 Term: *Clapper v. Amnesty International USA*,<sup>10</sup> *United States v. Windsor*,<sup>11</sup> and *Hollingsworth v. Perry*.<sup>12</sup> Each invites, and each has attracted, criticism as unprincipled, manipulative, and inconsistent with precedent.<sup>13</sup> But each also teaches generalizable lessons, albeit lessons of different kinds, about how the Court has decided standing cases in the past and will likely decide standing cases in the future. In at least the first two of these three cases, the Court's approach reflects recurring distinctions of which lower courts should take account in ruling on standing issues.<sup>14</sup>

The Essay comprises six brief Parts. Part I describes the standing issues and analysis in *Clapper*, *Windsor*, and *Hollingsworth* and sketches some of the criticisms to which each decision has appeared vulnerable. Part II describes the doctrinalist Realist approach that I believe would provide more fruitful interpretations of these cases and better predict outcomes of future cases than do approaches that purport to take the Court's language in standing cases at face value. Parts III, IV, and V respectively discuss *Clapper*, *Windsor*, and *Hollingsworth* and seek to provide some of the

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on "testable hypotheses and large data sets"); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459 (1979) (discussing the influence of social science on Realism in the 1920s).

<sup>8</sup> See, e.g., Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *HARV. L. REV.* 1222, 1240 (1931).

<sup>9</sup> See, e.g., *id.* at 1223; Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431, 447 (1930) (arguing that there are "real 'rules' and rights" distinct from "paper rules and rights"); Herman Oliphant, *A Return to Stare Decisis*, 14 *A.B.A. J.* 71, 159 (1928) ("Not the judges' opinions, but which way they decide cases will be the dominant subject matter of any truly scientific study of law."); Roscoe Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12, 15 (1910) (noting distinctions "between the rules that purport to govern the relations of man and those that in fact govern them").

<sup>10</sup> 133 S. Ct. 1138 (2013).

<sup>11</sup> 133 S. Ct. 2675 (2013).

<sup>12</sup> 133 S. Ct. 2652 (2013).

<sup>13</sup> See, e.g., Doug Mataconis, *Prop 8, DOMA, and Standing in the Supreme Court*, *OUTSIDE THE BELTWAY* (June 28, 2013), <http://www.outsidethebeltway.com/prop-8-doma-and-standing-in-the-supreme-court/>.

<sup>14</sup> *Id.*

kinds of insight that doctrinalist Realism promises. Those Parts also advance more general suggestions for making “realist” sense of standing cases besides the three on which this Essay centrally focuses. The last Part offers a brief conclusion.

### I. THREE STANDING CASES FROM THE 2012 TERM

Since the 1970s, the Supreme Court has recurrently described the test for standing to sue in federal court as having three elements that hold invariably in both constitutional and statutory cases alike.<sup>15</sup> In order to have standing to sue, a plaintiff or appellant must establish injury in fact, causation, and redressability.<sup>16</sup> In the literature on standing, the complaint sounds recurrently that the Court’s application of this test betrays rampant inconsistency: the Court varies the elements from case to case, typically depending on whether a majority of the Justices are friendly or hostile to a claim on the merits.<sup>17</sup> At least on the surface, *Clapper*, *Windsor*, and *Hollingsworth* all furnish fodder for those who wish to press criticisms of this kind.<sup>18</sup>

#### A. *Clapper*

The plaintiffs in *Clapper v. Amnesty International USA*<sup>19</sup> were U.S. citizens residing in the United States who sought to challenge the constitutionality of an amendment to the Foreign Intelligence Surveillance Act (FISA) under which, they alleged, the defendant federal officials were likely to intercept their communications with non-Americans abroad.<sup>20</sup> By a vote of 5 to 4, in an opinion by Justice Alito, the Supreme Court denied standing based on the plaintiffs’ failure to establish that an injury-in-fact was “certainly impending,”<sup>21</sup> despite the plaintiffs’ averment that their

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<sup>15</sup> For early iterations, see, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–18 (1973); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38–39 (1976).

<sup>16</sup> See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

<sup>17</sup> See *Pierce*, *supra* note 1, at 1743.

<sup>18</sup> See *Mataconis*, *supra* note 13.

<sup>19</sup> 133 S. Ct. 1138 (2013).

<sup>20</sup> The challenged amendment permitted the Attorney General and Director of National Intelligence, with the authorization of the Foreign Intelligence Surveillance Court, to authorize “the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” *Id.* at 1144 (quoting 50 U.S.C. § 1181a (2006 & Supp. V 2011)). The amendment also required “minimization procedures” to restrict the collection of information about persons within the United States. *Id.* at 1145.

<sup>21</sup> See *id.* at 1143 (“[R]espondents’ theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be ‘certainly impending.’” (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))).

work as scholars, lawyers, and journalists required them to communicate with overseas parties whom the government believed to be affiliated with terrorist groups.<sup>22</sup> The majority dismissed the plaintiffs' claims of likely future injury as too "speculative" to ground standing in light of uncertainties that the government would target the overseas parties with whom the plaintiffs communicated, that any attempt to intercept communications would succeed, and that any successful interceptions would include communications with the plaintiffs.<sup>23</sup> Justice Alito also reasoned that any injury that the plaintiffs might suffer could not be causally traced to the challenged amendment, since the government might subject them to surveillance by other means or under other sources of authority.<sup>24</sup>

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented.<sup>25</sup> Justice Breyer pointed out that although some past Court decisions had referred to a need for "certainly impending" injury in order for a plaintiff to have standing to seek injunctive relief, future injury is seldom if ever "absolutely certain."<sup>26</sup> Having so noted, Justice Breyer cited a long roster of cases in which the Court had "entertain[ed] actions for injunctions and for declaratory relief aimed at preventing future injuries that are reasonably likely or highly likely . . . to take place."<sup>27</sup> In *Clapper*, given the government's

<sup>22</sup> *Id.* at 1157.

<sup>23</sup> *Id.* at 1143.

<sup>24</sup> *See id.* at 1149.

<sup>25</sup> *See id.* at 1155 (Breyer, J., dissenting).

<sup>26</sup> *See id.* at 1160 (Breyer, J., dissenting).

<sup>27</sup> [R]ecognizing that "imminence" is concededly a somewhat elastic concept," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565, n.2 (1992)], the Court has referred to, or used (sometimes along with "certainly impending") other phrases such as "reasonable probability" that suggest less than absolute, or literal certainty [that injury will soon occur]. *See Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)] (plaintiff "must demonstrate a *realistic danger* of sustaining a direct injury" (emphasis added)); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, [528 U.S. 167, 190 (2000)] ("[I]t is the plaintiff's burden to establish standing by demonstrating that . . . the defendant's allegedly wrongful behavior will likely occur or continue"). *See also Monsanto Co. v. Geertson Seed Farms*, [130 S. Ct. 2743, 2754–55 (2010)] ("reasonable probability" and "substantial risk"); *Davis v. FEC*, 554 U.S. 724, 734 (2008)] ("realistic and impending threat of direct injury"); *MedImmune, Inc. v. Genentech, Inc.*, [549 U.S. 118, 129 (2007)] ("genuine threat of enforcement"); *Department of Commerce v. United States House of Representatives*, [525 U.S. 316, 333 (1999)] ("substantially likely" (internal quotation marks omitted)); *Clinton v. City of New York*, [524 U.S. 417, 432 (1998)] ("sufficient likelihood of economic injury"); *Pennell v. San Jose*, [485 U.S. 1, 8 (1988)] ("realistic danger" (internal quotation marks omitted)); *Blum v. Yaretsky*, [457 U.S. 991, 1001 (1982)] ("quite realistic" threat); *Bryant v. Yellen*, [447

past behavior and its high motivation to intercept communications with suspected terrorist groups, he thought injury sufficiently likely for standing to exist.<sup>28</sup>

The majority responded in a footnote to the dissenting opinion's complaint about shifting standards for determining how likely or imminent an injury must be in order to ground standing.<sup>29</sup> Even if the relevant standard required only likely, rather than "certainly impending," injury, the plaintiffs had failed to meet even the lower standard, Justice Alito wrote.<sup>30</sup> He added a further explanation in the text:

[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs. . . . [The] assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.<sup>31</sup>

The most predictable criticism of *Clapper* largely echoes the dissenting opinion: based on misplaced hostility to the plaintiffs' claim on the merits, the majority manipulatively and doctrinally inconsistently elevated the likelihood of future injury that a plaintiff needs to demonstrate in order to establish standing.<sup>32</sup>

#### B. Windsor

On the merits, *United States v. Windsor*<sup>33</sup> presented an equal protection challenge to Section 3 of the federal Defense of Marriage Act (DOMA), which denied federal recognition to gay marriages that are valid as a matter of state law.<sup>34</sup> Prior to the initiation of the litigation, the President and Attorney General concluded that Section 3 was unconstitutional.<sup>35</sup> Having done so, they notified Congress that they would not defend the provision in court.<sup>36</sup> Nevertheless, the Administration continued to enforce DOMA until the courts had determined the law's constitutionality and, accordingly, denied Windsor the \$363,053 estate tax refund to which she would

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U.S. 352, 367–68 (1980)] ("likely"); *Buckley v. Valeo*, [424 U.S. 1, 74 (1976)] (per curiam) ("reasonable probability").

*Id.* at 1160–61 (Breyer, J., dissenting).

<sup>28</sup> *Id.* at 1155 (Breyer, J., dissenting).

<sup>29</sup> *Id.* at 1150 n.5.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1147, 1154 (citing *United States v. Richardson*, 418 U.S. 166, 167–70 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 209–11 (1974); *Laird v. Tatum*, 408 U.S. 1, 11–16 (1972)).

<sup>32</sup> *See id.* at 1165 (Breyer, J., dissenting).

<sup>33</sup> 133 S. Ct. 2675 (2013).

<sup>34</sup> *Id.* at 2683.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

have been entitled if she were recognized as her deceased partner's lawful spouse.<sup>37</sup> With the Administration offering no legal resistance in suits challenging Section 3 of DOMA, the House of Representatives authorized its Bipartisan Legal Advisory Group (BLAG) to intervene on its behalf.<sup>38</sup> When the district court and then the court of appeals held DOMA unconstitutional in pertinent part, the United States and BLAG both sought certiorari.<sup>39</sup> On its own motion, the Court appointed an amica curiae to argue the position that the Court lacked jurisdiction to hear the dispute because the United States agreed with the prevailing party, Windsor, about the constitutional issue that it asked the Supreme Court to review.<sup>40</sup>

Writing for a 5–4 majority, Justice Kennedy upheld the standing of the United States to invoke the Court's jurisdiction.<sup>41</sup> His explanation began with a proposition with which all agreed: the district court had jurisdiction over Windsor's suit to recover money she had lost as a result of the government's refusing to treat her as the spouse of her deceased partner.<sup>42</sup> Regardless of the government's abstract views about the constitutionality of DOMA, she had suffered an injury in fact, for which she had standing to seek redress.<sup>43</sup> After Windsor prevailed in the lower courts, the issue shifted to whether "the United States retains a stake sufficient to support Article III jurisdiction on appeal" as a result of the order to it "to pay Windsor the refund she seeks."<sup>44</sup> The answer was yes, Justice Kennedy reasoned, because an obligation to pay funds out of the Treasury constituted an actual or threatened financial loss to the government.<sup>45</sup>

After concluding that the United States satisfied the Article III requisites for standing, the Court noted that its exercise of jurisdiction was also governed by "prudential" considerations.<sup>46</sup> But the Court found no prudential reasons to decline to resolve the case on the merits: the presence of BLAG as an intervenor and its "sharp adversarial presentation of the issues satisfie[d] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."<sup>47</sup> In fact, the balance of prudential concerns cut the other way:

Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue.

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<sup>37</sup> *Id.* at 2683–84.

<sup>38</sup> *Id.* at 2684.

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

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 2689.

<sup>42</sup> *Id.* at 2684–85.

<sup>43</sup> *Id.* at 2685.

<sup>44</sup> *Id.* at 2686.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 2687.

<sup>47</sup> *Id.* at 2688.



The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations.<sup>48</sup>

Having upheld the standing of the United States, the Court found it unnecessary to decide whether BLAG might have had standing to appeal in its own right.<sup>49</sup>

Justice Scalia dissented in an opinion in which Chief Justice Roberts and Justice Thomas joined and with which Justice Alito agreed in part.<sup>50</sup> "Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint," Justice Scalia wrote.<sup>51</sup> "The question here is not whether, as the majority puts it, 'the United States retains a stake sufficient to support Article III jurisdiction,' . . . [but] whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor."<sup>52</sup> Having thus framed the question, Justice Scalia answered in the negative.<sup>53</sup> Justice Alito also agreed that the government lacked standing, though he, alone among the Justices, concluded that BLAG did: "[In] the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so."<sup>54</sup>

An obvious comparison will suffice to illumine what many have seen as *Windsor's* deviation from basic standing principles. If any private party had claimed standing to appeal from a judgment that it acknowledged to be correct on the merits, it is unimaginable that the Supreme Court would have upheld standing. But a majority of the Justices clearly wanted to reach the merits in *Windsor*—and, the criticism continues, they simply refused to allow normally applicable standing principles to bar the way.<sup>55</sup>

### C. Hollingsworth

The standing issue in *Hollingsworth v. Perry*<sup>56</sup> arose when elected California officials declined to defend a ballot proposition enacted by California voters, entitled

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* For a thoughtful pre-*Windsor* examination of the standing of intervenor defendants, see Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539 (2012).

<sup>50</sup> 133 S. Ct. 2675, 2697 (2013) (Scalia, J., dissenting).

<sup>51</sup> *Id.* at 2701 (Scalia, J., dissenting).

<sup>52</sup> *Id.* (Scalia, J., dissenting).

<sup>53</sup> *Id.* (Scalia, J., dissenting).

<sup>54</sup> *See id.* at 2711–14 (Alito, J., dissenting).

<sup>55</sup> *See Mataconis, supra* note 13.

<sup>56</sup> 133 S. Ct. 2652 (2013).

Proposition 8, that amended the California constitution to define marriage as a union between a man and a woman.<sup>57</sup> With California officials taking no role in the case, the district court allowed the official proponents of Proposition 8 to intervene to defend it but ruled the initiative unconstitutional on the merits.<sup>58</sup> After receiving a certification from the California Supreme Court that “[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity,”<sup>59</sup> the court of appeals allowed the proponents to appeal but also concluded that Proposition 8 violated the federal Constitution.<sup>60</sup>

Despite the certification of the California Supreme Court that Proposition 8’s proponents were authorized to defend it on the state’s behalf,<sup>61</sup> the Supreme Court held by a 5–4 vote that the proponents lacked standing to appeal under Article III.<sup>62</sup> Writing for the majority, Chief Justice Roberts acknowledged the indisputable proposition that “a State has a cognizable interest ‘in the continued enforceability’ of its laws that is harmed by a judicial decision declaring a state law unconstitutional.”<sup>63</sup> He further acknowledged that “[t]o vindicate that interest or any other, a State must be able to designate agents to represent it in federal court.”<sup>64</sup> But the petitioners, according to the Chief Justice, were mere private citizens who had “no ‘direct stake’ in the outcome” and could assert only a “generalized grievance” that would not support standing.<sup>65</sup> Proposition 8’s proponents were not state officials, the Chief Justice held, and they could not claim standing as California’s “agents” because, absent any provision of state law providing for their possible removal, “the most basic features of an agency relationship [were] missing.”<sup>66</sup> A state’s determination that “a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary,” the Chief Justice wrote.<sup>67</sup>

In a dissenting opinion joined by Justices Thomas, Alito, and Sotomayor, Justice Kennedy argued that California state law “defin[ing] and elaborat[ing] the status of an initiative’s proponents who seek to intervene in court to defend the initiative after its adoption” was consistent with federal constitutional requirements and thus controlling.<sup>68</sup> “The initiative’s ‘primary purpose,’ . . . ‘was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions

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<sup>57</sup> *Id.* at 2659–60.

<sup>58</sup> *Id.* at 2660.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2660–61.

<sup>61</sup> *Id.* at 2660.

<sup>62</sup> *Id.* at 2668.

<sup>63</sup> *Id.* at 2664.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2662.

<sup>66</sup> *Id.* at 2666.

<sup>67</sup> *Id.* at 2667.

<sup>68</sup> *Id.* at 2668 (Kennedy, J., dissenting).

that their elected public officials had refused or declined to adopt,”<sup>69</sup> Justice Kennedy reasoned, and the Court had no constitutional warrant to thwart this design just “because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency.”<sup>70</sup>

The most predictable and perhaps the most telling criticism of *Hollingsworth* involves the lack of direct precedent for the Court’s holding.<sup>71</sup> A number of prior cases, which Chief Justice Roberts struggled to distinguish, had permitted states to authorize officials or agents to litigate on the state’s behalf.<sup>72</sup> The majority’s objection that a state cannot confer representative authority on a non-official except pursuant to what Justice Kennedy mocked as the strictures of the *Restatement of Agency* struck many observers as a manipulative device for disposing of a case that five Justices simply preferred not to decide on the merits.<sup>73</sup>

## II. THE RIGHT KIND OF REALISM—AND ITS PROMISE TO ILLUMINE STANDING DOCTRINE

In the introduction to this Essay, I suggested that making sense of the Supreme Court’s standing decisions frequently would require lawyers, judges, and law professors to analyze them with what I called the right kind of Realism. In giving further content to that notion, I repeat the caveat that I expressed earlier. Although my proposal draws some inspiration from a strand of Realist thought that emerged during the early part of the twentieth century,<sup>74</sup> its normative attractiveness does not depend on its historical pedigree. History is suggestive, but it need not bear argumentative weight. Eschewing attempted historical exegesis, I shall therefore simply stipulate that the approach to legal doctrinal analysis to which I assign the label of “the right kind of Realism” combines three characteristic elements.

First, this kind of Realism concerns itself largely with the prediction of future judicial decisions.<sup>75</sup> Past decisions are properly subject to analysis along many dimensions. The cogency of an opinion’s articulated reasoning properly commands

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<sup>69</sup> *Id.* at 2671 (Kennedy, J., dissenting).

<sup>70</sup> *Id.* at 2668 (Kennedy, J., dissenting).

<sup>71</sup> See Mataconis, *supra* note 13.

<sup>72</sup> Central among these was *Karcher v. May*, 484 U.S. 72 (1987), which held that a state may designate its speaker of the house or president of the senate to defend a state statute that state executive officials will not defend.

<sup>73</sup> See, e.g., Michael J. Klarman, Windsor and Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 146 (2013).

<sup>74</sup> See, e.g., sources cited *supra* note 9.

<sup>75</sup> See, e.g., LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 4–6 (1986) (noting the Realist goal of making judicial decisions more predictable); Llewellyn, *supra* note 8, at 1240–46 (discussing the Realist argument that rules need to be restated to facilitate more accurate predictions); Smith, *supra* note 4, at 1215 (“Realist lawyers are engaged in the positive task of predicting what judges will do . . .”).

attention. Badly reasoned decisions deserve criticism and sometimes condemnation. But while sometimes pursuing analysis along these lines, a doctrinal Realist approach gives careful attention to what a judicial ruling bodes for the decision of future cases.

Second, the right kind of Realism assumes that although the words that courts use in describing their holdings often and perhaps typically furnish the best guides to what courts will do in the future, judicial articulations of the grounds for court decisions can sometimes prove misleading.<sup>76</sup> Language can be highly general.<sup>77</sup> It can be taken out of context.<sup>78</sup> In grasping how legal concepts apply or how far general propositions extend, context matters.<sup>79</sup> And in ascertaining which elements of context matter most, analysts may often require both imagination, in anticipating the range of factual situations to which a decision's language might plausibly appear to each, and psychological and sociological insight.<sup>80</sup>

Third, patterns of cases in which courts hold general legal concepts either to apply or not to apply—including such requirements as those of injury, causation, and redressability—can give rise to legally cognizable reasons, and sometimes to judicial obligations, to extend those patterns into the future under the doctrine of *stare decisis*.<sup>81</sup> On this point, Realist assumptions come into partial alignment with Ronald Dworkin's celebrated claim that legal theories should be tested against the dual criteria of fit and normative attractiveness.<sup>82</sup> As applied to patterns of judicial decisions, a good theory, according to Dworkin, should both describe the results of

<sup>76</sup> See, e.g., sources cited *supra* note 9.

<sup>77</sup> See Fletcher, *supra* note 6, at 242 (observing that standing decisions are made “at wholesale rather than at retail”).

<sup>78</sup> See Smith, *supra* note 4, at 1215–16 (discussing the Realist critique of the determinacy of language).

<sup>79</sup> See Fletcher, *supra* note 6, at 260, 272–73 (discussing the need to consider context to understand certain controversial standing opinions); Smith, *supra* note 4, at 1215 (noting that Realists argued for “greater sensitivity to commercial, political, and social context”).

<sup>80</sup> See Smith, *supra* note 4, at 1217, 1219.

<sup>81</sup> See Llewellyn, *supra* note 8, at 1240 (“A further line of attack on the apparent conflict and uncertainty among the decisions in appellate courts has been to seek more understandable statement of them by grouping the facts in new—and typically but not always narrower—categories.”); see also, e.g., Fletcher, *supra* note 6, at 223–24, 268–69 (dividing standing cases into statutory and constitutional categories, and arguing, among other things, that “taxpayer standing” cases should be understood based on the constitutional provision at issue rather than the status of the petitioner); Martin Kellner, *Congressional Grants of Standing in Administrative Law and Judicial Review: Proposing a New Standing Doctrine from a Delegation Perspective*, 30 *HAMLIN L. REV.* 315, 358–69 (2007) (arguing that the factors of injury, causation, and redressability establish bounded discretion within which courts can make policy-based decisions); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 *HARV. L. REV.* 645, 646–47 (1973) (“distinguish[ing] the different contexts in which an issue of standing is said to arise” in order to “give coherence to the much-criticized doctrine”).

<sup>82</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 52–53, 255–58 (1986).

cases accurately and ascribe to them a more normatively attractive set of controlling and limiting principles than any rival explanation.<sup>83</sup> All else equal, a theory will fit a case better if it echoes the words that the rendering court used in its opinion than if it seeks to explain the court's decision on some other basis.<sup>84</sup> Nevertheless, in light of the tradeoff between fit and normative attractiveness, the best available legal theory may sometimes be one that appeals to what "really" drove the decision or to the facts of the case or to the elements of the court's reasoning that deserve for normative reasons to be treated as most legally central.<sup>85</sup>

### III. *CLAPPER* AND FUTURE INJURY CASES: ISSUES OF SUBSTANCE AND REMEDY

There is one sense in which hurling and pressing the charge that *Clapper* manipulatively elevated the standard for standing based on a probable future injury is as easy as child's play. Beyond any doubt, as Justice Breyer demonstrated in his dissenting opinion,<sup>86</sup> the Supreme Court has articulated apparently inconsistent standards for determining when a threatened future injury is sufficiently probable or imminent to support standing.<sup>87</sup> The question for a doctrinalist Realist would be whether the Supreme Court's decisions in cases presenting standing issues based on likely future injury exhibit patterns—and, in particular, whether the Supreme Court regularly tends to articulate and enforce demands for greater likelihood in some definable categories of cases than in others.

Without pretending to have done the work to establish my claims, I would begin by identifying two categories of cases involving probabilistic injuries that supply relevant analogies to *Clapper*, but that I think are ultimately unlikely to be much affected by the Court's decision. One involves cases in which plaintiffs sue to enjoin the initiation of criminal prosecutions against them for violating statutes that they allege to be unconstitutional.<sup>88</sup> In cases in which plaintiffs seek pre-enforcement declarations that statutes under which they might be prosecuted are constitutionally invalid, the Court frequently if not typically looks sympathetically on claims of standing, often without demands for proof that a criminal prosecution would actually be likely to occur if the plaintiffs violated a challenged statute.<sup>89</sup> The Court signaled its

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See *supra* note 27 and accompanying text (citing and quoting Justice Breyer's dissent and the collection of authorities that it assembled).

<sup>87</sup> For valuable academic discussions of probabilistic standing, see, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 511 (2008); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55 (2012); Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009); Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1297–98 (2013).

<sup>88</sup> See, e.g., *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

<sup>89</sup> See *id.*

disposition in cases of this kind in *MedImmune, Inc. v. Genentech, Inc.*, in which it said flatly that:

[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.<sup>90</sup>

The Justices unanimously confirmed this statement of the law in the 2013 Term case, *Susan B. Anthony List v. Driehaus*.<sup>91</sup> In upholding the standing of an advocacy group to seek to enjoin enforcement of a state criminal statute that forbids knowingly false statements about political candidates, Justice Thomas’s Court opinion explained that “a plaintiff satisfies the injury-in-fact requirement where he alleges ‘an intention to engage in [conduct] arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.’”<sup>92</sup>

Another category consists of cases in which plaintiffs seek to enjoin government officials from engaging in conduct—other than coercively enforcing an allegedly unconstitutional statute or regulation—in which those officials may or may not engage.<sup>93</sup> In cases of this kind, the Supreme Court tends to look skeptically on assertions that there is sufficient probability of future injury to ground standing.<sup>94</sup> If one seeks to make sense of the pattern, cases of this kind—in comparison with those in which plaintiffs ask for protection against criminal prosecution or the imposition of civil penalties for violating allegedly unconstitutional statutes—seldom raise neat questions

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<sup>90</sup> *Id.* at 128–29. The pattern is admittedly not one of perfect consistency. *See, e.g.*, RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 211–12 (6th ed. 2009) [hereinafter HART & WECHSLER] (discussing cases holding suits seeking to enjoin the enforcement of criminal statutes unripe).

<sup>91</sup> 134 S. Ct. 2334 (2014).

<sup>92</sup> *Id.* at 2342 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

<sup>93</sup> HART & WECHSLER, *supra* note 90, at 217, distinguishes this category from that encompassing suits to enjoin the enforcement of criminal statutes as follows:

First, . . . there is no challenged statute or regulation but rather a pattern of past events (and their implication for the future) that form the basis of the complaint and the prayer for equitable relief. Second, in a case . . . in which the matters complained of consist of official practices in law enforcement, it is especially difficult to identify the individuals who are likely to be harmed by those practices in the future. Third, such cases may involve requests for “structural relief”—for the shaping of a decree designed to modify significantly the way in which an arm of government (or in some cases a private institution) conducts its affairs. The Court’s evident reluctance to become enmeshed in disputes of this kind, especially when state institutions are at bar, has been expressed, in part, in terms of justiciability doctrines—notably ripeness and standing.

<sup>94</sup> *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 112–13 (1983).

about the constitutionality of a statute or regulation.<sup>95</sup> They require a court to anticipate exactly what officials are likely to do, and sometimes also to anticipate which actions, if any, might be justified by exigent circumstances.<sup>96</sup> As a result, granting relief in a case of this kind would frequently require the crafting of an intricate declaratory judgment or injunction that tolerates some hypothetical future actions but forbids others and possibly conditions the permissibility of yet others on contingent circumstances. Understandably, the Court tends to disfavor awards of injunctive relief in cases of this kind.<sup>97</sup>

Perhaps more controversially, the Court not infrequently uses standing doctrine to impose barriers to the award of injunctive relief that it thinks would overtax judicial competence or intrude unduly on the discretion of executive agencies.<sup>98</sup> In my view, this pattern occurs with sufficient regularity to warrant the predictive generalization that the Court is unlikely to find the threat of future injury sufficient to establish standing in cases in which a plaintiff seeks an injunction against allegedly unconstitutional official action that is not required by statute or regulation and that does not seek to bar coercive enforcement action against a private defendant.

Although the division that I have just sketched is an important one in the case law, *Clapper* did not fit neatly into either of the familiar categories that I have laid out. On the one hand, the plaintiffs did not seek to enjoin the filing of a criminal prosecution against them under an allegedly unconstitutional statute.<sup>99</sup> On the other hand, the plaintiffs put the constitutional validity of a statute squarely at issue in a context in which any suggestion that the defendants were unlikely to act pursuant to the authority conferred by the statute was deeply implausible.

*Clapper* did, however, fall into another pattern to which Justice Alito's opinion very explicitly, although only briskly, referred. The *Clapper* plaintiffs sought injunctive relief against policies adopted by the national executive branch in the domain of national defense and national security.<sup>100</sup> As the Court put it, "[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs."<sup>101</sup> When read against the background of the Court's otherwise inconsistent formulations of the probability of harm needed to establish probabilistic standing and its often asserted disposition to defer to the executive in defense and national security

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<sup>95</sup> See HART & WECHSLER, *supra* note 90, at 211–12.

<sup>96</sup> *Id.*

<sup>97</sup> See *id.* at 217; Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 694–701 (2006).

<sup>98</sup> See Fallon, *supra* note 97, at 649–53, 663–73.

<sup>99</sup> See *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1147 (citing *United States v. Richardson*, 418 U.S. 166, 167–70 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 209–11 (1974); *Laird v. Tatum*, 408 U.S. 1, 11–16 (1972)).

matters, this sentence stands out with beacon-like clarity and deep significance. A telling line in the subsequently decided case of *Susan B. Anthony List v. Driehaus*<sup>102</sup> so indicates. In *Susan B. Anthony List*, the Court cited *Clapper* as standing for the proposition that “[a]n allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk that harm will occur.’”<sup>103</sup> But of course *Clapper*, read by itself and taken at face value, would have raised rather than answered doubts about whether a “substantial risk” of injury would suffice to confer standing.<sup>104</sup> Looking to the future, I believe that *Clapper* both fits into and gives legal significance to a now-explicit pattern: lower courts should demand especially persuasive showings of likely future injury in order to establish standing to seek injunctive relief against national security policies (other than injunctions against criminal prosecutions).

In offering these comments about how *Clapper* fits into prior patterns of Supreme Court decisions and about its likely future significance, I do not mean to suggest that the case was necessarily rightly decided. What I would emphasize, however, is that *Clapper* almost certainly has no effect in elevating the *general* standard that plaintiffs must satisfy in order to establish standing based on likely future injuries, as *Susan B. Anthony List* now demonstrates. From a doctrinalist Realist perspective, there is no such general standard. Nor is the most illuminating category into which to sort the *Clapper* decision the one identified by cynical Realists when they assert very broadly that the Justices routinely manipulate standing doctrine to deny standing to plaintiffs asserting substantive claims to which the Justices are hostile on the merits.<sup>105</sup> Instead, the right kind of Realist offers a more discriminating analysis: the likelihood of future injury necessary to establish standing must be greater in some kinds of cases than in others, and it is important to try to figure out which. For at least so long as the Court retains its current composition, *Clapper* should be read and analyzed as a case about standing to seek injunctive relief against national security policies rather than about standing more broadly.

#### IV. *WINDSOR* AND THE STANDING OF DEFENDANTS, ESPECIALLY GOVERNMENTS AND THEIR OFFICIALS

A doctrinalist Realist should acknowledge at the outset that a majority of the Justices clearly wanted to reach the merits issue in *Windsor* for reasons that Justice Kennedy expressly identified.<sup>106</sup> A decision on the merits would control a large number

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<sup>102</sup> 134 S. Ct. 2334 (2014).

<sup>103</sup> *Id.* at 2341.

<sup>104</sup> *See Clapper*, 133 S. Ct. at 1143 (asserting the need for a “certainly impending” injury to support standing).

<sup>105</sup> *See supra* note 1 and accompanying text.

<sup>106</sup> *See United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).



of cases already in the pipeline and spare a myriad of judges from struggling with a constitutional issue that divided the Supreme Court by 5 to 4.<sup>107</sup> If the Court denied standing in *Windsor*, it is not clear that it—or the federal courts of appeals—would have had jurisdiction to entertain any case in which the plaintiff had prevailed. If standing would ever exist for an appeal to the Supreme Court, it would need to await a case in which a court of appeals affirmed a district court ruling sustaining the constitutionality of DOMA’s Section 3 and an aggrieved plaintiff, who suffered a financial loss as a result, petitioned for certiorari.<sup>108</sup>

As I noted earlier, it is unthinkable that Article III would permit a party—an entity other than a governmental body or person who was not a government official—who professed agreement with a lower court judgment nevertheless to claim standing to appeal that judgment to the Supreme Court.<sup>109</sup> From a doctrinalist Realist perspective, however, it does not follow that what is true of a private litigant should also necessarily be true of the government of the United States. Although the Supreme Court has found fewer occasions than one might expect to emphasize relevant differences within the domain of standing doctrine,<sup>110</sup> differences between government litigants and private litigants plainly abound.<sup>111</sup> Perhaps most centrally, the government of the United States need not demonstrate personal injury, to itself or anyone else, in order to bring a criminal prosecution or civil enforcement action.<sup>112</sup> In some cases, the government may step into the shoes of the victim of a crime or other violation of law.<sup>113</sup> But no one questions the government’s standing under Article III to prosecute victimless crimes as well.<sup>114</sup>

So recognizing, a doctrinalist Realist analysis of *Windsor* would characterize it, not as a case about the general law of standing to appeal, but as a case about the standing of the government to appeal when money is at stake but the government agrees with the prevailing party in the lower court about the merits of a constitutional issue.<sup>115</sup> If one accepts that proposition, then the central Article III issue in *Windsor*—as Justice Scalia correctly noted—did not involve injury so much as concrete adversity.<sup>116</sup> This strikes

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<sup>107</sup> *Id.*

<sup>108</sup> *Cf. Windsor*, 133 S. Ct. 2675 (2013).

<sup>109</sup> *See supra* note 55 and accompanying text.

<sup>110</sup> *But cf. Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (finding that states are entitled to “special solicitude in our standing analysis”).

<sup>111</sup> *See* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999).

<sup>112</sup> *See id.*

<sup>113</sup> *Cf. Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (holding a suit challenging school segregation not mooted by the graduation of the original plaintiffs due to the intervention of the United States).

<sup>114</sup> *See supra* note 112 and accompanying text.

<sup>115</sup> *See United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>116</sup> *See generally id.* at 2701 (Scalia, J., dissenting).

me as a difficult question for reasons rooted in precedent as much as principle, as my colleague Vicki Jackson forcefully argued to the Court in her role as *amica curiae*.<sup>117</sup> In noting its difficulty, however, a doctrinalist Realist would surely recognize that issues of concrete adversity can take on a complex coloration in other categories of litigation involving the federal government, including those in which one official or agency has sued another official<sup>118</sup> or agency of the federal government.<sup>119</sup> It would be odd to describe the government as standing in a relation of concrete adversity to itself, especially in cases in which the president could resolve any apparent dispute by determining authoritatively what the United States understood its ultimate interest to be.

In offering a relatively narrow framing of the category of cases into which *Windsor* most specifically fit, I do not mean to imply that it was necessarily correctly decided. I do mean to suggest, however, that it was neither an aberrational holding that future decisions will likely limit to its facts nor one with broad implications for the generality of standing cases. Long before *Windsor*, generally stated standing rules necessarily included implied exceptions for the government in some cases (such as criminal prosecutions in which the government has not suffered injury-in-fact) and permitted adjustments in their application to the government in other cases (such as those in which one official or agency of the federal government sues another).<sup>120</sup> *Windsor* should be read as contributing to that pattern. It clarifies the law of governmental standing in the narrow set of cases in which the government seeks appellate review of a decision with which it agrees on the merits, but which imposes a financial burden on it, in order to secure authoritative resolution of a constitutional issue by a higher court.<sup>121</sup>

#### V. *HOLLINGSWORTH V. PERRY*, STRATEGIC VOTING, AND “PRESUMPTIVE POSITIVISM”

In my initial discussion of *Hollingsworth v. Perry*, I noted two familiar criticisms.<sup>122</sup> First, the majority’s analysis—which interpreted Article III to require a tight agency relationship between the state and parties authorized by state law to represent the state’s interests—was strained and unprecedented and thus smacked of manipulation.<sup>123</sup> Second, some of the Justices who voted to uphold standing in *Windsor* had engaged

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<sup>117</sup> Reply Brief for Court-Appointed *Amica Curiae* on Jurisdiction, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

<sup>118</sup> See *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>119</sup> See, e.g., *United States v. Interstate Commerce Comm’n*, 337 U.S. 426 (1949) (suit by the United States as shipper to set aside a reparations order entered by the ICC). See generally Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

<sup>120</sup> See Hartnett, *supra* note 111.

<sup>121</sup> *Windsor*, 133 S. Ct. 2675 (2013).

<sup>122</sup> See *supra* notes 71–73 and accompanying text.

<sup>123</sup> See *supra* note 73 and accompanying text.

in result-oriented, strategic voting by acting on the basis of reasons that they would not be prepared to acknowledge as furnishing appropriate grounds for decision in subsequent standing cases.<sup>124</sup>

Although neither of these criticisms may be flatly false, I believe that a doctrinalist Realist analysis of *Hollingsworth* will yield more predictively illuminating insights. California's attempted assignment of its interests in defending Proposition 8 to parties other than state officials fits into previously established doctrinal patterns in complex ways. Long before the development of modern standing doctrine, widely shared historical understandings apparently acknowledged a distinction between private rights—which private individuals could assert in litigation—and the more broadly shared rights or interests of the public as a whole, which only the government or its officials could assert.<sup>125</sup> Paradigmatic within the latter category was the general interest of the public as a whole in the enforcement and vindication of the law in cases in which a would-be representative of the public's interest had not suffered a distinctive injury.<sup>126</sup>

*Hollingsworth*, of course, involved the added consideration of an express attempt by the state of California to designate private parties to litigate as the state's representatives.<sup>127</sup> But a doctrinalist Realist, prior to *Hollingsworth*, would not have assumed—based on snippets of language that might be extracted from any single case—that governmental bodies could assign their power to represent the public interest in litigation before an Article III court to anyone whom they might choose.<sup>128</sup> Within the subcategory of standing cases in which one party has assigned its interests in litigation to another, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*<sup>129</sup> upheld the federal government's assignment of a financial interest in litigation to a private party, for the private party to assert on the government's behalf.<sup>130</sup> As commentators have recognized, however, it remained a live question in the wake of *Vermont Agency* whether that decision's rationale—which relied heavily on historical practice—would extend to an attempted assignment of the government's more general, nonfinancial interest in the enforcement of the criminal and civil law, which historically would have fallen within the category of litigation to vindicate public rights.<sup>131</sup>

Against that backdrop, the question of whether Article III might pose obstacles to federal jurisdiction of an action in which a state had assigned its interest in vindicating state law to private parties becomes a freighted one. If Article III would permit a state to designate any person or persons that it chose to defend a state law against constitutional attack, why could a state not also designate any person residing

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<sup>124</sup> See, e.g., Klarman, *supra* note 73, at 145–46.

<sup>125</sup> See, e.g., Anne Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 712–18 (2004).

<sup>126</sup> *Id.*

<sup>127</sup> See 133 S. Ct. 2652, 2660 (2013).

<sup>128</sup> See, e.g., *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

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

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

<sup>131</sup> See HART & WECHSLER, *supra* note 90, at 940–41 n.8.

within the state to bring any action to enforce state law that the state or its agents could bring? With that question potentially looming, and unresolved by the Court's precedents,<sup>132</sup> Justices whose general jurisprudential philosophies would incline them to answer in the negative could reasonably think that cases that have upheld the assignment of a state's litigating interests to state officials, including state officials outside the executive branch,<sup>133</sup> are not necessarily controlling. Some "limiting principle" may be needed.<sup>134</sup>

In light of the potential precedential significance of a decision to uphold standing in *Hollingsworth*, I believe that any charge of strategic voting would be wholly misplaced with regard to Justice Scalia, who has long insisted on maintaining historical limits on standing.<sup>135</sup> The same may be true of Chief Justice Roberts.

If one turns to the other Justices comprised within the *Hollingsworth* majority, the charge of strategic voting looks more plausible. Justice Ginsburg has long argued that the Court went too far too fast in ruling as it did in *Roe v. Wade*.<sup>136</sup> With the Court having held in *Windsor* that the federal government cannot refuse to recognize same-sex marriages that the states have authorized,<sup>137</sup> she very plausibly might have thought it prudent for the Court to avoid considering whether and if so when the Constitution creates a more general right to same-sex marriage, at least for the time being. If so, Justices Breyer and Kagan might have thought likewise.<sup>138</sup>

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<sup>132</sup> See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) ("Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.").

<sup>133</sup> See *Karcher v. May*, 484 U.S. 72 (1987).

<sup>134</sup> RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, 2013 SUPPLEMENT TO HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17 (2013).

<sup>135</sup> *But see* Klarman, *supra* note 73, at 145–46 ("It is especially difficult to fathom how ordinarily staunch defenders of the states' constitutional prerogatives such as Chief Justice Roberts and Justice Scalia could deny states the authority to determine who gets to defend the constitutionality of their laws in federal court." (internal footnotes omitted)).

<sup>136</sup> 410 U.S. 113 (1973); see, e.g., Allen Pusey, *Ginsburg: Court Should Have Avoided Broad-Based Decision in Roe v. Wade*, A.B.A. J. (May 13, 2013, 9:20 AM), [http://www.abajournal.com/news/article/ginsburg\\_expands\\_on\\_her\\_disenchantment\\_with\\_roe\\_v\\_wade\\_legacy/](http://www.abajournal.com/news/article/ginsburg_expands_on_her_disenchantment_with_roe_v_wade_legacy/) (reporting Justice Ginsburg's most recent criticism of *Roe*). Justice Ginsburg has long maintained that, in contrast with the Supreme Court's methodical line of "gender classification" cases such as *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), "*Roe v. Wade* sparked public opposition and academic criticism . . . because the Court ventured too far in the change it ordered and presented an incomplete justification for its action." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376 (1985); see also Ruth Bader Ginsburg, *Speaking in A Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) ("Measured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable.").

<sup>137</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>138</sup> *Cf.* Klarman, *supra* note 73, at 146–47 ("[T]he Court probably ducked the constitutional

This disaggregation of “the Court” or even “the majority” into individual Justices—to whom disparate views are ascribed despite their all having joined a single opinion—itsself reflects a strategy of the right kind of Realism that grows out of its concern with predicting the outcomes of future cases.<sup>139</sup> The Supreme Court “is a ‘they,’ not an ‘it,’”<sup>140</sup> and anyone who wishes to make good predictions of the outcomes of future standing cases must look at the likely decisions of the nine Justices individually. Any minimally sophisticated observer should know that the bare language of the opinions in which multiple Justices have joined may fail to reflect divergences that a broader-based analysis would identify. To take just one hypothetical yet very real example, one should not expect that the votes of Justices Ginsburg, Breyer, and Kagan in *Hollingsworth* would necessarily presage their views about the constitutionality of a federal statute authorizing “any person” to sue as the assignee of the government’s interests in disputes of other kinds.

Doctrinalist Realist reflection on *Hollingsworth* may support further, pattern-based generalizations about the likely occasions for strategic voting in standing cases. Even if we provisionally accept that some Justices voted strategically in one standing case, it does not follow that those Justices—much less all of the Justices—vote strategically in all standing cases. During the Supreme Court’s 2012 Term, it decided seventy-nine cases.<sup>141</sup> Regardless of their positions on the merits, none of the Justices doubted the existence of standing in more than a handful of them. In the six cases in which the Court took note of standing issues, it divided in only four.<sup>142</sup>

If one wanted to generalize about the likely conditions of strategic voting with respect to standing, I think the appropriate lesson would adapt a general jurisprudential thesis that Fred Schauer has advanced under the heading of “presumptive positivism.”<sup>143</sup> Presumptive positivism postulates that judges will adhere to applicable legal rules, even when those rules dictate outcomes that the judges think unwise or otherwise regret, but only up to a point; beyond that threshold, particular judges who experience the costs of adhering to rules’ natural or presumptive meanings as exorbitant

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issue in *Hollingsworth* because one or more of the five Justices in the *Windsor* majority . . . preferred to postpone the day of reckoning.”).

<sup>139</sup> *Cf. id.*

<sup>140</sup> This idea received its most powerful introduction into the legal literature in Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

<sup>141</sup> *2012 Term Opinions of the Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/opinion/slipopinions.aspx?term=12> (last visited Oct. 23, 2014).

<sup>142</sup> See *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013); *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Maracich v. Spears*, 133 S. Ct. 2191 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>143</sup> See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 206 (1991).

or intolerable will find mechanisms of avoidance.<sup>144</sup> Whether or not presumptive positivism is true as a general jurisprudential thesis, I hypothesize that it has significant explanatory power as applied to standing cases in which a vote on standing—whether to uphold it or deny it—would serve an important strategic purpose that a vote on the merits, or at least on the merits alone, would not serve as well.

*Duke Power Co. v. Carolina Environmental Study Group, Inc.*<sup>145</sup> furnishes one well-known example in support of this thesis. In *Duke Power*, the Supreme Court upheld otherwise highly doubtful claims of standing and ripeness on its way to sustaining the constitutionality of an important federal statute, any doubts about the validity of which might have cast a cloud over the nuclear power industry.<sup>146</sup> Commentators widely speculated that a desire to remove that cloud powerfully influenced the Justices' holding with regard to standing and ripeness.<sup>147</sup>

In *Hollingsworth*, by contrast, the Court rejected a claim of standing.<sup>148</sup> Its decision to do so fits with Alexander Bickel's once hotly debated thesis that the Supreme Court both does and should strategically employ the devices furnished by justiciability doctrines, including standing, to avoid resolving constitutional questions on the merits until the time is ripe for them to do so.<sup>149</sup> In Bickel's formulation, the Court should "declare as law only such [moral] principles as will—in time, but in a rather immediate foreseeable future—gain general assent."<sup>150</sup> If a majority of the Justices thought the public unlikely to accept a ruling that they would otherwise make, he commended postponement of the issue to await future, hoped-for evolution in public attitudes as frequently constituting the best available option.<sup>151</sup> "[T]he future will not be ruled," Bickel wrote; "it can only possibly be persuaded."<sup>152</sup>

Intervening developments have largely overtaken Bickel's thesis. Of perhaps most central importance, Congress virtually eliminated the Supreme Court's mandatory jurisdiction in 1988.<sup>153</sup> Today, if the Court wants to avoid resolving a case on the merits, it can almost always do so by denying certiorari. As a result, there is normally no perceived necessity for the strategic deployment of justiciability doctrines.

<sup>144</sup> See *id.* at 205 (postulating that although rules are "presumptively controlling," a "rule will be set aside when the result it indicates is egregiously at odds with the result that is indicated by [a] larger and more morally acceptable set of values").

<sup>145</sup> 438 U.S. 59 (1978).

<sup>146</sup> See generally *id.*

<sup>147</sup> See, e.g., Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980).

<sup>148</sup> 133 S. Ct. 2652, 2656 (2013).

<sup>149</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS* 127 (1969).

<sup>150</sup> See *id.* at 239.

<sup>151</sup> See BICKEL, *supra* note 149.

<sup>152</sup> *Id.* at 98.

<sup>153</sup> See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

Bickel's thesis may retain currency, however, if, after the writ of certiorari issues, a majority of the Justices either continue or come to believe that to decide a case on the merits would be dramatically imprudent. The Court ordinarily observes "the Rule of Four," under which the votes of four Justices suffice to put a case on the Court's docket, even if the other five would rather not hear it.<sup>154</sup> Among the options open to a bare majority of five Justices after four have voted to grant certiorari is to dismiss for absence of standing—even if doing so requires a strategic manipulation of otherwise applicable doctrine.<sup>155</sup>

Once more a caveat is in order: I cannot be sure that strategic voting happened in *Hollingsworth v. Perry*. I am confident, however, that anyone who is prepared to indulge the assumption that strategic voting did occur would profitably go on to engage in the further, pattern-making mode of analysis that the right kind of Realism promotes.

#### CONCLUSION

Beyond any shadow of doubt, standing doctrine is complex and confusing. Given its vagaries, anyone who takes all of the Supreme Court's seemingly categorical pronouncements at face value will swiftly fall into error. But not every apparent deviation in one case from words uttered in another reflects the sacrifice of meaningful legal order to rank or unpredictable judicial manipulation—at least if one practices "the right kind of Realism" in developing one's understanding of what the law of standing is or requires. The Supreme Court's standing cases frequently exhibit patterns that the Justices themselves do not always emphasize, and sometimes do not even acknowledge, but that nonetheless offer relatively stable grounds for prediction regarding the outcomes of subsequent cases.

I call the approach that I have advocated a form of "Realism" because it sometimes looks beyond the words of judicial opinions in a quest to determine what is "really" going on. But doctrinalist Realism is not Realist in a cynical sense, implying that Justices always simply vote to uphold or deny standing based on their ideological preferences, nor in the sense of suggesting that what "really" happens is normally or even frequently something other than judges conscientiously attempting to apply the law of standing. Lawyers and lower court judges do not have the luxury of throwing up their hands and insisting that standing has nothing to do with law and everything to do with judicial manipulation and politics. Nor should law professors content themselves too readily with that mode of commentary and analysis. There often are patterns in the Court's standing decisions, available to be found if we search for them with sufficient diligence and imagination. To a greater extent than is frequently appreciated, those patterns help constitute the law of standing, even when the Supreme Court has not expressly pointed them out to us.

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<sup>154</sup> See HART & WECHSLER, *supra* note 90, at 1470.

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