

# SCREENING OUT UNWANTED CALLS: THE HYPOCRISY OF STANDING “DOCTRINE”

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*Closing the doors of the court to a disinterested petitioner who gives warning of an unlawful governmental action is detrimental to the governance of the law, since where there is no judge—there is no law.—Justice Aharon Barak<sup>1</sup>*

## INTRODUCTION

Justice William Rehnquist put it best when he observed “[s]imple justice” is achieved when a complex body of law developed over a period of years is *evenhandedly* applied.<sup>2</sup> This was of course the aspiration and expectation of the drafters of the Federal Rules of Civil Procedure when they prefaced their innovation with the mandate that the rules “be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>3</sup> Unfortunately, these noble ambitions have been betrayed of late as certain members of the Supreme Court, including Rehnquist himself, have bent and distorted rules and doctrine to fit their ideological agendas. No one could be unhappier about this state of affairs than Steve Subrin, whom we honor with this symposium, and who has devoted his illustrious fifty-year career to the construction and preservation of a workable framework for the pursuit of equal justice in our federal courts.

Witnessing the dismantling of the great edifice that Dean Charles Clark and the other big thinkers and dreamers gave us in 1938, Professor Subrin has

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Editor’s Note: A version of this article was presented at the April 2014 symposium, *Through a Glass Starkly: Civil Procedure Reassessed*, at Northeastern University Law School. This version was drafted in Summer, 2014, and submitted for this symposium issue of the Nevada Law Journal, honoring the career and scholarship of Professor Stephen Subrin.

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<sup>1</sup> HCJ 910/86 Ressler v. Minister of Defence 42(2) PD 441 ¶ 22 [1988] (Isr.), in PUBLIC LAW IN ISRAEL 275, 283 (Itzhak Zamir & Allen Zysblat eds., 1996).

<sup>2</sup> Federated Dep’t Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (referring to finality doctrine) (emphasis added).

<sup>3</sup> FED. R. CIV. P. 1.

written eloquently about the demise of notice pleading,<sup>4</sup> the restriction of plaintiffs' rights under Title VII by way of ostensibly "technical" procedural decisions regarding such matters as burden of proof and discovery,<sup>5</sup> and (most passionately) the near-disappearance of the civil jury trial.<sup>6</sup> While he remains concerned about the transsubstantive (one of Steve's favorite phrases) breadth of the FRCP, arguing against the "One Size Fits All" approach,<sup>7</sup> far more threatening to the drafters' conception of an ideal dispute resolution system is the peremptory closing of the courthouse door to disfavored litigants asserting disfavored causes.

The problem is not new. Speaking on the 50th anniversary of the FRCP in 1988, U.S. District Judge Jack Weinstein bemoaned the early skirmishes in the "anti-access movement" under the "'disingenuous guises' of 'administrative efficiency' and 'a purported litigation explosion.'"<sup>8</sup> Specifically, he noted the negative impact of FRCP 11 on civil rights plaintiffs, the hostility to class actions, the summary judgment trilogy and heightened pleading requirements that were green-lighting the early dismissal of cases, and the restrictions on discovery. U.S. District Judge Robert Carter shared the concern that efficiency was being used "as a smokescreen to hide a 'substantive bias' against cases [particularly civil rights claims] that efficiency proponents do not like."<sup>9</sup>

Like Judges Weinstein and Carter, Steve Subrin knows that "procedure" can produce a just result even when the "substantive law" is not up to the task. For instance, the City of Chicago between the World Wars was among the most racially segregated enclaves outside the Deep South, maintained largely through restrictive covenants in the white neighborhoods sponsored by the Chicago Real Estate Board. It would not be until *Shelley v. Kraemer*<sup>10</sup> in 1948 that the Supreme Court finally struck down these vile devices under the equal protection clause of the Fourteenth Amendment. Accomplishing virtually the same result eight years earlier, Justice Harlan Fisk Stone invoked the procedural protections of the due process clause to overturn a class action decree that purport-

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<sup>4</sup> Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571 (2012).

<sup>5</sup> Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992). For more on discovery, see Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001).

<sup>6</sup> Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011).

<sup>7</sup> Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377 (2010).

<sup>8</sup> Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, 73 JUDICATURE 4, 6 (1989).

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

ed to insulate the covenants from challenge.<sup>11</sup> The headline in the Chicago newspaper the next day read “COURT HOLDS COVENANTS NON EXISTENT.”<sup>12</sup>

Similarly, *Joint Anti-Fascist Refugee Committee v. McGrath* (another of Steve’s favorites),<sup>13</sup> *Goldberg v. Kelly*,<sup>14</sup> and *Fuentes v. Shevin*<sup>15</sup> constrained the abuses of arbitrary executive and bureaucratic power through application of procedural due process, again at a time when enforceable substantive rights for the victims were lacking.

But now, sadly, procedure has entered a less uplifting phase. Long ago, in *Dred Scott v. Sandford*,<sup>16</sup> the Court declared that black persons, having no rights of a citizen, had no *standing to sue* in court for their freedom. Although that decision has earned its special ignominy in our history, it set a template for an exclusionary view of the federal courts whereby some seeking enforcement of our most basic rights are turned away before the merits of their cause are ever aired, on the dubious grounds that they lack a sufficient stake in the outcome. As set out below, this power has been invoked quite selectively.

#### I. THE NARROWING OF THE FEDERAL FORUM

The troublesome “anti-access movement” that Judges Weinstein and Carter bemoaned in 1988 has gathered considerable steam since, with the erecting of what Professor Arthur Miller refers to as procedural stop signs that serve the economic or political agendas of powerful interest groups.<sup>17</sup>

Notice pleading has been unceremoniously cast-off, first in *Bell Atlantic Corp. v. Twombly*<sup>18</sup> in the interest (as Justice Souter acknowledged) of protecting corporate defendants from the considerable expenses of discovery in anti-trust actions; and then more broadly when post-9/11 civil rights abuses of the Bush administration were challenged in *Ashcroft v. Iqbal*.<sup>19</sup> Pleadings that would easily satisfy *Conley v. Gibson*’s<sup>20</sup> standard of fifty years vintage were suddenly found wanting, as judges displaced jurors in determining the “plausibility” of plaintiffs’ claims, based not on evidence but merely the complaint

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<sup>11</sup> *Hansberry v. Lee*, 311 U.S. 32 (1940). Stone ruled that the class of homeowners who had successfully sought to uphold the validity of the covenants could not properly bind those opposed to the covenants, effectively defanging enforcement.

<sup>12</sup> Enoch P. Waters, *Hansberry Decision Opens 500 New Homes to Race: Court Holds Covenants Non Existent*, CHI. DEFENDER, Nov. 16, 1940, at 1.

<sup>13</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

<sup>14</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>15</sup> *Fuentes v. Shevin*, 407 U.S. 67 (1972).

<sup>16</sup> *Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>17</sup> Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 310 (2013).

<sup>18</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>19</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>20</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

and their own “judicial experience and common sense,”<sup>21</sup> whatever that means. The great innovation of liberal discovery is thus put out of reach for those plaintiffs who are most in need of it to establish the merits of their claim. Fact pleading, long discredited, is back in fashion.

Justice Harlan’s sensible approach to the granting of summary judgment,<sup>22</sup> consistent with the drafters’ predilection for deciding cases on the merits after full consideration, has similarly been replaced by a defendant-friendly regime. *Celotex Corp. v. Catrett*,<sup>23</sup> allowing the defendant to secure summary judgment merely by calling the plaintiff’s bluff as to its evidence, just happened to benefit the besieged asbestos industry, then under large-scale attack by injured victims and their families. *Matsushita Electric Industrial Co. v. Zenith Radio*<sup>24</sup> facilitated summary judgment for antitrust defendants accused of conspiring to fix prices; no surprise, given that it was authored by the same Justice Lewis Powell who as a corporate lawyer penned the infamous memo to the U.S. Chamber of Commerce calling for an aggressive campaign to shape American law to protect the “free enterprise system” from litigation.<sup>25</sup> To so rule, as Justice White complained for the four dissenters, the Court was “overturning settled law” by weighing the evidence, assessing the credibility of witnesses, and rejecting the plaintiffs’ expert economist’s opinion out of hand as “implausible.”<sup>26</sup> *Anderson v. Liberty Lobby, Inc.*<sup>27</sup> similarly green-lighted what Justice Brennan described as “a brand new procedure [that] will transform what is meant to provide an expedited ‘summary’ procedure into a full-blown paper trial on the merits,” raising “grave concerns” about “the constitutional right of civil litigants to a jury trial.”<sup>28</sup>

More recently, in a highly unusual move, the Court ordered summary judgment (without a remand) for the mostly white firefighter plaintiffs in a reverse discrimination case against the city of New Haven, notwithstanding clear disputes of fact in the evidence regarding the validity and disparate racial impact of the challenged multiple-choice test for promotion in the fire depart-

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<sup>21</sup> *Iqbal*, 556 U.S. at 679.

<sup>22</sup> *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153–61 (1970).

<sup>23</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>24</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see also Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004).

<sup>25</sup> Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Educ. Comm. Chair, U.S. Chamber of Commerce (Aug. 23, 1971), available at <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf>.

<sup>26</sup> *Matsushita*, 475 U.S. at 600–01 (White, J., dissenting).

<sup>27</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

<sup>28</sup> *Id.* at 266–67 (Brennan, J., dissenting).

ment.<sup>29</sup> Incredibly, this was done based on a record that was unsworn and utterly failed to conform to FRCP 56(c) (requiring admissible evidence).<sup>30</sup>

Summary judgment has thus morphed, as Professor Miller observes, from a motion for identifying trial-worthy issues to “the centerpiece and end-point for many (perhaps too many) federal civil cases.”<sup>31</sup>

In the area of finality, hypocrisy reigns supreme (no pun intended). William Rehnquist usually demonstrated an abiding commitment to the concept that once a matter is finally decided, it is finally decided. In *Federated Department Stores v. Moitie*, he emphatically dismissed the possibility of *any* exception to the doctrine of claim preclusion, even when, as in that case, a significant change in substantive law (by way of a Supreme Court decision) that benefits appealing parties is thus rendered unavailable to similarly-situated non-appealing parties. Rehnquist insisted that *res judicata* must be strictly enforced as it “serves vital public interests beyond any individual judge’s ad hoc determination of the equities in a particular case.”<sup>32</sup> “Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.”<sup>33</sup> Noble sentiments, indeed.

Yet just three years later Rehnquist somehow *did* find an exception when he exempted the U.S. Government as litigant from the consequences of issue preclusion in *United States v. Mendoza*.<sup>34</sup> This time the precluded party was not a class of bilked retail purchasers, but immigration authorities sued by Filipino World War II veterans whose promise of naturalization had been reneged upon. Skilled lawyer that he was, Rehnquist conveniently distinguished this case:

A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.<sup>35</sup>

But alas, it is still an exception to a doctrine that purportedly allows for no exceptions.<sup>36</sup>

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<sup>29</sup> *Ricci v. DeStefano*, 557 U.S. 557 (2009).

<sup>30</sup> See Mark S. Brodin, *Ricci v. DeStefano: The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 183–88 (2011).

<sup>31</sup> Miller, *supra* note 17, at 311.

<sup>32</sup> *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

<sup>33</sup> *Id.* (quoting *Baldwin v. Traveling Men’s Ass’n*, 283 U.S. 522, 525 (1931)).

<sup>34</sup> *United States v. Mendoza*, 464 U.S. 154 (1984).

<sup>35</sup> *Id.* at 160.

<sup>36</sup> Willie McCurry, plaintiff in a § 1983 action against police officers and the department for an allegedly unlawful search of his home and assault on his person, was bestowed no such favor by the Court when he was precluded from litigating by virtue of collateral estoppel arising from his motion to suppress in the state criminal trial. *Allen v. McCurry*, 449 U.S. 90 (1980). Justice Blackmun, joined by Brennan and Marshall in dissent, found ample room for

Rehnquist would have also cut some slack in finality doctrine when a corporate defendant was collaterally estopped from relitigating the issue of its securities fraud based on the results of a prior bench trial. His dissent in *Parklane Hosiery Co. v. Shore*<sup>37</sup> argued that Parklane's Seventh Amendment right to retry the issue before a jury trumped collateral estoppel.

However, Rehnquist reemerged as the champion of finality in his 1993 opinion for the Court in *Herrera v. Collins*,<sup>38</sup> ruling that a defendant under death sentence for the murder of a police officer could not pursue a habeas corpus petition based on a claim of actual innocence demonstrated by newly discovered evidence "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States."<sup>39</sup>

There is hardly any more disruptive effect on finality than to permit final decrees to be reopened at any time by any person impacted. Yet that is precisely what the Court (per William Rehnquist) did when it allowed a group of white firefighters in Birmingham, Alabama (dubbed "Bombingham" because of its violent opposition to desegregation and the civil rights movement<sup>40</sup>) to collaterally attack and ultimately overturn consent decrees entered in an earlier case providing goals for minority hiring in the department.<sup>41</sup> The decrees had been agreed upon between the parties (the NAACP and the City) after findings of discrimination had been made by the District Court, ending decades of litigation.<sup>42</sup>

The white plaintiffs in *Martin v. Wilks* had been aware of the proposed decrees in the prior litigation but failed to intervene or appear at the fair hearing held before the decrees were entered.<sup>43</sup> The firefighters union and several other

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an exception in the clear legislative history of the civil rights statute—to provide a federal forum for persons alleging abuse by state actors—as well as the inequity of foreclosing the civil damages action based on findings from the suppression hearing, where McCurry was an "involuntary litigant." *Id.* at 116 (Blackmun, J., dissenting).

<sup>37</sup> *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 337 (1979) (Rehnquist, J., dissenting).

<sup>38</sup> *Herrera v. Collins*, 506 U.S. 390 (1993).

<sup>39</sup> *Id.* at 417. Speaking for himself, Stevens, and Souter, Justice Blackmun stated the obvious: "I believe it contrary to any standard of decency to execute someone who is actually innocent." *Id.* at 435 (Blackmun, J., dissenting). But in Rehnquist's calculus, the Seventh Amendment right to a jury trial in a civil action was more weighty than a criminal defendant's right to avoid execution by proving his innocence.

<sup>40</sup> Mark S. Brodin, *The Fraudulent Case Against Affirmative Action—The Untold Story Behind Fisher v. University of Texas*, 62 *BUFF. L. REV.* 237, 256 (2014).

<sup>41</sup> *Martin v. Wilks*, 490 U.S. 755 (1989).

<sup>42</sup> *See id.* at 776 n.12 (Stevens, J., dissenting).

<sup>43</sup> For the four dissenters, such persons who chose to "remain on the sidelines" run the risk that "they may be harmed as a practical matter even though their legal rights are unaffected." *Id.* at 769–70.

white firefighters did appear and objected, taking the same positions now asserted by the *Martin* plaintiffs.<sup>44</sup>

Overturning the then universally recognized impermissible collateral attack doctrine,<sup>45</sup> Rehnquist exhibited none of his usual concern for orderly closing of matters. What followed, predictably, was an onslaught of “reverse discrimination” challenges to final decrees around the nation.<sup>46</sup> The *Washington Post* lamented “the chaos of interminable litigation” engendered by *Martin v. Wilks*.<sup>47</sup> Indeed, *In re Birmingham Reverse Discrimination Employment Litigation* dragged on for five more years, culminating in the overturning of the 1981 consent decrees that were at last beginning to integrate the supervisory ranks of the fire department.<sup>48</sup> It is difficult to imagine any other context in which the five conservative, finality-booster justices would have entertained such heterodoxy.

It is telling that numerous amicus briefs were filed in support of Birmingham by dozens of groups representing municipalities and states, as well as thirty-two states themselves and the District of Columbia. One representative brief urged that:

Should respondents’ collateral attack on the consent decrees be permitted to proceed, state and local governments sued as employers under Title VII could not confidently negotiate and execute consent decrees containing race-conscious relief, even following actual notice and an opportunity to be heard by all interested parties. Every selection decision made pursuant to such a decree could subject the employer to claims from disappointed employees or applicants seeking to challenge the decree upon which the personnel action was based. Government personnel practices thus would remain in an unacceptable state of uncertainty, and scarce funds would be diverted from other governmental needs to cover litigation costs as well as potential settlements and judgments. The inevitable effect would be to discourage public employers from entering into judicially approved settlements of Title VII litigation, thereby frustrating Congress’s preference for voluntary compliance as a primary means to enforce Title VII.<sup>49</sup>

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<sup>44</sup> *Id.* at 759 (majority opinion).

<sup>45</sup> *See id.* at 762 n.3.

<sup>46</sup> *See* Brodin, *supra* note 40, at 258.

<sup>47</sup> *Id.* The dissenters shared that view: “Such a broad allowance of collateral review would destroy the integrity of litigated judgments, would lead to an abundance of vexatious litigation, and would subvert the interest in comity between courts.” *Martin*, 490 U.S. at 783 (Stevens, J., dissenting).

<sup>48</sup> *Bennett v. Arrington (In re Birmingham Reverse Discrimination Emp’t Litig.)*, 20 F.3d 1525 (11th Cir. 1994). Congress legislatively overruled the Court in the Civil Rights Act of 1991. Section 108 disallows challenges to a litigated or consent judgment by any person who had notice of the proposed judgment and an opportunity to present objections, or whose interests were adequately represented by a party in the prior case. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075. This would have precluded the collateral attack in *Martin v. Wilks*.

<sup>49</sup> Brief of Nat’l League of Cities et al. as Amici Curiae in Support of Petitioners at 2–3, *Martin*, 490 U.S. 75 (No. 87-1614), 1988 WL 1025890.

Ironically, Justice Anthony Kennedy blatantly disregarded the “deep-rooted historic tradition that everyone should have his own day in court,”<sup>50</sup> the very core justification for the result in *Martin v. Wilks*, when in *Ricci v. DeStefano*, noted above, he purported to foreclose all *future challenges* to the discriminatory impact of the promotion test by *non-party* minority firefighters.<sup>51</sup>

Another favorite litigation-terminator of conservatives on the bench is dismissal for lack of personal jurisdiction. In an evolution all too familiar to 1Ls, Harlan Fisk Stone brought the doctrine into the modern age in *International Shoe Co. v. Washington*,<sup>52</sup> recognizing the anachronism of requiring physical presence in an age of robust interstate commerce and easy transportation. Increasingly, however, the Court has tightened the minimum contacts standard to throw plaintiffs out of court unless their corporate defendants drew a clear straight line of *deliberate and purposeful connections* to the forum state.

The undoing of Stone’s construct, which endured for nearly fifty years, and of the “stream of commerce” theory that flowed from it, culminated in *J. McIntyre Machinery, Ltd. v. Nicaastro*, where to the shock of dissenting Justices Ginsberg, Sotomayor, and Kagan, Anthony Kennedy concluded it would violate the due process rights of a British manufacturer, whose allegedly dangerous metal-shearing machine injured a worker in New Jersey, to subject it to suit in that state.<sup>53</sup> McIntyre had cleverly interposed an American distributor (with the same name) to market and sell in the States. Kennedy’s opinion adopts a feudal notion of jurisdiction, premised on an assessment of whether the defendant *submitted* to the sovereign’s power. He invokes the term “submission” so many times that a law review article on the case could justly be titled “*J. McIntyre Machinery, Ltd. v. Nicaastro*: Fifty Shades of Jurisdiction.”

In short, the Court has been refashioning our procedural system to be increasingly anti-consumer, anti-civil rights, and pro-business.<sup>54</sup> Judge Patricia Wald has lamented that “[w]e are approaching a time when a civil trial will be thought of as a ‘pathological event.’”<sup>55</sup> “While judges appear to be requiring plaintiffs to plead facts with ever greater detail in order to survive motions to

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<sup>50</sup> Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)).

<sup>51</sup> Ricci v. DeStefano, 557 U.S. 557, 593 (2009); see Brodin, *supra* note 30, at 188–91. The Second Circuit saw things differently on remand. Citing *Martin v. Wilks*, it ruled that the non-party firefighter Michael Briscoe could not be precluded from litigating his own disparate impact action. Briscoe v. City of New Haven, 654 F.3d 200, 204–05 (2d Cir. 2011).

<sup>52</sup> Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945). “Stream of commerce” theory had further expanded the reach of courts, although it was applied parsimoniously. See Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

<sup>53</sup> J. McIntyre Mach., Ltd. v. Nicaastro, 131 S. Ct. 2780 (2011). The Court has found jurisdiction lacking in all its recent decisions. See Walden v. Fiore, 134 S. Ct. 1115 (2014); Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

<sup>54</sup> See generally Stempel, *supra* note 5.

<sup>55</sup> Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1915 (1998).



dismiss, they also seem reluctant to find genuine issues of material fact meriting a trial.”<sup>56</sup> We are living now, as Arthur Miller puts it, in a “dismissal culture.”<sup>57</sup>

## II. STANDING “DOCTRINE” AND THE AVOIDANCE OF UNWANTED CASES

Gene Nichol Jr. began his 1984 article, *Rethinking Standing*, with a quote from Justice Rehnquist: “We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency . . . .”<sup>58</sup> Professor Nichol was troubled by the inconsistency of results, and the practice of courts “peering beyond preliminary access issues” and into the merits of the actions in the guise of determining whether the plaintiff had “such a personal stake in the outcome of the controversy” to justify proceeding.<sup>59</sup> In the decades since, mere inconsistency has given way to cynical manipulation in apparent conformity with an agenda to deny the federal forum to disfavored plaintiffs and causes.<sup>60</sup>

The origins of the current restrictive view of standing to sue can be traced to a series of cases in the 1970s and 1980s (when the Court began its rightward shift) that were dismissed at the outset for failure of the plaintiffs to satisfy the Court that: 1) they suffered personally some actual or threatened injury, 2) the injury was traceable to the allegedly illegal conduct of the defendant, and 3) the injury could likely be redressed by a favorable decision.<sup>61</sup> The courthouse door was thus closed to advocates for low-income housing challenging exclusionary zoning provisions;<sup>62</sup> to claims on behalf of indigents and welfare rights organi-

<sup>56</sup> *Id.* at 1942.

<sup>57</sup> Miller, *supra* note 17, at 358.

<sup>58</sup> Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68 (1984) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)). Rehnquist conceded similar inconsistency in the closely related area of the adequacy of a class representative. *Gratz v. Bollinger*, 539 U.S. 244, 263 n.15 (2003).

<sup>59</sup> Nichol, *supra* note 58, at 69, 71.

<sup>60</sup> See Heather Elliott, *Further Standing Lessons*, 89 IND. L.J. SUPP. 17 (2014) (discussing the challenges to the Affordable Care Act, the Defense of Marriage Act, and California’s ban on same-sex marriage). Elliott observes:

[I]n *Windsor* [the Court found] standing and [went] on to strike down portions of the federal Defense of Marriage Act (DOMA) on the merits, yet in *Perry* [it found] no standing to review California’s ban on same-sex marriage. Given extensive similarities in the procedural posture of both cases, the different standing outcomes are hard to reconcile. The unfortunate explanation for the differing outcomes is political: the Court wanted to get the federal government out of the marriage equality debate and leave it for the States. Thus the Court found standing and reached the merits in the DOMA case, while finding no jurisdiction in the California case. Unfortunately for standing doctrine, these results don’t make sense.

*Id.* at 25 (footnotes omitted); see also Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317 (2012) (discussing *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), in which the Court divided on ideological lines to deny standing to opponents of tax credits for parochial schools).

<sup>61</sup> Nichol, *supra* note 58, at 71.

<sup>62</sup> *Warth v. Seldin*, 422 U.S. 490 (1975). Justice Brennan chided the majority for “toss[ing] out of court almost every conceivable kind of plaintiff [two local fair housing groups, low-

zations challenging an IRS ruling granting favorable tax treatment to hospitals denying indigents medical services;<sup>63</sup> to nursing home residents and Medicaid recipients complaining of a reduction in their level of care;<sup>64</sup> to litigants challenging systemic use of chokeholds by police in Los Angeles;<sup>65</sup> and to the mother of an illegitimate child challenging the discriminatory enforcement of the Texas child support statute.<sup>66</sup> Contrast the recognized standing of the holder of even a *single share* to vindicate the corporation's claims in a derivative action despite the shareholder's negligible personal stake in the action.<sup>67</sup>

Close reading of these decisions suggests that *no plaintiff* would have standing to challenge any of these policies, which thus evade review, and all of which happen to be in close sync with the agenda of the political right. As Justice Thurgood Marshall complained in *Lyons*: "Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy."<sup>68</sup> Indeed, in a moment of candor, Justice White agreed when he re-

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income and minority residents, and taxpayers]" who could possibly challenge a town's restrictive zoning ordinance, which he asserted "can be explained only by an indefensible hostility to the claim on the merits." *Id.* at 520 (Brennan, J., dissenting). The Court, Brennan lamented, had turned "the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation." *Id.* at 523.

<sup>63</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). The case was thrown out on the grounds that the plaintiffs failed to demonstrate that changing the Ruling *would assure them* the services they sought, as the hospitals might forgo the tax advantage, a result Justice Brennan complained defied both logic and precedent. *Id.* at 56 (Brennan, J., concurring).

<sup>64</sup> *Blum v. Yaretsky*, 457 U.S. 991 (1982).

<sup>65</sup> *City of L.A. v. Lyons*, 461 U.S. 95 (1983). At least 16 persons, mostly African-American males, had died following use of chokeholds by the LAPD, pursuant to a policy the district court found permitted their use even in situations where there was no threat of violence. *Id.* at 115–16, 119 (Marshall, J., dissenting). Overturning injunctive relief ordered below, the Court ruled that Lyons, who had been choked into unconsciousness by police when stopped for a routine traffic violation, failed to show an imminent threat that he would be subject to such conduct *again*.

The Court relied on *O'Shea v. Littleton*, 414 U.S. 488 (1974), which had similarly overturned injunctive relief awarded to a class of civil rights plaintiffs complaining about racially discriminatory enforcement of the criminal law by judges in Cairo, Illinois. Justice Douglas characterized the case in his dissent:

What has been alleged here is not only wrongs done to named plaintiffs, but a recurring pattern of wrongs which establishes, if proved, that the legal regime under control of the whites in Cairo, Illinois, is used over and over again to keep the blacks from exercising First Amendment rights, to discriminate against them, to keep from the blacks the protection of the law in their lawful activities, to weight the scales of justice repeatedly on the side of white prejudices and against black protests, fears, and suffering. This is a more pervasive scheme for suppression of blacks and their civil rights than I have ever seen. It may not survive a trial. But if this case does not present a "case or controversy" involving the named plaintiffs, then that concept has been so watered down as to be no longer recognizable. This will please the white superstructure, but it does violence to the conception of evenhanded justice envisioned by the Constitution.

*O'Shea*, 414 U.S. at 509.

<sup>66</sup> *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

<sup>67</sup> 12B FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5909 (perm. ed. 2014).

<sup>68</sup> *Lyons*, 461 U.S. at 113 (Marshall, J., dissenting).

vealed the real agenda behind that dismissal, contending that “[a] federal court, however, is not the proper forum to press *such* claims.”<sup>69</sup>

The plaintiffs who have given their names to the familiar line of “reverse discrimination” cases which have severely curtailed race-conscious preference, on the other hand, were much more obviously unable to establish their own standing based on these precedents.<sup>70</sup> The Court, nonetheless, chose to entertain each of the cases.<sup>71</sup>

Alan Bakke could not persuasively connect his rejection from U.C. Davis Medical School to the affirmative action program he challenged.<sup>72</sup> At thirty-three, he was well over the typical age of entering medical students, and he interviewed poorly at Davis. Indeed, he was unsuccessful with at least eleven other medical schools he applied to.<sup>73</sup> Yet U.C. Davis inexplicably abandoned its original position, which had prevailed in the district court, that Bakke would not have been admitted in any event (without any minority set-aside) and thus lacked standing to sue.<sup>74</sup>

Barbara Grutter and Jennifer Gratz, whose cases set the benchmarks for race-conscious programs before *Fisher v. University of Texas*,<sup>75</sup> were both below the profile of successful applicants and thus unlikely admits even under a race-blind program.<sup>76</sup> And most recently Abigail Fisher, hailed in much of the media as a victim of reverse racism, graduated eighty-second in her high school class of 674 (and thus could not be admitted under Texas’s Top Ten Percent Law). With a mediocre 1180 (out of 1600) on her SATs (below the 80th percentile), there were 168 minority applicants with higher index numbers than Fisher who were also denied admission.<sup>77</sup>

The University of Texas argued that Fisher lacked standing to bring her action, and Justices Ginsburg and Sotomayor raised that obvious problem early in the oral argument,<sup>78</sup> noting that in 1999 the Court had dismissed a similar case for lack of standing when the plaintiff applicant could not show he would have

<sup>69</sup> *Id.* at 111–12 (majority opinion) (emphasis added).

<sup>70</sup> See Juan F. Perea, *Doctrines of Delusion: Bakke, Fisher and the Case for a New Affirmative Action* 41 (Loyola Univ. Chi. Sch. of Law Research Paper No. 2013-022, 2013), available at <http://ssrn.com/abstract=2312630>.

<sup>71</sup> Only *DeFunis v. Odegaard*, 416 U.S. 312 (1974), was dismissed for mootness. DeFunis was already in his last semester at University of Washington Law School, having been ordered admitted by the district court three years before when he filed the case. *DeFunis*, 416 U.S. at 319–20.

<sup>72</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* 54–56 (2000).

<sup>73</sup> Brodin, *supra* note 40, at 264 n.144; Perea, *supra* note 70, at 41.

<sup>74</sup> Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1073, 1094 (2002).

<sup>75</sup> *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

<sup>76</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); see Liu, *supra* note 74, at 1073; Perea, *supra* note 70, at 42.

<sup>77</sup> Brodin, *supra* note 40, at 264–65.

<sup>78</sup> Transcript of Oral Argument at 3–8, *Fisher*, 133 S. Ct. 2411.

been selected for the PhD program even absent its racial preference. In *Texas v. Lesage* the Court had insisted: “Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury . . . .”<sup>79</sup>

But *Texas v. Lesage* conveniently provided reverse discrimination plaintiffs with a work-around to their standing problem: “Of course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. *The relevant injury in such cases is ‘the inability to compete on an equal footing.’*”<sup>80</sup> The same stretched reasoning permitted the Court to ignore Alan Bakke’s inability to show that his rejection from U.C. Davis could be traced to the minority set-aside, or that his “injury” could be redressed by a favorable decision forbidding it.<sup>81</sup>

William Rehnquist, an architect of the narrow entry door to federal court, was nonetheless able to confer standing in *Gratz v. Bollinger* on two plaintiffs who, having been rejected from the University of Michigan, enrolled at and graduated from other universities. One sought to challenge the transfer admissions program *despite never having applied to transfer* to the University of Michigan. It was sufficient, Rehnquist asserted, that he stood “able and ready” to apply as soon as the University ceased its racial preference.<sup>82</sup>

Applying the very precedents established by Rehnquist and his conservative colleagues, these reverse discrimination plaintiffs would have been booted out, as Justice Stevens (joined by Souter and Ginsburg) would have held in *Gratz*.<sup>83</sup> The two plaintiffs’ graduation from other schools without ever applying for transfer to Michigan rendered any alleged injury from the selection process purely conjectural, in the dissenters’ view, and should have defeated the plaintiffs’ claim for injunctive relief. “There is,” Stevens observed, “a total absence of evidence that either petitioner would receive any benefit from the prospective relief sought by their lawyer.”<sup>84</sup> Thus,

like the plaintiff in *Los Angeles v. Lyons*, who had standing to recover damages caused by “chokeholds” administered by the police in the past *but had no stand-*

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<sup>79</sup> *Texas v. Lesage*, 528 U.S. 18, 21 (1999).

<sup>80</sup> *Id.* (emphasis added). This rationale could have similarly conferred standing on the unsuccessful plaintiffs in each of the above cases dismissed—i.e., the indigents and nursing home residents had a right to equal medical treatment, the low-income housing advocates to non-discriminatory zoning, and the journalists and lawyers in *Clapper*, discussed below, to free-exchange of communications without fear of snooping.

<sup>81</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978).

<sup>82</sup> *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003). The same logic did not apply to prospective minority students who sought to intervene, but were denied by the district court on the grounds they failed to allege a legally protectable interest. The Sixth Circuit reversed. *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999).

<sup>83</sup> *Gratz*, 539 U.S. at 285 (Stevens, J., dissenting).

<sup>84</sup> *Id.* at 282.

ing to seek injunctive relief preventing future chokeholds, petitioners' past injuries do not give them standing to obtain injunctive relief to protect third parties from similar harms. To seek forward-looking, injunctive relief, petitioners must show that they face an imminent threat of future injury.<sup>85</sup>

Justice O'Connor recognized in *Grutter* that it is in the nature of competitive university admissions that even high index numbers do not assure admission any more than low numbers automatically disqualify the applicant.<sup>86</sup> The process is far too complex and nuanced to reliably predict results. Indeed, one writer has concluded that, statistically, minority preferences and rejection of white applicants "are largely independent events, improperly linked through the causation fallacy," generally undercutting the standing of reverse discrimination plaintiffs to sue.<sup>87</sup>

Abigail Fisher's attorney was able to take advantage of the "but-we-like-reverse-discrimination-cases" loophole, contending she had the right to be judged by a completely race-blind process.<sup>88</sup> And Anthony Kennedy's opinion for the Court fails to even mention the standing issue, a threshold requirement of justiciability.

The Court's selective open door policy has extended to challenges to minority set-asides as well. Both *Adarand Constructors, Inc. v. Peña*<sup>89</sup> (opinion by Justice Sandra Day O'Connor) and *Northeastern Florida Chapter, Associated General Contractors v. City of Jacksonville*<sup>90</sup> (opinion by Justice Clarence Thomas) conferred standing on plaintiffs even in the absence of any showing that they would have obtained a contract notwithstanding the challenged preference. Again, injury in fact was found in "the inability to compete on an equal footing in the bidding process, not the loss of a contract."<sup>91</sup> It was sufficient for *Adarand*, in seeking forward-looking relief against all such set-asides, to allege simply that it was "very likely" to bid on another government contract in the relatively near future.<sup>92</sup>

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<sup>85</sup> *Id.* at 284 (emphasis added) (citations omitted). As Justice Souter complained, "the Court thus ignores the basic principle of Article III standing that a plaintiff cannot challenge a government program that does not apply to him." *Id.* at 292 (Souter, J., dissenting).

<sup>86</sup> *Grutter*, 539 U.S. 306, 315 (2003).

<sup>87</sup> Liu, *supra* note 74, at 1049.

<sup>88</sup> See Ronald Dworkin, *The Case Against Color-Blind Admissions*, N.Y. REV. BOOKS, Dec. 20, 2012, available at <http://www.nybooks.com/articles/archives/2012/dec/20/case-against-color-blind-admissions/>.

<sup>89</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>90</sup> *Ne. Fla. Chapter, Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993).

<sup>91</sup> *Id.* at 666; see also *Adarand*, 515 U.S. at 211. Clarence Thomas attempted to distinguish *Warth v. Seldin* on the grounds that in that case, the low-income housing advocates did not explicitly allege that they had been prevented from "competing on an equal footing." See *Jacksonville*, 508 U.S. at 667–668. To base constitutional doctrine on so constrained a reading of a complaint, the import of which was clearly a challenge to the inability to compete, is to cynically rest on the thinnest of reeds.

<sup>92</sup> *Adarand*, 515 U.S. at 212.

Additionally, when serious standing questions were raised by school districts whose student assignment plans (which they had already voluntarily abandoned) were challenged because they included racial classifications designed to further desegregation, the Court, per Chief Justice Roberts, dismissed them. The parents were permitted to proceed despite the fact that their children would not be affected unless they applied to attend certain oversubscribed schools, thus rendering any possible injury speculative—but the right at stake, Roberts asserted, was the newly recognized right not to be forced to compete in a race-based system.<sup>93</sup>

Thus, whenever necessary to impose its ideology of “color-blindness” and hostility to race-preference, the Roberts Court tosses aside all its usual concerns about justiciability. So too when the Court allowed to proceed a challenge to Ohio’s law banning lies in political campaigns, brought by antiabortion and anti-“Obama Care” groups. It had been dismissed by the Sixth Circuit for lack of standing when the threat of prosecution was terminated.<sup>94</sup>

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The logic of the race preference cases should have afforded standing to the journalists, media organizations, attorneys, and human rights activists who challenged the federal government’s omnibus electronic surveillance program in *Clapper v. Amnesty International USA*.<sup>95</sup> Do they not have the right to pursue their professions without fear of surreptitious monitoring of their every communication?<sup>96</sup>

But discounting their daily participation in sensitive international communications with likely targets of foreign intelligence surveillance (as set forth in affidavits), the Court (per a five-to-four opinion written by Justice Alito) overturned the Second Circuit’s finding that they presented both an “objectively

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<sup>93</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007). The plaintiff in the companion case against the Jefferson County Board of Education had already been granted the transfer he was seeking, but Roberts noted “*he may again* be subject to assignment based on his race” in the future. *Id.* at 719–20 (emphasis added).

<sup>94</sup> *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

<sup>95</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013). See generally Liz Clark Rinehart, *Clapper v. Amnesty International USA: Allowing the FISA Amendments Act of 2008 to Turn “Incidentally” into “Certainly”*, 73 MD. L. REV. 1018 (2014).

<sup>96</sup> The notion that recasting the standing issue as the right to engage in a market undistorted by unconstitutional conduct is explored by Professor Maxwell L. Stearns in *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on Hollingsworth and Windsor*, 65 ALA. L. REV. 349, 367–69 (2013). He compares *Allen v. Wright*, 468 U.S. 737 (1984), denying standing to African American parents challenging the IRS policy conferring tax-exempt status on schools practicing racial discrimination, with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), permitting Bakke to pursue his challenge to the set-aside program for minority applicants notwithstanding evidence he would not have been admitted in any event. Stearns convincingly demonstrates that both scenarios involved the same kind of contingent links between challenged conduct and redress, yet the Court came to opposite conclusions by manipulating the chains.

reasonable likelihood”<sup>97</sup> that their communications will be intercepted and a present injury in having to take costly and burdensome protective measures to avoid that risk. Instead, characterizing the plaintiffs’ fears as merely “speculative,”<sup>98</sup> as they (of course) had no “actual knowledge” of the secret program’s targets, and unrealistically requiring a showing of “*certainly impending* interception,” the Court dismissed for lack of standing:

[R]espondents’ argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under [the challenged provision] rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government’s proposed surveillance procedures satisfy [the challenged provision’s] many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents’ contacts; and (5) respondents will be parties to the particular communications that the Government intercepts. . . . [R]espondents’ theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.<sup>99</sup>

Absent evidence that *specific* communications of *specific* plaintiffs were being (or would be) intercepted under the *specific* (and *secret*) FISA provision, the case could not proceed, thus effectively insulating the surveillance program (and presumably all other similar ones) from judicial scrutiny. The majority’s suggestion that the Foreign Intelligence Surveillance Court provides judicial review of the surveillance program and protection of Fourth Amendment rights<sup>100</sup> is laughable, given the secret and *ex parte* nature of its proceedings and its rubber-stamping of virtually all government applications for surveillance.<sup>101</sup>

Writing for the dissenters, Justice Breyer observed that the “Court has often found the occurrence of similar future events sufficiently certain to support standing” and “has often *found* standing where the occurrence of the relevant injury was far *less* certain than here.”<sup>102</sup> He rejected the notion that plaintiffs’

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<sup>97</sup> *Amnesty Int’l v. Clapper*, 638 F.3d 118, 134 (2d Cir. 2011), *rev’d*, 133 S. Ct. 1138 (2013).

<sup>98</sup> As Stephen I. Vladeck notes, the only reason the plaintiffs’ allegations were “speculative” was because the challenged surveillance was secretive. Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 I/S: J.L. & POL’Y FOR INFO. SOC’Y 551, 565 (2014). As Catch-22s go, this one is pretty good.

<sup>99</sup> *Clapper*, 133 S. Ct. at 1148. The Court rejected plaintiffs’ suggestion at oral argument that the Government disclose in an *in camera* proceeding whether it was intercepting plaintiffs’ communications. *Id.* at 1149 n.4.

<sup>100</sup> *Id.* at 1154.

<sup>101</sup> *Id.* at 1159 (Breyer, J., dissenting).

<sup>102</sup> *Id.* at 1155, 1161. As the Second Circuit has observed, “[t]he Supreme Court’s jurisprudence regarding how imminent a threat must be in order to support standing, however, has been less than clear.” *Hedges v. Obama*, 724 F.3d 170, 195 (2d Cir. 2013) (dismissing for lack of standing challenge brought by writers, journalists, and activists challenging Presi-

fears were “speculative” by demonstrating the high and realistic likelihood that at least some of the plaintiffs’ communications would be intercepted under the challenged program.<sup>103</sup>

Breyer pointed to several prior decisions in which standing was found even though injury was far more speculative than in *Clapper*.<sup>104</sup> Landlords in *Pennell v. City of San Jose* were permitted to challenge a rent control ordinance despite the many contingencies that would have to occur before they suffered any loss.<sup>105</sup> Nursing home residents in *Blum v. Yaretsky* were permitted to challenge a Medicaid regulation allowing their transfer to a less desirable setting even though such transfers had been enjoined and the nursing home had not threatened to transfer any plaintiff.<sup>106</sup>

In *Davis v. Federal Election Commission* a candidate was conferred standing to challenge an election law that relaxed limits on an opponent’s contributions, even though his opponent had opted *not to take advantage of the provision*.<sup>107</sup> In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, plaintiffs were permitted to pursue a challenge to a statute that limited the liability of nuclear power plants, asserting that the proposed plant nearby would not be built without that provision, and, if built, might harm them by emitting radiation into the environment.<sup>108</sup> The Court premised their standing on the uncertainties and apprehensions surrounding radiation.

And in a scenario quite similar to *Clapper*, farmers had standing to challenge deregulation of genetically modified crops on the assertion that their neighbors would plant such crops, and the farmers would suffer present harm in their efforts to protect against contamination as well as their need to conduct testing to determine whether their own plants had been contaminated as a result.<sup>109</sup> Where a member of the California State Senate sued to challenge the characterization of three Canadian films (dealing with nuclear war and acid rain) he sought to exhibit to constituents as “foreign political propaganda,” he was deemed to have standing because of the potential harm to his reputation if he went ahead with his plan. Again, the Court ruled that the steps he would need to take to minimize the risk *would themselves constitute cognizable injury*.<sup>110</sup> Yet the Court rejected the *Clapper* plaintiffs’ similar claim that they would have to take burdensome protective measures to avoid the risk of their

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dent’s authority to detain persons for “substantial support” of terrorists, for lack of imminent threat to plaintiffs). *Clapper* “made clear that plaintiffs cannot establish standing on the basis of speculation about how the government may choose to utilize its authority to engage in foreign surveillance.” *Id.* at 201.

<sup>103</sup> *Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting).

<sup>104</sup> *Id.* at 1161–62.

<sup>105</sup> *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

<sup>106</sup> *Blum v. Yaretsky*, 457 U.S. 991 (1982).

<sup>107</sup> *Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008).

<sup>108</sup> *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978).

<sup>109</sup> *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

<sup>110</sup> *Meese v. Keene*, 481 U.S. 465, 475 (1987).



communications being acquired under the surveillance program, like traveling to meet with foreign clients and sources in person.<sup>111</sup>

In its more candid moments, the Court has conceded that the matter of standing “is one of degree, of course, and is not discernible by any precise test.”<sup>112</sup> The gist is that the litigant must demonstrate “a realistic danger of sustaining a direct injury” as a result of the challenged action in order to assure a real controversy.<sup>113</sup> But although inconsistency rules in this area, could there be any doubt that the *Clapper* plaintiffs would have pursued their cause with the greatest of energy and “vigorous advocacy,”<sup>114</sup> assuring a concrete “case or controversy?”<sup>115</sup>

These journalists, lawyers, and human rights activists were, as the Second Circuit observed,

unlike most Americans, [because] they engage in legitimate professional activities that make it reasonably likely that their privacy will be invaded and their conversations [some privileged] overheard—unconstitutionally, or so they argue—as a result of the surveillance newly authorized by the [FISA Amendments of 2008], and that they have already suffered tangible, indirect injury due to the reasonable steps they have undertaken to avoid such overhearing, which would impair their ability to carry out those activities.<sup>116</sup>

They were a far cry from the wildlife activist plaintiffs seeking protection for endangered species in foreign lands, dismissed for lack of standing because their plans to visit those lands were indeterminate and speculative—whose “some day” intentions were too thin to base their challenge upon.<sup>117</sup>

The *Clapper* majority underscores that standing analysis is “especially rigorous” when plaintiffs challenge executive action alleged to be unconstitutional (thus raising separation of powers issues),<sup>118</sup> and in the highly sensitive matter of foreign intelligence.<sup>119</sup> Yet since *Clapper* was dismissed, the dramatic revelations by former NSA contractor Edward Snowden of the massive Orwellian nature of the surveillance program, largely confirmed by the authorities, vindicate the dissenters’ view of the likelihood (if not certainty) that at least some

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<sup>111</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1150–51 (2013).

<sup>112</sup> *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 297 (1979).

<sup>113</sup> *Id.* at 298.

<sup>114</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting).

<sup>115</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

<sup>116</sup> *Amnesty Int’l v. Clapper*, 638 F.3d 118, 149 (2d Cir. 2011), *rev’d*, 133 S. Ct. 1138 (2013).

<sup>117</sup> *Lujan*, 504 U.S. at 564.

<sup>118</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147; see Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 242–45 (2014). Thirty years ago Antonin Scalia published *The Doctrine of Standing as an Essential Element of the Separation of Powers*, arguing standing acts to prevent the “overjudicialization of the processes of self-governance,” and in particular interference in the President’s role. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).

<sup>119</sup> *Clapper*, 133 S. Ct. at 1147.

plaintiffs were in fact monitored, and without judicial oversight.<sup>120</sup> In fact it is now clear that American lawyers' confidential attorney-client communications have been intercepted,<sup>121</sup> prompting one legal ethics expert to lament, "[y]ou run out of options very quickly to communicate with [clients] overseas. . . . [L]awyers are in a difficult spot to ensure that all of the information remains in confidence."<sup>122</sup>

The NSA's dragnet also "threatens to put journalists under a cloud of suspicion and to expose them to routine spying by government agencies. By storing mass data for long periods, the NSA could develop the capability to recreate a reporter's research, retrace a source's movements and listen in on past communications . . . ."<sup>123</sup>

So much for the Court's characterization of the *Clapper* plaintiffs' claims as purely "speculative." Yet, remarkably, the Government continues to seek dismissal of actions challenging the NSA bulk metadata collection, citing *Amnesty International v. Clapper*, and asserting that plaintiffs still cannot demonstrate *how the information collected is being used*.<sup>124</sup> Now that the cat is out of the bag, so to speak, the lower courts have been less receptive to such arguments.<sup>125</sup>

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<sup>120</sup> See Charlie Savage, *Broader Sifting of Message Data by N.S.A. Is Seen*, N.Y. TIMES, Aug. 8, 2013, at A1; Jameel Jaffer & Patrick C. Toomey, *How the Government Misled the Supreme Court on Warrantless Wiretapping*, THE NATION, (Dec. 18, 2013), <http://www.thenation.com/article/177649/>.

<sup>121</sup> James Risen & Laura Poitras, *Spying by N.S.A. Ally Entangled U.S. Law Firm*, N.Y. TIMES, Feb. 16, 2014, at A1 (revealing that an American law firm was monitored while representing the Indonesian government in talks with the United States).

<sup>122</sup> *Id.* The ABA has since asked NSA to disclose the policies in place to protect attorney-client communications. Press Release, Am. Bar Ass'n, ABA Asks NSA How It Handles Attorney-Client Privileged Information in Intelligence Work (Feb. 21, 2014), available at [http://www.americanbar.org/news/abanews/aba-news-archives/2014/02/aba\\_asks\\_nsa\\_howit.html](http://www.americanbar.org/news/abanews/aba-news-archives/2014/02/aba_asks_nsa_howit.html).

<sup>123</sup> Ed Pilkington, *NSA Actions Pose "Direct Threat to Journalism" Leading Watchdog Warns*, THE GUARDIAN (Feb. 12, 2014), <http://www.theguardian.com/world/2014/feb/12/nsa-direct-threat-journalism-cpj-report>. "The National Security Agency's dragnet of communications data poses a direct threat to journalism in the digital age by threatening to destroy the confidence between reporter and source on which most investigations depend, one of the world's leading journalism watchdogs has warned." *Id.*

<sup>124</sup> See Government Defendants' Partial Motion to Dismiss at 9, *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013) (No. 13-0881), 2014 WL 125887; Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 10, *ACLU v. Clapper*, 959 F.Supp.2d 724 (S.D.N.Y. 2013) (No. 13-3994), 2013 WL 5744828 ("Plaintiffs' motion for a preliminary injunction is based entirely on conjecture as to how the Government might misuse telephony metadata collected under the program, and consequences that might ensue.").

<sup>125</sup> Despite government lawyers "[s]training mightily to find a reason that plaintiffs nonetheless lack standing" even in the face of the post-*Clapper* revelations, District Judge Richard Leon found that the telecommunication subscribers could pursue their Fourth Amendment challenge to the then-acknowledged wholesale collection of phone data in *Klayman*, 957 F. Supp. 2d at 26–29.

But if the Supreme Court continues to insist that plaintiffs identify *specific* communications of theirs that have been accessed under *specific* provisions of intelligence law, the *Clapper* result will stand. And with the *Clapper* bar set so unrealistically high, what are the prospects for challenging any government program that is not entirely transparent, and in the absence of an Edward Snowden to unveil the dark side? The government appears to get a pass from the Court on any program that remains covert.

The dismissal in *Clapper* evidenced the same constricted tunnel-vision that the Court exhibited when it overturned a district court order granting President Bill Clinton temporary immunity from the sex harassment civil action filed by Paula Corbin Jones.<sup>126</sup> Concluding that there was *no reason to be concerned that the civil action would interfere in the President's conduct of his office, or that it would degenerate into politically motivated harassing litigation*, the Court allowed the case to proceed unimpeded.<sup>127</sup> Within eighteen months, the Jones lawsuit had spawned the Monica Lewinsky scandal, and Clinton was impeached on charges of perjury and obstruction of justice. The Senate ultimately acquitted him.<sup>128</sup> Although the final chapters in this saga were certainly unforeseeable, the Court's naiveté in throwing a sitting president into the political minefield of a sex harassment lawsuit was breathtaking.

But of course this was also the group that believed unlimited corporate contributions to politicians would not corrupt the system, or cause the elec-

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[W]hereas the plaintiffs in *Clapper* could only speculate as to whether they would be surveilled at all, plaintiffs in this case can point to strong evidence that, as Verizon customers, their telephone metadata has been collected for the last seven years (and stored for the last five) and will continue to be collected barring judicial or legislative intervention.

*Id.* at 26. In *ACLU v. Clapper*, District Judge William Pauley also found that the ACLU had standing to challenge the metadata collection program. He nonetheless undercut the significance of this ruling when he dismissed as speculative the claim that the Government would actually access and retrieve the organization's telephone calls without reasonable suspicion. *ACLU v. Clapper*, 959 F. Supp. 2d at 738, 754.

<sup>126</sup> *Clinton v. Jones*, 520 U.S. 681, 708–09 (1997).

<sup>127</sup> *Id.* at 708.

Other than the fact that a trial may consume some of the President's time and attention, there is nothing in the record to enable a judge to assess the potential harm that may ensue from scheduling the trial promptly after discovery is concluded. We think the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court's discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President's duties would not occur. But no such impingement upon the President's conduct of his office was shown here.

*Id.*

<sup>128</sup> Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, WASH. POST, Feb. 13, 1999, at A1; *A Chronology: Key Moments in the Clinton-Lewinsky Saga*, CNN (last visited Sept. 24, 2015), <http://www.cnn.com/ALLPOLITICS/1998/resources/lewinsky/timeline/>.

torate to lose faith in democracy.<sup>129</sup> The Court gets an “F” in predictive abilities, but an “A+” in denial capacity.<sup>130</sup>

#### CONCLUSION

*Clapper* creates what Justice Aharon Barak calls a “dead area,” one in which the government can act unlawfully without fear of being called to account.<sup>131</sup> The Court implicitly acknowledges this when rejecting plaintiff’s argument that if they cannot pursue the litigation, there is no one else with ‘more standing’ who can,<sup>132</sup> thus foreclosing judicial review of the profoundly important issues they seek to raise.

Justice William O. Douglas lamented long ago that in the guise of standing “doctrine,” the Court reads certain complaints “with antagonistic eyes. . . . [But] the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need.”<sup>133</sup> De Tocqueville’s famous observation<sup>134</sup> that every significant disagreement in America ends in the courts needs modification—if a majority on the Supreme Court wants to adjudicate it.

The five Republican appointees on the Court did agree to adjudicate George Bush’s quest for the presidency in 2000 even though as a candidate, he clearly had no standing to raise an equal protection claim *on behalf of Florida voters*.<sup>135</sup> The Court adjudicated the reverse discrimination cases noted above even though those particular plaintiffs did not meet the usual requirements for standing. Yet it refused to reach the merits of the *Clapper* dispute, matters that go to the heart of the relationship between government and citizen, and in which the courts are the only meaningful avenue of redress from uncontrolled governmental overreaching.

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<sup>129</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359–60 (2010); *see also* *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014) (striking down the aggregate limits on political contributions).

<sup>130</sup> *See* Richard L. Hasen, *The Numbers Don’t Lie*, SLATE (Mar. 9, 2012), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/03/the\\_supreme\\_court\\_s\\_citizens\\_united\\_decision\\_has\\_led\\_to\\_an\\_explosion\\_of\\_campaign\\_spending.html](http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending.html) (documenting the massive increase in campaign contributions post-*Citizens United*, much coming from undisclosed donors).

<sup>131</sup> HCJ 910/86 Ressler v. Minister of Defence 42(2) PD 441 ¶ 25 [1988] (Isr.), *in* PUBLIC LAW IN ISRAEL, *supra* note 1, at 275, 287.

<sup>132</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1154 (2013).

<sup>133</sup> *Warth v. Seldin*, 422 U.S. 490, 518–19 (1975) (Douglas, J., dissenting).

<sup>134</sup> “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (George Lawrence trans., J.P. Mayer ed., 1969).

<sup>135</sup> Mark S. Brodin, *Bush v. Gore: The Worst (or at least second-to-the-worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563, 566 (2012).

As Gene Nichol pointed out thirty years ago,<sup>136</sup> the Court has long manipulated the redressability prong of standing doctrine, and it is even more telling today who the winners and losers of the game have been. The Court's assertion that "[t]he doctrine of standing is 'an essential and *unchanging* part of the case-or-controversy requirement of Article III'"<sup>137</sup> thus ranks as one of the more jarring hypocrisies of recent jurisprudence.

What began as an understandable prudential requirement that a plaintiff demonstrate "a personal stake [in the outcome of the case] sufficient to create concrete adverseness"<sup>138</sup> and to ensure that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action,"<sup>139</sup> has become a wildly swinging door that conveniently closes on cases the Court would prefer not to consider.

Restricting standing to pursue litigation in American courts is in stark contrast with the "discernible world-wide trend towards opening the doors of the court to every claimant."<sup>140</sup> The Supreme Court of Israel has, for example, significantly narrowed its doctrines of nonjusticiability. Former Justice Aharon Barak explains that "when an important question of the rule of law comes up, we do not require standing. Everyone can come to the Court."<sup>141</sup> Canada takes a similar approach.<sup>142</sup> Throughout Europe, standing has been extended over the past several decades to allow broad access to the courts by "public petitioner."<sup>143</sup>

<sup>136</sup> Nichol, *supra* note 58, at 79.

<sup>137</sup> *Northeastern Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663 (1993) (emphasis added) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, (1992)).

<sup>138</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 56 (1976) (Brennan, J., concurring).

<sup>139</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

<sup>140</sup> HCJ 910/86 *Ressler v. Minister of Defence* 42(2) PD 441 ¶ 18 [1988] (Isr.) (quoting HCJ 566, 563/75 *Ressler v. Minister of Finance* 30 PD(2) 337 [1988] (Isr.)), in *PUBLIC LAW IN ISRAEL*, *supra* note 1, at 279.

<sup>141</sup> Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, 6.1 *ELEC. J. COMPARATIVE L.* (2002), <http://www.ejcl.org/61/art61-1.html>; see also Shimon Shetreet, *Standing and Justiciability*, in *PUBLIC LAW IN ISRAEL* 265 (Itzhak Zamir & Allen Zysblat eds., 1996) (tracing the widening circle of standing to entertain questions of public import, and observing that "the right of standing is now given more or less to anyone who wants it").

Standing, as Justice Barak has observed, is a function of a judge's philosophy of judicial review: standing for a judge whose model is protecting individual rights is different than for a colleague with a model of preserving the legitimacy of official action. *Ressler*, 42(2) PD 441 ¶ 19. Where a petitioner raises a problem of a "salient constitutional character," a direct personal stake in the outcome is not required—taxpayer status would suffice. *Id.* at 282. Such an approach would almost certainly have conferred standing upon the *Clapper* plaintiffs.

<sup>142</sup> See *Ressler*, 42(2) PD 441 ¶ 22. Access to Canadian courts has been expanding for over twenty years. See *Can. Council of Churches v. Canada (Minister of Emp't & Immigration)*, [1992] 1 S.C.R. 236 (Can.). In order to be granted public interest standing to challenge the validity of legislation, a Canadian plaintiff must simply show that there is a "serious issue" regarding the validity of the legislation and there is no other effective or reasonable way in

That our Supreme Court has restricted access to the federal dispute resolution system created by the Framers, in apparent conformity with the justices' ideological, political, and economic agenda, is all the more disturbing. The conservative majority have acted like bouncers at an exclusive after-hours nightclub, admitting the recognizable VIPs, while turning away the rest. Or to return to the original metaphor, unwanted phone calls are simply screened out.

*A PERSONAL NOTE*

Hubert Humphrey used to say that when he felt down, he'd go to a union meeting (he of course lived during the height of the trade union movement). I felt the same electric energy at this symposium that Humphrey sought at gatherings of workers collectively pushing for a better workplace. To be in the presence of so many academics (young and not so young) deeply devoted to the preservation of a dispute resolution system that is fair, just, inclusive, and democratic, was to me a profoundly uplifting moment. And for it to be in tribute to one of the dearest men ever to walk among us, who continually inspires us all to work toward that goal, was so fitting. Steve Subrin's closing remarks about the sanctity of the jury trial were beyond moving, and demonstrate why he has had so profound an influence on so many. He is truly, in all senses, a mensch.

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which the issue may be brought before the court, and that he is directly affected by the legislation *or* that he has a "genuine interest" as a citizen in the validity of the legislation. *Id.* at 238. This concept of public interest standing has also been extended to cases not involving a constitutional issue, even providing standing in situations where the plaintiff failed to meet the general standing requirements of the Canadian courts. *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (Can.).

<sup>143</sup> VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 736 (2d ed. 2006). Statutes in France and Germany give private organizations standing to sue on behalf of the interests of consumers and racial minorities. *Id.* at 736. In Italy, a 1973 Italian Court decision granted the analogue of the Sierra Club standing to sue the government in its own right to advocate for environmental conservation. *Id.*

The expansion of citizens' access to the courts has occurred on other continents as well. *Id.* at 712. In India, courts have loosened the rules of standing so much that there are no longer any real barriers to public interest litigants. *Id.* at 718. When an individual or class of individuals is unable to petition the courts on their own, any member of the public or a social action group is allowed to petition the courts for relief on their behalf. *Id.* at 712. Journalists, academics, social action organizations, and individuals have all initiated lawsuits on behalf of other individuals and groups. *Id.* at 718.

The approach to standing in Japan is more comparable to the requirements in the United States. The plaintiff must show that his or her rights were infringed upon by some government measure, and that he or she will gain a benefit from the reversal of the measure that caused the infringement. *Id.* The latter prong of the standing requirement can be much more difficult to prove, which is reflected by the small number of laws that have been considered unconstitutional in recent years. *Id.*