

STANDING AFTER SCALIA

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Although he is, and will be, better remembered for his methodological approaches to constitutional and statutory interpretation, there aren't many substantive constitutional doctrines on which Justice Antonin Scalia had a greater or more deliberate impact¹ during his thirty-year tenure on the Supreme Court than Article III standing—and its now-familiar three-pronged requirement that plaintiffs demonstrate (1) a concrete injury-in-fact; that (2) was caused by the defendant; and (3) can be redressed through the sought-after relief.² Justice Scalia was not just the most ardent and vocal defender among modern Justices of rigid judicial enforcement of these requirements;³ he was also the leading exponent among contemporary jurists of the *theoretical* justifications for such rigidity—explaining that it was necessary in order to both prevent courts from arrogating the political branches' constitutional authority and preserve the (in his

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1. Of course, he may be more well-known *outside* the legal community for some of his substantive constitutional opinions, especially his majority opinion re-invigorating the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and any number of noteworthy dissents. But given *Heller's* still-uncertain compass, *see, e.g.*, *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from the denial of certiorari); *Jackson v. City and County of San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from the denial of certiorari), it does not seem unreasonable to see Article III standing doctrine as an area in which, given the significance of his views and their impact on a large number of the Supreme Court's decisions (and that many more lower-court rulings), Justice Scalia's impact was as significant as any other.

2. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015).

3. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 93–102 (1998) (Scalia, J.).

view, limited) original understanding of the proper judicial role.⁴

Thus, as then-Judge Scalia explained in a 1982 speech at Suffolk University Law School,

There is, I think, a functional relationship, which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*. Thus, when an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing. That is the classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a "generalized" one.⁵

Challenges to "administrative law cases in which the plaintiff is complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*,"⁶ in contrast, were less appropriate for the exercise of judicial power, because, as Scalia explained, they reflected majoritarian harms that could be (and, if truly important enough, *would* be) redressed through the majoritarian political process.⁷ As significantly, recognizing unduly expansive theories of standing in cases raising majoritarian harms might also implicate Article II, insofar as courts would increasingly be called upon to review Executive Branch exercises of administrative discretion.⁸

4. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–78 (1992) (Scalia, J.). In earlier cases, the Court had expressly *disclaimed* any relationship between standing doctrine and the separation of powers. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 99–101 (1968).

5. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 894 (1983).

6. *Id.*

7. See *id.* at 894–95.

8. See, e.g., *Lujan*, 504 U.S. at 559–60. But see *Steel Co.*, 523 U.S. at 102 n.4 ("This case calls for nothing more than a straightforward application of our standing jurisprudence, which,

Why shouldn't we trust judges to resolve disputes arising out of majoritarian harms? Then-Judge Scalia argued that it was not just because of the constitutional design, but because judges were uniquely *un*-suited to be trusted properly to resolve the issues presented in such cases. In his words, federal judges

have in a way been specifically designed to be bad at it—selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result, and (just in case any connection with the man in the street might subsist) removed from all accountability to the electorate. That is just perfect for a body that is supposed to protect the individual against the people; it is just terrible (unless you are a monarchist) for a group that is supposed to decide what is good for the people. Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class.⁹

Whatever the merits of Justice Scalia's theoretical model of standing, or his explanation for why judges can't be trusted to resolve majoritarian disputes, there can be little doubt that he brought it with him to the Supreme Court, or that a long line of standing cases decided during his tenure—and, often, through majority opinions he penned—reflect some, if not most, of its core elements.¹⁰ And, as Scalia himself predicted in the Suffolk speech,¹¹ this particular view of the judicial role eventually mutated into other contexts, as well, especially the ability (or lack thereof) of federal courts to infer private causes of

though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II.”).

9. Scalia, *supra* note 5, at 896.

10. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (Scalia, J.); *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83 (1998) (Scalia, J.); *Spencer v. Kemna*, 523 U.S. 1 (1998) (Scalia, J.); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Scalia, J.).

11. *See* Scalia, *supra* note 5, at 898–99.

action into statutory or constitutional provisions that don't expressly provide for private enforcement.¹² Few Justices in history have had a similar impact on the Federal Courts canon—and perhaps none in the last half-century.

This paper is not meant to relitigate or otherwise join in the longstanding debate over the normative desirability and/or analytical defensibility of Justice Scalia's stated approach to these questions. Forests have been (and surely are in the process of being) felled over the merits of Justice Scalia's view of the judicial role in general, and Article III in particular, and I take it as a given that reasonable people will continue to disagree about the policy wisdom and doctrinal attractiveness of both. Nor do I mean to take a strong position on whether Justice Scalia always *followed* his own principles, although there is certainly room for skepticism on that front.¹³

But I also take it as a given that Justice Scalia's approach in this field *can* be objectively described by its supporters and detractors alike—and, as such, that its contemporary salience can be descriptively assessed. Thus, this paper is aimed at a narrow—but, in the near-term, potentially significant—query, *i.e.*, whether Justice Scalia's normative approach to standing cases, such as he had sought to describe it, has staying power.

In one respect, any question about Justice Scalia's legacy on an issue on which the remaining eight Justices are so often divided is necessarily dependent upon the views of his eventual successor. But as I aim to demonstrate in the pages that follow, there are at least two respects in which recent lower-court decisions suggest that, regardless of the views of whoever ultimately fills the seat once held by Justice

12. *See, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015) (Scalia, J.); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Scalia, J.).

13. Consider, as just one example, the absence of any consideration of the plaintiff's standing in *Fisher v. University of Texas* ("*Fisher P*"), 133 S. Ct. 2411 (2013), in which a challenge to a university's race-based affirmative action admissions policy included no evidence whatsoever of causation—*i.e.*, that the plaintiff would likely have been admitted had it not been for the policy. *See also, e.g.*, *Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (holding that Congress had the power to confer standing upon *qui tam* relators to sue on behalf of the United States).

Jackson and the second Justice Harlan, Justice Scalia's standing framework did not survive his passing—if it had even persisted *that* long.

First, and perhaps most obviously, there has been a subtle resurgence of judicial recognition of standing to raise quintessentially “majoritarian” claims—not only in the context of conventional challenges to administrative regulation and statutes conferring standing upon exceptionally broad classes of plaintiffs, but also in the unconventional contexts of challenges to federal regulation by Congress and/or sovereign states. *Second*, and less obviously, there have also been lower-court decisions that have made it *harder* for plaintiffs with paradigmatically *anti*-majoritarian claims to establish their standing.

Although both of these trends are, at least in my view, antithetical to Justice Scalia's stated conception of standing (if not of the judicial role, more generally), they are *especially* inconsistent with his articulated approach when taken together. After all, they suggest not only that courts have lost sight of the deeper analytical justifications Justice Scalia sought to provide for Article III standing doctrine, but that, in fact, some *other* considerations are driving the judicial approach in these contexts—considerations that may (and likely do) have far less to do with the text, structure, or purpose of Article III's case-or-controversy requirement.

I have my own views about the merits (or lack thereof) of some of these recent developments, but it seems to me that they objectively support at least one of two conclusions: *First*, insofar as Justice Scalia sought to situate Article III standing doctrine within an objectively describable (and applicable) theoretical architecture, either these recent rulings are wrong, or the project failed. *Second*, and more generally, efforts (like Justice Scalia's) to articulate objective understandings of, and approaches to, Article III standing—whether in the direction of justifying more permissible or more restrictive standing rules—may be little more than a fool's errand, given the inherent *subjectivity* that will necessarily pervade how individual jurists assess and apply each of the requirements for standing that the Supreme Court has read into Article III. Thus, the fundamental question raised by Justice Scalia's standing legacy is whether its already-apparent demise is unique to its merits, or, instead, whether it

provides a more general indictment of *any* effort to operationalize standing at such a high level of doctrinal generality.¹⁴

To unpack this thesis, I begin in Part I with examples of the first phenomenon—of recent decisions appearing to recognize Article III standing in cases in which the approach then-Judge Scalia outlined in his Suffolk speech would seem to militate against it. As Part I demonstrates, although some of these cases may just reflect doctrinal muddle, especially in the unique context of “organizational” standing, others—including those with unconventional public plaintiffs and congressionally conferred standing—appear more squarely inconsistent with Justice Scalia’s approach to the judicial role. And although the Supreme Court had an opportunity this last Term to correct at least two of these departures, the absence of Justice Scalia appears to have prevented it from doing so.

Part II turns to the less-obvious (and, frankly, less voluminous) category—using the litigation challenging the National Security Agency’s bulk collection of telephone metadata as an example of a recent decision in which courts have *rejected* standing even where plaintiffs raised a far more conventional (and anti-majoritarian) constitutional challenge to government surveillance. There, the rejection was justified by conflating the standing inquiry with the standard for obtaining a preliminary injunction—an approach that could have significant ramifications in a bevy of future cases.

To be sure, I don’t mean to make too much out of such small data sets; it is surely too early to offer a holistic assessment of the impact Justice Scalia’s approach to standing had in the lower courts. And, in any event, focusing on these departures may well obscure the countless decisions that thoroughly reflect (and, sometimes, affirmatively embrace) his approach. It cannot meaningfully be gainsaid that Justice Scalia had a significant impact on how lower courts—and litigants—approach Article III standing, whether or not the resulting doctrine has been consistent.

Instead, the larger point of this essay is not to take a strong view on

14. *See, e.g.,* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (suggesting that standing doctrine is not really about objective justiciability constraints, but rather reflects, and should be understood as reflecting, subjective judicial assessments of the relative merits of plaintiffs’ claims).

the merits of any of these developments, but rather to suggest the extent to which Article III standing doctrine, at least in the lower courts, has increasingly found critics on *all* sides—destabilizing the analytical coherence that seemed to be one of the signal purposes and features of Justice Scalia’s stated approach. Simply put, my thesis is that, if Justice Scalia sought to impose an objectively describable and analytically consistent framework onto how Article III courts apply standing doctrine, these recent developments suggest that he was unsuccessful—and they raise the question of whether *any* effort in that direction, whatever its merits in the abstract, and regardless of who attempts it, could ever succeed.

I. MAJORITARIAN STANDING

It would be a fool’s errand to attempt a comprehensive assessment of contemporary Article III standing doctrine—even in the more specific context of administrative law. Instead, to illuminate the emerging tensions between recent lower-court decisions and Justice Scalia’s articulated view of and approach to the purposes of Article III standing doctrine, this Part focuses on three examples: organizational standing; standing of government plaintiffs (including states and Congress); and standing created *by* Congress. In each of these contexts, as we shall see, lower courts in the last few years have embraced especially—and, perhaps, unduly—expansive standing rules.

A. Organizational Standing

At its core, organizational standing is the idea that a group will have standing if *it* is directly injured.¹⁵ (A group can also have “associational” standing if (1) “its members would otherwise have standing to sue in their own right;” (2) “the interests it seeks to protect are germane to the organization’s purpose;” and (3) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”¹⁶)

This understanding of organizational standing suggests that the

15. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982).

16. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

inquiry should be the same as that for an individual, private plaintiff. But in a series of cases in recent years, lower courts have embraced an especially expansive understanding of organizational standing, as illustrated perhaps most poignantly by the D.C. Circuit's August 2015 decision in *People for the Ethical Treatment of Animals (PETA) v. U.S. Dept't of Agriculture*.¹⁷

PETA arose out of the U.S. Department of Agriculture's 2004 decision to apply the protections of the 1966 Animal Welfare Act¹⁸ to birds.¹⁹ Although the USDA promised to promulgate at least *some* avian-specific regulations in the ensuing years, it has failed to do so, and has also not even applied the Act's *general* regulations to birds. *PETA* brought suit in 2013, alleging that the USDA's failure to take any steps to implement its 2004 decision constituted agency action "unlawfully withheld" under section 706(1) of the Administrative Procedure Act.²⁰ Although the district court and the D.C. Circuit both ruled for the USDA on the merits, they also both concluded that *PETA* had Article III standing to bring such a claim. As Judge Henderson wrote for the D.C. Circuit majority,

the USDA's allegedly unlawful failure to apply the AWA's general animal welfare regulations to birds has "perceptibly impaired [*PETA*'s] ability" to both bring AWA violations to the attention of the agency charged with preventing avian cruelty and continue to educate the public. Because *PETA* has expended resources to counter these injuries, it has established Article III organizational standing.²¹

The problem with this analysis, as Judge Millett pointed out in a

17. 797 F.3d 1087 (D.C. Cir. 2015).

18. 7 U.S.C. § 2131 *et seq.* (2012).

19. Animal Welfare; Definition of Animal, 69 FED. REG. 31,513, 31,513 (June 4, 2004); *see also* 9 C.F.R. § 1.1.

20. 5 U.S.C. § 706(1).

21. *PETA*, 797 F.3d at 1095 (citing *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011)).

*dubitante*²² opinion, is that the *PETA* majority thereby held that “standing exists because the government’s inaction injured PETA’s ‘interest’ in having the Animal Welfare Act enforced against certain third parties, and because PETA chose to devote its own resources to make up for the government’s enforcement ‘omission.’”²³ In other words, PETA’s standing was based upon its complaint that it was injured by the money it voluntarily chose to spend to make up for the USDA’s failure to enforce the Animal Welfare Act against somebody else. Such an approach, Judge Millett explained, is inconsistent with the general Article III standing principles “that an individual’s interest in having the law properly enforced against others is not, without more, a cognizable Article III injury,”²⁴ and “that a plaintiff’s voluntary expenditure of resources to counteract governmental action that only indirectly affects the plaintiff does not support standing.”²⁵ More generally, as Judge Millett lamented,

our organizational standing precedents now hold that the required Article III injury need not be what the defendant has done to the plaintiff; it can also be what the defendant has not done to a third party. And the manifestation of that injury is not that the defendant has torn down, undone, devalued, or otherwise countermanded the organization’s own activities or deprived it of a statutorily conferred right. It is instead a failure to facilitate or subsidize through governmental enforcement the organization’s vindication of its own parallel interests.²⁶

22. *See* *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1151 (9th Cir. 2005) (Berzon, J., concurring in the judgment) (citing LON L. FULLER, *ANATOMY OF THE LAW* 147 (1968) (“[E]xpressing the epitome of the common law spirit, there is the opinion entered *dubitante*—the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent.”)).

23. *PETA*, 797 F.3d at 1099 (Millett, J., *dubitante*).

24. *Id.* (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)).

25. *Id.* (citing *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1148–51 (2013)).

26. *Id.* at 1101.

Although that result may have been compelled by other recent D.C. Circuit decisions, Judge Millett concluded, those cases appear to have pushed Article III standing to—and, indeed, beyond—the brink.²⁷ And unlike fact-bound rulings that particular plaintiffs have *individual* standing, the D.C. Circuit’s organizational standing approach seems to present a more frontal assault against how the Supreme Court has approached these issues, all the more so insofar as it has “spawned . . . an unwarranted disparity . . . between individuals’ and organizations’ standing,”²⁸ and has made it easier for organizations, as such, to challenge particular types of agency action (or inaction, as in *PETA*).

B. State and Legislator Standing

Many of Judge Millett’s critiques about the growing disparity between individual and organizational standing map onto two other areas where recent judicial decisions have recognized more expansive forms of majoritarian standing than the Supreme Court has historically endorsed: The standing of states to challenge particular federal policy initiatives, and the standing of a House of Congress to challenge particular executive branch interpretations of a statute. In both of these contexts, as in *PETA*, lower courts seem to have tolerated standing arguments that, in suits brought by private individuals, have long been rejected.

In one sense, the Supreme Court itself may be to blame for the resurgence of state standing, since its 2007 decision in *Massachusetts v. EPA* controversially sustained the ability of a state to petition for review of the Environmental Protection Agency’s denial of a petition for rulemaking to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act.²⁹ As Justice Stevens wrote for the majority, Massachusetts was entitled to “special solicitude” in the Court’s standing analysis both because of its quasi-sovereign interest

27. *See id.*; *see also* *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 926 (D.C. Cir. 2015) (Millett, J., concurring) (“I continue to believe that our organizational standing doctrine should be revisited in an appropriate case.”).

28. *Food & Water Watch*, 808 F.3d at 926 (Millett, J., concurring).

29. 549 U.S. 497 (2007).

in the value of its own coastal property and because it was suing to enforce rights that it possessed under the Clean Air Act as such, and not merely on behalf of its citizens.³⁰

At least initially, though, lower courts in the context of whether states had standing to challenge the Affordable Care Act³¹ saw *Massachusetts* as a modest ruling—and certainly not one that overturned the century-old rule that states may not act as *parens patriae* in suits against the federal government. In their view, it merely recognized an additional circumstance in which a state could sue the federal government to enforce its *own* rights under federal law—when it could claim some kind of discrete and unique injury that separated it from at least *some* states, if not all of them. Thus, where the ACA was concerned, states *lacked* standing to challenge the individual mandate,³² but *had* standing to challenge the Medicaid expansion.³³

In contrast, what may well represent the more significant potential expansion of state standing came in the Fifth Circuit’s analysis in *Texas v. United States*, in which Texas (joined by 26 other states as plaintiffs) sued to challenge President Obama’s “deferred action” immigration policy on the grounds that it violated both the APA and Article II.³⁴ As Judge Smith explained for the Court of Appeals, Texas’s standing derived entirely from the costs it would incur if it had to issue driver’s licenses to those immigrants who, under the deferred action program, would be entitled to apply for them:

If permitted to go into effect, DAPA would enable at least 500,000 illegal aliens in Texas to satisfy that requirement with proof of lawful presence or employment authorization. Texas subsidizes its licenses and would

30. *Id.* at 519–20 & n.17.

31. See Stephen I. Vladeck, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845 (2012).

32. See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011).

33. See, e.g., *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Hum. Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part sub nom. Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

34. 809 F.3d 134 (5th Cir. 2015), *aff’d without opinion*, 136 S. Ct. 2271 (2016) (4–4).

lose a minimum of \$130.89 on each one it issued to a DAPA beneficiary. Even a modest estimate would put the loss at several million dollars.³⁵

And even though Texas *voluntarily* chose to subsidize driver's licenses (and to thereby absorb at least much of the costs of the increased eligibility among immigrants), the Court of Appeals held that Article III's standing requirement was still satisfied: "Although Texas could avoid financial loss by requiring applicants to pay the full costs of licenses, it could not avoid injury altogether."³⁶ Instead, the court concluded, "[S]tates have a sovereign interest in 'the power to create and enforce a legal code, and the possibility that a plaintiff could avoid injury by incurring other costs does not negate standing.'"³⁷

Dissenting, Judge King heavily criticized the majority's standing analysis, accusing her colleagues of both dramatically over-reading *Massachusetts's* "special solicitude" discussion and misidentifying the cause of Texas's claimed injury-in-fact. As she explained, "Such a theory of standing—based on the indirect economic effects of agency action—could theoretically bestow upon states standing to challenge any number of federal programs as well."³⁸ And because the costs on which the majority based Texas's standing were manufactured wholly by a voluntary state choice, such an approach "appears to allow limitless state intrusion into exclusively federal matters—effectively enabling the states, through the courts, to second-guess federal policy decisions—especially when, as here, those decisions involve prosecutorial discretion."³⁹

Judge King's objection to the Fifth Circuit's expansive conception of state standing underscores the same general concerns as Judge Millett's objection to the D.C. Circuit's organizational standing jurisprudence—that lower courts have widened the gulf between individual and entity standing, and in a manner that threatens not

35. *Id.* at 155 (citation and footnotes omitted).

36. *Id.* at 156.

37. *Id.* at 156–57 (footnotes omitted).

38. *Id.* at 195–96 (King, J., dissenting).

39. *Id.* at 196.

just the coherence of the Supreme Court’s Article III standing doctrine specifically, but, especially as in the *Texas* case, the appropriate judicial role more generally. After all, if states could sue the federal government any time a federal policy had an impact on the state fisc (including one that the state could have avoided), “[i]t would make a mockery . . . of the constitutional requirement of case or controversy . . . to countenance automatic litigation—and automatic it would surely become—by states situated no differently than was [Texas] in this instance.”⁴⁰ And if every state could claim the same injury from President Obama’s deferred action immigration program, then “It is not difficult to imagine a future in which any and all executive branch decisions would first be brought before a federal court by whichever state attorneys general object to that policy.”⁴¹ But without Justice Scalia, the Supreme Court apparently divided 4-4 on the standing question (and, it would seem, on the merits of the states’ challenge, as well)—affirming the Fifth Circuit in June 2016 without an opinion.⁴²

There’s no question that *Massachusetts* (a ruling from which Justice Scalia dissented) has complicated the question of when states will (and should) have standing to sue the federal government. And the subsequent litigation has generated a wave of excellent scholarship (and academic panels) debating the relative merits of the opposing sides.⁴³ But whether *Massachusetts* is rightly decided or not, it seems difficult to square any *broader* endorsement of state standing (including the Fifth Circuit’s in *Texas*) with Justice Scalia’s hostility to what he called “majoritarian” theories of standing. Otherwise, such litigation appears to endorse the ability of uniquely powerful actors within the political process to bypass that process (or appeal adverse

40. Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89–90.

41. Amanda Frost & Stephen I. Vladeck, *Limit State Access to Federal Court*, N.Y. TIMES, Dec. 22, 2015, at A27.

42. *United States v. Texas*, 136 S. Ct. 2271.

43. *See, e.g.*, Tara Leigh Grove, *When Can A State Sue the United States?*, 101 CORNELL L. REV. 851 (2016). Indeed, the Section on Federal Courts of the Association of American Law Schools is devoting its substantive program at the 2017 AALS Annual Meeting to the topic of “Inter-Governmental Disputes and Justiciability.”

results therein) by invoking the countermajoritarian judicial power.⁴⁴

To similar effect, consider also the D.C. district court's September 2015 ruling in *U.S. House of Representatives v. Burwell*, holding that the entire House as an entity had institutional standing to challenge the Department of Health and Human Services' alleged expenditure of government funds without an appropriation, in violation of Article I, Section 9, Clause 7.⁴⁵ Notwithstanding the Supreme Court's longstanding skepticism of "legislative standing,"⁴⁶ though, the district court upheld the House's standing to raise the non-appropriation claim, distinguishing between disputes about "the implementation, interpretation, or execution of federal statutory law,"⁴⁷ which Judge Collyer suggested that the House would not have standing to pursue, and a claim that "the appropriations process is *itself* circumvented,"⁴⁸ which she held that the House did have standing to bring.

The problems with Judge Collyer's standing analysis are two-fold: *First*, in the abstract, it would appear to allow either House of Congress to challenge the Executive Branch's implementation of a federal statute *in any case* in which Congress can cast the disagreement in appropriations terms—so long as it can plausibly claim that, in implementing a federal statute, the government has spent *any* money not specifically appropriated to that end. In other words, Judge Collyer's effort to distinguish between disputes about "implementation, interpretation, or execution" and those about "the appropriations process" may collapse under the weight of artful pleading.

If so, then such a holding would open the door to the very broad species of legislative standing that the Supreme Court has repeatedly decried—and to substantial separation-of-powers concerns insofar as a

44. *See, e.g.*, *Tx. Health & Hum. Servs. Comm'n v. United States*, No. 15-3851 (N.D. Tex. June 15, 2016) (dismissing on the merits—and not for lack of standing—a suit seeking to bar the federal government from resettling Syrian refugees within Texas).

45. 130 F. Supp. 3d 53 (D.D.C. 2015).

46. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811 (1997). Justice Scalia was in the majority in *Raines*. *See id.*

47. *U.S. House of Reps.*, 130 F. Supp. 3d at 74.

48. *Id.* at 75.

potentially limitless class of interbranch disputes over statutory interpretation could end up in the courts. After all, what is to stop one House of Congress from challenging the President's use of military force against the Islamic State in Iraq and the Levant on the ground that Congress appropriated no funds to support such action? The answer may well be (as is the case vis-à-vis the use of force against ISIL) that Congress *has* appropriated such funds,⁴⁹ but on the logic of Judge Collyer's opinion, that conclusion goes to the merits, not Congress's standing.

Second, and more specifically, even if Judge Collyer's distinction is tenable in the abstract, it is not at all clear that the House's claims in the ACA case actually *fall* on the appropriations side of the line, as the government has argued in its merits briefing in the district court. Instead, the nub of the dispute appears to be whether the Executive Branch is correct that a *separate* appropriation in the ACA allows it to implement the programs at issue. Thus, the government has argued, "Now that the Court has before it the defendants' merits arguments at the summary judgment stage, it should be evident that the complaint's allegations do not accurately capture the true nature of this dispute."⁵⁰ If the government is correct on this score, then not only does Judge Collyer's standing holding rest on a distinction that may be untenable in practice, but it is not at all clear that the House falls on the right side of that distinction in the first place.

Given the Supreme Court's recent admonition that "a suit between Congress and the President would raise separation-of-powers concerns [that are] absent [in other contexts],"⁵¹ and that its standing analysis has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was

49. See Marty Lederman, *Captain Smith's Brief on the Merits in the Litigation Challenging the Legality of Operation Inherent Resolve (PQD and Merits)*, JUST SECURITY, Aug. 19, 2016, <https://www.justsecurity.org/32465/captain-smiths-merits-litigation-challenging-legality-operation-inherent-resolve/>.

50. Defendants' Memorandum in Support of Their Motion for Summary Judgment at 34, *U.S. House of Representatives v. Burwell*, No. 14-1967 (D.D.C. filed Dec. 2, 2015).

51. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015).

unconstitutional,”⁵² Judge Collyer’s standing conclusion seems increasingly difficult to defend, whatever the merits of the House’s substantive claims. After all, unlike a true “nullification” claim of the likes the Supreme Court *has* allowed legislators to pursue,⁵³ the dispute in the *Burwell* case is simply over whether the Executive Branch is spending money in a manner that is unconstitutional—a serious claim, to be sure, but not one that implicates Congress’s institutional role to a degree that other challenges to Executive Branch interpretations of statutes do not.⁵⁴ And as in the context of state standing, the *Burwell* case seems easily distinguishable from contexts in which some congressional body is specifically and directly harmed—as, for example, when a committee sues to enforce a subpoena with which a government official has declined to comply.⁵⁵

More fundamentally, like the standing theory at issue in *United States v. Texas*, it is hard to see where Judge Collyer’s theory would stop—and why it wouldn’t allow for the very intervention of courts into the political process that then-Judge Scalia thought standing doctrine was supposed to prevent.

C. Standing Created by Statute

The last category in which lower courts in recent years have embraced conceptions of standing seemingly at odds with Justice Scalia’s proffered approach is in the context of standing created by statute—especially where Congress has defined a novel injury that could be claimed by a large (and potentially unbounded) class of putative plaintiffs. Justice Scalia famously led the charge against such statutes in *Lujan v. Defenders of Wildlife*,⁵⁶ explaining that,

52. *Raines*, 521 U.S. at 819–20.

53. *See, e.g.*, *Coleman v. Miller*, 307 U.S. 433 (1939).

54. Even in the specific context of appropriations, it is difficult to see why, on Judge Collyer’s theory, either House of Congress could not sue *anytime* it could state a non-frivolous claim that the Anti-Deficiency Act, 31 U.S.C. § 3141, had been violated.

55. *See, e.g.*, House Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (recognizing the House Judiciary Committee’s standing in such a case).

56. 504 U.S. 555 (1992).

Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches.⁵⁷

Thus, the *Lujan* Court held that the citizen-suit provision of the Endangered Species Act could not constitutionally be read to allow such suits without a more specific showing of injury. Otherwise, “[t]o permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”⁵⁸

As I’ve written elsewhere,⁵⁹ *Lujan*—and especially the opinion concurring in the judgment by Justices Kennedy and Souter—left open just how far Congress could go to “define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”⁶⁰ And in subsequent rulings, the Court has often *allowed* Congress to define injuries sufficiently broad to raise the concerns Justice Scalia alluded to in *Lujan*—as Justice Scalia himself usually underscored in dissenting opinions.⁶¹ But the Court’s most recent extended foray into Congress’s power in this field—its 2009

57. *Id.* at 576.

58. *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

59. See Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 I/S: J.L. & POL’Y FOR INFO SOC’Y 551, 558–62 (2014).

60. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

61. See, e.g., *Massachusetts v. EPA*, 549 U.S. 507 (2007); *Friends of the Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *FEC v. Akins*, 524 U.S. 11 (1998).

decision in *Summers v. Earth Island Institute*⁶²—once again saw Justice Scalia invalidating an effort by Congress to confer standing upon an exceptionally broad class of plaintiffs. As he there explained, “deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing,”⁶³ and “it makes no difference that the procedural right has been accorded by Congress.”⁶⁴

With that in mind, consider the Ninth Circuit’s 2014 ruling in *Robins v. Spokeo, Inc.*,⁶⁵ upholding Congress power to allow a consumer to sue a website operator under the Fair Credit Reporting Act for publishing inaccurate information about him—even though the statute did not require the consumer to show that the published misinformation actually harmed him in any concrete way.⁶⁶ As Judge O’Scannlain wrote for the Court of Appeals,

First, [Robins] alleges that Spokeo violated *his* statutory rights, not just the statutory rights of other people, so he is “among the injured.” Second, the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them. Like “an individual’s personal interest in living in a racially integrated community” or “a company’s interest in marketing its product free from competition,” Robins’s personal interests in the handling of his credit information are individualized rather than collective.

62. 555 U.S. 488 (2009).

63. *Id.* at 496.

64. *Id.* at 497. Justice Kennedy wrote separately to reiterate his view that “This case would present different considerations if Congress had sought to provide redress for a concrete injury ‘giv[ing] rise to a case or controversy where none existed before.’” *Id.* at 501 (Kennedy, J., concurring) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). He nevertheless joined the majority in full because “[n]othing in the statute at issue here . . . indicates Congress intended to identify or confer some interest separate and apart from a procedural right.” *Id.*

65. 742 F.3d 409 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540 (2016).

66. *See* 15 U.S.C. § 1681n.

Therefore, alleged violations of Robins’s statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III.⁶⁷

Although Judge O’Scannlain was certainly correct on both of those points, the question his opinion did not answer is whether those conditions were sufficient, or merely necessary, for a litigant to have standing. After all, as Justice Scalia wrote in *Summers*, “deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.”⁶⁸ The Ninth Circuit held that the plaintiff had a concrete interest; it just failed to demonstrate how that interest was “*affected* by the deprivation,” given that Robins alleged no specific, concrete harm arising from the incorrect information published online independent of the violation of the statute. The question the Ninth Circuit’s analysis raised, but did not answer, was whether FCRA might therefore be unconstitutional insofar as it would theoretically authorize a suit even in a case in which no concrete harm could be demonstrated.

Without Justice Scalia,⁶⁹ the Supreme Court declined to answer that question, as well. Instead, its response to the Ninth Circuit’s ruling was modest, at best. As Justice Alito wrote in a terse, 11-page opinion for a 6-2 Court,

On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a

67. 742 F.3d at 413–14 (citations omitted).

68. *Summers*, 555 U.S. at 496.

69. Although the 6-2 vote does not immediately suggest that the case might have come out differently with Justice Scalia’s participation, the extensive length of time between the oral argument and the handing down of the decision (especially given the short length of the majority, concurring, and dissenting opinions) provides at least circumstantial evidence that the initial vote—and analysis—might have been significantly different. *See* Steve Vladeck, TWITTER, May 16, 2016, 10:15 a.m., https://twitter.com/steve_vladeck/status/732212860387008512.

bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.⁷⁰

But rather than take a position on which side of the line Robins' claim fell, the Court simply concluded that the Ninth Circuit "failed to fully appreciate the distinction between concreteness and particularization,"⁷¹ and remanded the case for further consideration. And as Justice Thomas suggested, it might even be possible for Robins to prevail on this point on remand—"If Congress has created a private duty owed personally to Robins to protect *his* information."⁷² If Justice Thomas's views have the support of at least four of his colleagues (as is likely), then the bottom line appears to be a fairly broad power on Congress's part to create incredibly broad statutory entitlements to standing—at least where the relevant federal statutes create duties on the part of putative defendants to individual consumers, customers, and so on, as opposed to an amorphous duty to comply with federal law. Where those duties can be owed to as broad a class of potential plaintiffs as was at issue in *Spokeo*, such a conclusion seems to be a backdoor endorsement of Congress's power to create decidedly majoritarian standing.

II. ANTI-MAJORITARIAN STANDING

As Part I suggests, there are any number of examples of

70. *Spokeo*, 136 S. Ct. at 1550.

71. *Id.*

72. *Id.* at 1554 (Thomas, J., concurring).

contemporary contexts in which lower courts have recognized standing on terms at least superficially incompatible with Justice Scalia's stated majoritarian critique, *i.e.*, that courts are better off leaving to the political processes those claims that raise "majoritarian" harms—and that, as such, have alternative remedies.

Although such cases are fewer and further between, one can also find examples of courts in recent years refusing to recognize standing even in contexts in which Justice Scalia's theory would appear to have counseled in favor of justiciability.

Consider, for example, the D.C. Circuit's August 2015 decision in *Obama v. Klayman*, a challenge to the National Security Agency's bulk collection of telephone metadata on the grounds that it was unauthorized by statute and in violation of the Fourth Amendment.⁷³ Although the specific claim in *Klayman* was a challenge to *bulk* surveillance, the actual injury found by the district court—a violation of an individual's constitutional right to be free from unreasonable searches and seizures—presented a quintessentially anti-majoritarian claim.⁷⁴ And unlike in *Clapper v. Amnesty Int'l USA*,⁷⁵ where the Supreme Court had held that plaintiffs could not challenge a secret governmental surveillance program without some proof that interception of *their* communications was "certainly impending," thanks to Edward Snowden, the public was well aware not only of the *existence* of the metadata program, but of its massive (if not comprehensive) sweep.

Nevertheless, the Court of Appeals unanimously concluded that the plaintiff lacked standing. In her separate opinion, Judge Brown focused on the "higher burden of proof required for a preliminary injunction,"⁷⁶ stressing that, even though the plaintiffs "barely fulfilled the requirements for standing at this threshold stage,"⁷⁷ he clearly couldn't make out a "substantial likelihood of success" as to his Article

73. 800 F.3d 559 (D.C. Cir. 2015) (per curiam).

74. Indeed, the district court held that the metadata collection program *violated* the Fourth Amendment. *See* *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013), *vacated*, 800 F.3d 559.

75. 133 S. Ct. 1138 (2013).

76. *Klayman*, 800 F.3d at 564 (opinion of Brown, J.).

77. *Id.*

III standing.⁷⁸ Judge Williams largely echoed Judge Brown, explaining that, because the government was not actually collecting *all* metadata, “I find plaintiffs’ claimed inference inadequate to demonstrate a ‘substantial likelihood’ of injury.”⁷⁹

Leaving aside the merits of the plaintiffs’ standing argument in *Klayman*, the problem with both Judge Brown’s and Judge Williams’ analysis (which, together, form forward-looking precedent in the D.C. Circuit) is their application of the “substantial likelihood” standard for a preliminary injunction to the Article III standing question. Courts have long assumed that, the further a case goes along, the more specificity plaintiffs must show in demonstrating their standing. Thus, standing at the motion-to-dismiss stage is usually analyzed a bit more liberally than standing at, for example, the summary judgment stage. The reason for this is obvious enough: At the motion-to-dismiss stage, it would be unfair to impose upon plaintiffs a requirement to support their claims with evidence that could not yet have been adduced. That calculus necessarily changes on the far side of discovery.

The fact that plaintiffs are seeking a preliminary injunction *shouldn’t* alter that analysis. Yes, plaintiffs must show a likelihood of success on the merits—but that goes to whether interim relief is justified, not whether the plaintiffs have standing sufficient to invoke the court’s jurisdiction in the first place (which must be independently assessed). And the D.C. Circuit itself had previously said so, based upon the Supreme Court’s earlier decision in *United States v. SCRAP*:

[Defendant] argues that the [Plaintiff’s] standing should not be viewed from this more generous [motion-to-dismiss] perspective because there is a preliminary injunction at issue. This argument is flawed. In *SCRAP* itself, the standing issue came before the trial court in exactly the same way as in this case—on motions to dismiss and for a preliminary injunction. The Court made clear that the defendants could not complain that the allegations in the plaintiff’s complaint were not specific

78. *See id.*

79. *Id.* at 566 (Williams, J., concurring).

enough.⁸⁰

It's certainly true that the Supreme Court's standing jurisprudence has taken on a far more skeptical tenor since *SCRAP*—and that *Clapper*, in particular, raises difficult questions about the standing of plaintiffs like those in *Klayman*. But neither Judge Brown nor Judge Williams (nor Judge Sentelle, for that matter) offered any explanation for why those cases (about how to prove standing in general) also allow the court to raise the standing threshold in the specific context of resolving a motion for a preliminary injunction—especially when the law of the circuit seems to expressly foreclose such a move. Indeed, the only citation Judge Williams offered in support of his analysis was to his own dissenting opinion in an earlier case.

The upshot of the Brown/Williams approach in *Klayman*, then, is to make it far more difficult for *any* plaintiff to establish their standing in the context of an application for a preliminary injunction, since, on their logic, a plaintiff in such a case would have to allege facts that would not only prove their standing if true, but that are *substantially likely* to be true. The amount of mischief such an approach could pose in *all* cases—but especially in suits to vindicate anti-majoritarian claims such as the one in *Klayman*—is difficult to overstate.

And even in more traditional anti-majoritarian challenges, courts have been unusually skeptical of claims challenging, *e.g.*, government counterterrorism policies, throwing out a serious challenge by a coalition of writers, journalists, and activists, to allegedly overbroad military detention authority in the FY2012 National Defense Authorization Act;⁸¹ rejecting a challenge to the New York City Police Department's surveillance of the Muslim community in New Jersey following the September 11 attacks;⁸² and so on.

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80. *Nat'l Wildlife Fed. v. Burford*, 835 F.2d 305, 312 (D.C. Cir. 1987) (citation omitted).

81. *See Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013).

82. *See Hassan v. City of New York*, No. 12-3401, 2014 WL 654604, at *7 (D.N.J. Feb. 20, 2014), *rev'd*, 804 F.3d 277 (3d Cir. 2015).

In a thoughtful (if somewhat nihilistic) concurrence in the D.C. Circuit’s August 2015 ruling in *Arpaio v. Obama*—an attempt by a county sheriff to challenge the constitutionality of both of President Obama’s deferred action immigration programs (which was rejected for lack of standing)⁸³—Judge Brown critiqued “the consequences of our modern obsession with a myopic and constrained notion of standing.”⁸⁴ As she explained, “Our approach to standing, I fear, too often stifles constitutional challenges, ultimately elevating the courts’ convenience over constitutional efficacy and the needs of our citizenry.”⁸⁵

If anything, Judge Brown’s *Arpaio* concurrence underscores the schizophrenia that is increasingly coming to characterize Article III standing doctrine, at least in the lower courts. On the one hand, litigants from across the political spectrum (and some judges, too) surely agree that *certain* constitutional challenges are “too often stifle[d]” by Article III standing (even if they can’t agree on which ones), and that standing is therefore ineffective in vindicating the Constitution “and the needs of our citizenry,” whatever those may be. On the other hand, there will certainly never be *agreement* about *which* constitutional challenges ought to be allowed to go forward (or who should be allowed to bring them), especially if the relevant baseline for answering that question goes to an assessment of amorphous and subjective concepts like “constitutional efficacy” and “the needs of our citizenry.”

The particular genius of Justice Scalia’s stated approach to standing doctrine, narrow though it may have been, was to look to principles in shaping its contours that did not seem to be nearly as malleable—or as subject to the whim and caprice of the current electorate or the reviewing jurist. A proper understanding of the separation of powers, Justice Scalia always maintained, included the belief that not all legal questions could or should be answered by courts, and that allowing arguments sounding in policy imperatives to supersede that principle even in *some* cases would necessarily lead to its dilution (if not its evisceration) in all cases. Justice Scalia himself

83. 797 F.3d 11 (D.C. Cir. 2015).

84. *Id.* at 25 (Brown, J., concurring).

85. *Id.* at 31.

may have occasionally honored that understanding in the breach, but at least his was a defensible baseline against which novel (or not) claims of standing could meaningfully be measured.

In my view, the cases surveyed in this paper, whether or not they are a representative sampling of the current state of Article III standing doctrine more generally, go a long way toward bearing out both Justice Scalia's defense of the desirability for doctrinal stability on the subject and the complete contemporary lack thereof. After all, one is hard-pressed to imagine the separation-of-powers principle that produces a world in which it is easier for organizations, states, and Houses of Congress to vindicate their policy differences in the federal courts than it is for private individuals to pursue classically anti-majoritarian claims. That's not to say that Justice Scalia was *right* about Article III standing,⁸⁶ or even, more problematically, that he always *consistent*.⁸⁷ But his stated theory certainly was coherent—and that may be a lot more than what we can say about the current state of the doctrine.

The harder question raised by that the disconnect between contemporary standing doctrine and the conceptual framework then-Judge Scalia outlined in his 1982 Suffolk speech is whether the former is simply the result of a specific series of flawed decisions, or whether it is instead a more general defect in the premise of the latter—that there *can* be first principles for Article III standing that can be objectively described and applied by judges of all stripes. In at least one respect, the flaw may lie with Justice Scalia's framework: Should Article III standing forbid all claims that might properly be described as “majoritarian” (assuming we can even agree on a definition of that term)? If not, what features describes the line between permissible

86. Thus, for example, I am far more partial to Justice Kennedy's view of Congress's power to create broadly defined injuries and indirect chains of causation—and to thereby allow far broader standing than would otherwise be available. *See, e.g.,* Vladeck, *supra* note 59. Among other things, it seems to me that both (1) the separation-of-powers objection is at least *somewhat* ameliorated when the political branches have collectively and affirmatively authorized such a judicial role; and (2) in any event, the power to create a right brings with it the power to bestow that right (and the power to enforce it) upon a broad class of intended beneficiaries.

87. *See supra* note 13.

majoritarian claims and impermissible ones?

But in a larger sense, the existing uncertainties of Article III standing doctrine don't seem to be especially new or novel—and seem in many respects different in neither kind nor degree from flaws in prior generations of standing case law, decisions that provoked comparable incoherence-focused critiques from scholars across the ideological spectrum. In other words, the real lesson from these cases may have more to do with inherent and ultimately intractable structural instabilities in standing doctrine than with the virtues or vices of Justice Scalia's particular approach thereto. If so, then in the specific context of contemporary environmental law, and in challenges to government enforcement initiatives more generally, this punchline suggests that there isn't likely to be an objectively discernable vision of Article III standing to which courts should aspire—and that, instead, we're in for more of the same, with pro- or anti-standing holdings turning on hyperspecific factual or legal distinctions that are increasingly difficult to reconcile with overarching conceptions of the appropriate judicial role. Ultimately, then, Justice Scalia's true legacy vis-à-vis Article III standing may be in having helped to prove, once and for all, that it is best understood as a jobs program for law professors—and is otherwise cover for subjective and outcome-oriented judicial assessments of which kinds of lawsuits should and should not go forward.