CONNECTICUT LAW REVIEW

VOLUME 41 DECEMBER 2008 NUMBER 2

Note

BEYOND TAXPAYERS' SUITS: PUBLIC INTEREST STANDING IN THE STATES

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In the 2007 Term, the United States Supreme Court reinforced its narrow formulation of standing in public interest cases in Hein v. Freedom from Religion Foundation, Inc. *The case was yet another in a long line of Supreme Court cases that have denied public interest litigation on standing grounds in cases where a litigant—as taxpayer and/or citizen—seeks to vindicate the public interest by challenging an alleged government illegality. As a consequence, the restrictive standing model in federal courts creates a number of circumstances in which a potential constitutional violation by the government may go unchallenged. Alternatively, many state courts have developed and successfully employed alternative standing models that allow citizens or taxpayers to sue on behalf of the public interest in cases involving issues of great constitutional importance. These models—more liberal and discretionary than the federal model—demonstrate the state courts' commitment to ensuring that constitutional limitations on governmental power are judicially enforced. This Note will compare the federal standing model with the alternative public interest standing models developed in a group of select states, providing the first case study to focus on the extent to which states exercise approaches to the standing doctrine that diverge from the federal model. This Note concludes that public interest standing models, though most likely unfit for federal courts, are appropriate in state courts, given the significant differences in constitutional background, governance structures, and historical common law developments between federal and state judicial systems.*

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BEYOND TAXPAYERS' SUITS: PUBLIC INTEREST STANDING IN THE STATES

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I. INTRODUCTION

A fundamental question both federal and state courts have grappled with is who should have access to the judicial system. This question is dealt with by the doctrine of standing. Standing—along with such doctrines as mootness, ripeness, and political question—is a justiciability doctrine. Justiciability doctrines determine whether, when, and by whom significant public questions ought to be adjudicated, and therefore directly affect issues such as government accountability, public involvement in issues of social significance, and the proper policymaking authority of government.[1] The federal system of justiciability, in particular its doctrine of standing, has developed in part as a means of ensuring a proper separation of powers between the branches of the federal government through both constitutional—under the "case or controversy" requirement of Article III[2]—and prudential sources of judicial restraint.[3] As the Supreme Court has noted:

> All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected,

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[1] Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961).

[2] Article III provides, in part, that "[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made . . . to Controversies to which the United States shall be a Party;—[and] to Controversies between two or more States." U.S. CONST. art III, § 2.

[3] The prohibition against *jus tertii*, or third-party standing, is one such prudential consideration. Regarding this doctrine, the Court has stated that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975).

unrepresentative judiciary in our kind of government.[4]

The Supreme Court has stated that the question of standing concerns whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[5] More specifically, the Court has elucidated three major components to the doctrine of constitutional standing. First, the plaintiff must have suffered an "injury-in-fact," that is, "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical.'"[6] Second, there must be a causal link between the conduct complained of and the injury suffered by the plaintiff.[7] Third, it must be likely, rather than simply speculative, that the injury can be redressed by a judicial decision favoring the plaintiff.[8] The Court has also asserted that although some of the federal standing model's elements display prudential considerations, the central element of standing is tied directly to Article III's "case or controversy" requirement.[9] Thus, the Court has developed a doctrine, rooted in the Constitution, which limits access to the federal court system to that class of litigants who possess "concrete and particularized" injuries causally connected to another party's conduct.[10]

The Supreme Court's constrained articulation of the law of standing

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[4] Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)); *see* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1882–83 (2001) (noting that Article III justiciability doctrine supports this view of separation of powers in two ways: as a matter of democratic theory, that is, as a logical means of assigning public questions to the elected branches as they are "more politically accountable than unelected federal judges;" and as a matter of institutional competence, that is, as a proper means of allocating policymaking to those branches of government that possess the resources necessary to adequately assess and monitor the corresponding results). *But see* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692 (1990) (noting that neither constitutional nor prudential standing requirements are explicitly mentioned in the Constitution, but rather that "a requirement is constitutional if the Court says it is, and it is prudential if the Court says it is that. Nothing in the content of the doctrines explains their constitutional or prudential status").

[5] Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

[6] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).

[7] *Id.* at 560; *see also* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976) ("[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.").

[8] *Lujan*, 504 U.S. at 561.

[9] *Id*. at 560.

[10] *Id.* Related to the requirement for a concrete, particularized injury, the Court has asserted that standing does not exist "when the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens." Warth v. Seldin, 422 U.S. 490, 499 (1975) (internal quotation marks omitted). Although the Court in *Warth* noted that this prohibition against "generalized grievances" in taxpayer and citizen suits was a *prudential* bar, almost twenty years later, in *Lujan*, the Court indicated that the limitation was *constitutionally* based, citing separation of powers concerns. *See Lujan*, 504 U.S. at 573–574 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy.").

has led to an accordingly constrained acceptance of non-statutory public interest actions where a litigant seeks to vindicate the public interest.[11] These public interest cases often involve a litigant, as taxpayer and/or citizen—a so-called "non-Hohfeldian" litigant[12]—who seeks to challenge alleged government illegalities. The threshold question in these cases, of course, is whether the litigant, in his or her capacity as a taxpayer and/or citizen, has standing to challenge an alleged unconstitutional or unlawful government action. Because the party asserting the public right is likely to be affected no differently than the general public, the federal courts have often denied standing to such a party due to concerns such as the separation of powers, the need for judicial economy, and the fear of a flood of litigation.[13] Thus, the current federal standing model creates a number of instances where a potential constitutional violation by the government may go unchallenged.[14]

On the other hand, because state courts are not bound by Article III, their role differs from that of the federal courts to varying degrees.[15] Courts in many states allow broad citizen standing on the theory that standing "must be viewed in part in light of 'discretionary doctrines aimed at prudently managing judicial review of the legality of public acts.'"[16] Thus, although some states adhere solely to the strict federal system of standing, many state courts have developed, through common law, alternative standing doctrines that allow citizens or taxpayers to sue on

[11] It is notable that in the federal system, as well as in many states, the legislative branch has conferred standing to citizens to sue to enforce particular statutory provisions. *See, e.g.*, 42 U.S.C 11046(a)(1) (giving citizens the right to sue to enforce the EPCRA, a federal environmental protection statute). This Note, however, focuses exclusively on non-statutory, common law derived citizen standing doctrines in the states.

[12] The term "non-Hohfeldian" derives from the scholar Wesley Newcomb Hohfeld, who devised a categorization of legal rights. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Ideological plaintiffs, who do not fit into any of Hohfeld's categories of legal rights, are termed "non-Hohfeldian." *See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 4 (1984) ("Non-Hohfeldian plaintiffs aspire to secure the enforcement of legal principles that touch others as directly as themselves and that are valued for moral or political reasons independent of economic interests.").

[13] *See* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1036 (1968) ("The traditional requirement [for legal injury] is one that distinguishes the particular plaintiff from the generality of citizens, taxpayers, and so forth, and is required precisely because the argument maintains that the administration of justice is not designed to vindicate the interest of the fungible citizen in the enforcement of the law. The plaintiff, it would be said, must seek his relief from the *political process* where he, along with those who feel as he does, will be represented by elected officials.").

[14] One commentator noted that the Supreme Court's refusal to recognize federal taxpayer standing has effectively "written a large segment of the Constitution out of the reach of judicial protection." Joseph J. Giunta, *Standing, Separation of Powers, and the Demise of the Public Citizen*, 24 AM. U. L. REV. 835, 874 (1975).

[15] For further discussion on the differences between state and federal courts, see *infra* Part III.

[16] Comm. for an Effective Judiciary v. State, 679 P.2d 1223, 1226 (Mont. 1984) (quoting Stewart v. Bd. of County Comm'rs, 573 P.2d 184, 186 (Mont. 1977)).

behalf of the public interest in cases that involve issues of great constitutional importance.[17] In these cases, it is often not necessary for a litigant to show that his or her interest is protected by positive law, but rather it is sufficient that the interest he or she represents is recognized as a public value by the court. The existence of such alternative doctrines underscores the significant weight to which many state courts give such concerns as the vindication of the public interest and the need for checks and balances within a tripartite system of government.

This Note compares the federal standing model with the vastly understudied alternative public interest standing models developed in a group of select states. As such, it provides the first case study that focuses on the extent to which states exercise approaches to the standing doctrine that diverge from the federal model.[18] Additionally, this Note will raise questions about the judiciary's place in democratic governance. Though it does not argue that the federal model ought to be altered or abandoned—virtually inconceivable given its firm entrenchment in the Supreme Court's jurisprudence—this Note is meant to convey to the reader that liberal forms of standing do exist and, in fact, thrive in some United States jurisdictions.

Part II will explore the evolution of the federal standing model in the realm of public interest actions, specifically taxpayer cases, through an analysis of some of the key Supreme Court decisions from the last eighty-five years. Part III will begin with an overview of the broad spectrum of state standing doctrines, particularly the states' public interest standing models, and will then delve into a comparative analysis of the key differences between the federal judiciary and the states' judiciaries in the constitutional scheme, structurally and theoretically. These differences—philosophical, textual, and otherwise—are meant to explain the basis on which state courts diverge from federal courts when it comes to the issue of standing in the context of public interest litigation.

As for the specific public interest standing doctrines among the states, Parts IV and V will provide a detailed case study of four states which have developed such doctrines through their common law. Part IV will focus on states that base their public interest standing doctrines on the character of the issue—whether the issue is of great public or constitutional importance, and whether there is a significant public need to have the interest

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[17] *See infra* Parts IV, V.

[18] As Professor Jaffe put it, "[m]ost of the writing on standing . . . has been preoccupied with federal law." Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1268 (1961). Moreover, "state constitutionalism remains intellectually isolated from a great deal of public law scholarship. Constitutional law courses at U.S. law schools not only ignore state constitutions, but also more generally avoid any comparative approach [between federal and state systems]." Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1194–95 (1999) (footnotes omitted).

vindicated by the judiciary. Part V will focus on states that base their public interest standing doctrines on the character of the litigant—whether the litigant is the best party to proceed with a given challenge, and if not, whether the constitutional or public issue involved will go unchallenged if such litigant is denied standing. These cases focus on the capacity of the litigant to show some connection to the issue and the competence with which such a litigant can advocate on behalf of the public. Thus, the analysis within Parts IV and V illuminate the philosophy of the state courts which have some form of public interest standing.

Ultimately, this Note proposes that non-Article III justiciability is appropriate in states given the significant differences in constitutional background, governance structures, and historical common law developments between federal and state judicial systems. The analysis of the public interest standing models will demonstrate the states' interest in ensuring that constitutional limitations on governmental power are judicially enforced, as well as their commitment to limiting such review to those cases where it is necessary to protect the citizens' collective rights.[19]

II. STANDING IN PUBLIC ACTIONS IN THE FEDERAL COURTS: A RESTRICTIVE FRAMEWORK

A. *Historical Development of Public Action Litigation: From* Frothingham *to* Valley Forge

The Court's narrow definition of injury standing in the context of taxpayer and citizen standing was first articulated in *Frothingham v. Mellon*.[20] Forty-five years later, the Court changed course when, in *Flast v. Cohen*, it granted standing to taxpayers challenging a federal spending

[19] Some commentators have argued that such a public rights approach should be followed in the federal courts as well. *See, e.g.*, Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 96 (1985) ("[T]here is a clear collective societal interest in having the government behave in strict accord with the Constitution. When government violates the Constitution, the stake in the outcome of the controversy is society's stake, and is the most fundamental interest possible: the interest in government functioning as agreed upon by [the people] . . . ."); Hershkoff, *supra* note 4, at 1933 ("[J]udicial review of government practices—in particular of structural practices that a Hohfeldian rights-holder would not otherwise challenge—creates important incentive effects that may deter unconstitutional or otherwise arbitrary behavior and thereby secure greater government accountability."); Jaffe, *supra* note 13, at 1045–46 ("Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking. . . . [I]f there is to be judicial protection of the individual from the impact of . . . unconstitutional exercises of power . . . an action by a [non-Hohfeldian] plaintiff . . . must be allowed.").

[20] Frothingham v. Mellon, 262 U.S. 447, 487 (1923). In *Massachusetts v. Mellon*, a companion case, the Supreme Court denied the State of Massachusetts standing to challenge the constitutionality of the Maternity Act. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) ("The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.").

program under the Establishment Clause.[21] Despite this marked divergence, the Court has retreated to its pre-*Flast* jurisprudence over the past forty years. From *United States v. Richardson*[22] and *Schlesinger v. Reservists Committee to Stop the War*,[23] to *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*[24] and most recently *Hein v. Freedom from Religion Foundation, Inc.*,[25] the Court has narrowed the *Flast* precedent, demonstrating a strict injury-based standing model in the public action context.

In *Frothingham*, the plaintiff, suing as a federal taxpayer, sought to halt expenditures under the Federal Maternity Act of 1921, which gave financial grants to states if they cooperated in programs designed to reduce maternal and infant mortality.[26] The plaintiff claimed that the expenditures exceeded Congress' taxing powers and violated the Tenth Amendment's reservation of powers to the state governments.[27] The Supreme Court held that it did not have "power *per se* to review and annul acts of Congress," and that federal judicial review could only be exercised when a plaintiff alleged that "some direct injury" was caused by a legislative act and "not merely that he suffer[ed] in some indefinite way in common with people generally."[28]

Similarly, in *Ex parte Levitt*, the Court extended this philosophy of restraint in the context of a citizen suit over the constitutionality of a Supreme Court Justice's appointment.[29] The Court held that the plaintiff lacked standing because "it is not sufficient that he has merely a general interest common to all members of the public."[30] It was this narrow view of the role of the federal courts in adjudicating public action cases that informed the Court for the next thirty years.

The Court departed from its strict injury-based model in *Flast*, a case involving a taxpayer challenge to a federal program providing federal funds to assist public and private schools, including religious schools.[31] The Court held that the taxpayers had standing to challenge these congressional expenditures as a violation of the First Amendment

[21] Flast v. Cohen, 392 U.S. 83, 88 (1968).

[22] United States v. Richardson, 418 U.S. 166 (1974).

[23] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

[24] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

[25] Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007).

[26] Frothingham v. Mellon, 262 U.S. 447, 479 (1923).

[27] *Id.*

[28] *Id.* at 488.

[29] *Ex parte* Levitt, 302 U.S. 633, 633 (1937). In *Levitt*, the constitutionality of Justice Hugo Black's appointment to the United States Supreme Court was challenged because Black had voted, while he was a Senator, to increase Supreme Court Justices' retirement benefits, in violation of Article I, Section 6 of the Constitution. *Id.*

[30] *Id.* at 634.

[31] Flast v. Cohen, 392 U.S. 83, 85–86 (1968).

prohibition against the establishment of religion by the federal government.[32] The Court distinguished *Flast* from *Frothingham* by noting that although both cases involved challenges to government spending programs, *Flast* implicated the First Amendment's Establishment Clause—which is a limit on Congress' taxing and spending authority—whereas *Frothingham* involved the Tenth Amendment, which does not entail such authority.[33]

Noting the distinction between standing requirements and separation of powers principles, the *Flast* Court stated that the "question [of] whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems . . . . [S]uch problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated."[34] Rather, the Court noted, the threshold question of standing was concerned with "whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'"[35] Thus, the Court did not weigh separation of powers concerns as heavily as it did in *Frothingham*, departing from that precedent to create its own test to be used in taxpayer standing cases.

In *Flast*, the Court articulated a two-part nexus test to determine whether a litigant had standing as a federal taxpayer. First, the taxpayer had to establish a logical link between his status as a taxpayer and the type of legislation he was challenging.[36] The Court qualified this requirement by stating that a taxpayer could not challenge the expenditure of funds merely "incidental" to a statute, but rather could only do so under the direct employment of the taxing and spending clause of Article I, Section 8.[37]

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[32] *Id.* at 88.

[33] *Id.* at 105.

[34] *Id.* at 100–01. Conversely, three years before ascending to a position as Associate Justice on the United States Supreme Court, Justice Scalia penned an influential article that summarized his views on the role of the court in the adjudication of public actions and the nature of standing doctrine as a means of addressing separation of powers concerns. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983). As then-Judge Scalia puts it, "[n]or is it true, as *Flast* suggests, that the doctrine of standing cannot possibly have any bearing upon the allocation of power among the branches since it only excludes *persons* and not *issues* from the courts." *Id.* at 892. He concedes that because some constitutional provisions are not amenable to particularized injury, not common to the general public, such provisions would be barred from judicial review altogether. *Id.* Contrarily, in states with public interest standing doctrines, the courts have often held that for this very reason—that the constitutional or statutory provision may go unreviewed or unchallenged if standing is denied to the litigant—standing must be granted to assure that such an issue of constitutional significance be addressed, to protect the people's right to maintain the constitutional system of justice they created. *See infra* Parts IV, V.

[35] *Flast*, 392 U.S. at 99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

[36] *Id.* at 102.

[37] *Id.* ("It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."). The Taxing and Spending Clause reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts

Second, the Court in *Flast* stated that the taxpayer had to establish a nexus between his status as a taxpayer and the nature of the alleged constitutional infringement.[38] Therefore, the litigant had to allege that Congress' expenditure exceeded a specific constitutionally-derived limitation on the exercise of its taxing and spending power.[39] The Court held that the plaintiffs satisfied the two-prong nexus test because the challenged educational program involved a "substantial expenditure of federal tax funds" under Congress' taxing and spending power, and because it violated the Establishment Clause of the First Amendment—a specific limitation on that power.[40]

Notably, Justice Douglas, in his concurrence in *Flast*, elucidated for the first time his position regarding the proper role of the courts in public actions,[41] a position he reinforced in his dissents in the *Richardson* and *Schlesinger* cases.[42] Justice Douglas, calling for *Frothingham* to be overturned,[43] advocated liberal standing requirements where all federal taxpayers be granted standing to challenge federal expenditures.[44] Arguing a position akin to that of the state courts that allow for public interest standing, Justice Douglas recognized that it is not only the judiciary's constitutional *role* to act as a check to overreaching by the other branches, but it is the judiciary's constitutional *duty* to do so:

> The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, it

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and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

[38] Flast v. Cohen, 392 U.S. 83, 102 (1968) ("Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power.").

[39] *Id.* at 102–03. The Court did not indicate which, if any, other constitutional provisions limited Congress' taxing and spending power.

[40] *Id.* at 103.

[41] *Id.* at 110 (Douglas, J., concurring) ("[T]he role of the federal courts is not only to serve as referee between the States and the center but also to protect the individual against prohibited conduct by the other two branches of the Federal Government.").

[42] United States v. Richardson, 418 U.S. 166, 197, 201–02 (1974) (Douglas, J., dissenting); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 229–31 (1974) (Douglas, J., dissenting).

[43] *Flast*, 392 U.S. at 111 (Douglas, J., concurring) ("We have a Constitution designed to keep government out of private domains. But the fences have often been broken down; and *Frothingham* denied effective machinery to restore them.").

[44] *Id.* at 114.

is abdication for courts to close their doors.[45]

Although at the time *Flast* signified a potential shift by the Court toward recognizing a more liberalized standard for taxpayer and citizen standing,[46] the precedent has since been limited to its facts by subsequent cases, including the *Hein* case in 2007. The first two cases that narrowed the *Flast* precedent and "embraced private rights and separation of powers principles in the context of public actions"[47] were *United States v. Richardson*[48] and *Schlesinger v. Reservists Committee to Stop the War*,[49] both decided on the same day in 1974.

In *Richardson*, the plaintiff claimed that a congressional enactment providing that the Central Intelligence Agency may keep its budget secret was unconstitutional because it violated the Accounts Clause.[50] The Court distinguished *Richardson* from *Flast* by noting that the Accounts Clause was not a limitation on Congress' taxing and spending power, and that the plaintiff-taxpayer was not challenging a statute enacted under the taxing and spending power, but rather one regulating the reporting of expenditures by the CIA.[51] The Court noted that the litigant, claiming injury only as a citizen and federal taxpayer, lacked standing because he sought "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government" rather than alleging violation of a particular constitutional right.[52]

In *Richardson*, the plaintiff argued that if he was denied standing, nobody could have standing, and that the Accounts Clause would be rendered an unenforceable constitutional provision.[53] The Court used this very claim to reinforce its private rights model—requiring concrete, particularized injury to procure standing in a public action—by stating that "the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of . . . the political process."[54]

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[45] *Id.* at 111.

[46] *See* Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 601 (1968) ("The narrow holding [in *Flast*] seems impregnable and seems destined to become a long-term cornerstone of the law of standing.").

[47] Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. PITT. L. REV. 351, 361 (1993).

[48] United States v. Richardson, 418 U.S. 166, 171 (1974).

[49] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216–17 (1974).

[50] *Richardson*, 418 U.S. at 168. The Accounts Clause provides, in part, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art I, § 9, cl. 7.

[51] *Richardson*, 418 U.S. at 175 ("[T]here is no logical nexus between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency.") (internal quotation marks omitted).

[52] *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)) (citations omitted).

[53] *Richardson*, 418 U.S. at 179.

[54] *Id.*

Similarly, in *Schlesinger*, the Court denied citizen and taxpayer standing where the plaintiffs sought to prevent members of Congress from serving in the military reserves, which the plaintiffs claimed was a violation of the Constitution's Incompatibility Clause.[55] As in *Richardson*, stating that a concrete injury rather than a generalized grievance is required for justiciability, the Court held that the plaintiffs lacked standing as citizens because they sought to "have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens."[56] The Court noted that to hold otherwise "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing government by injunction."[57]

As in his concurrence in *Flast*[58] and in his dissenting opinions in both *Richardson* and *Schlesinger*, Justice Douglas stated his philosophy regarding the proper role of the courts in the constitutional scheme.[59] Justice Douglas proposed a liberalized standing model in cases involving issues of constitutional importance that might otherwise go unchecked by any of the branches of the federal government.[60] Particularly in his *Schlesinger* dissent, Justice Douglas reaffirmed his view that the Court must, in its discretion, grant standing to a citizen or taxpayer if the constitutional provision would otherwise go unchallenged:

> The interest of the citizen in this constitutional question is, of course, common to all citizens. But . . . "standing is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."[61]

After limiting taxpayer standing to the specific set of facts in *Flast*, the

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[55] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209 (1974). The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art I, § 6, cl. 2.

[56] *Schlesinger*, 418 U.S. at 217.

[57] *Id.* at 222 (internal quotation marks omitted).

[58] Flast v. Cohen, 392 U.S. 83 (1968).

[59] *See* United States v. Richardson, 418 U.S. 166, 200–01 (1974) (Douglas, J., dissenting) (referring to the views expressed in his *Schlesinger* dissent); *Schlesinger*, 418 U.S. at 232–34 (Douglas, J., dissenting) (describing the role of standing in the judicial process).

[60] *See Schlesinger*, 418 U.S. at 234 ("The interest of citizens in guarantees written in the Constitution seems obvious. . . . The 'personal stake' in the present case is keeping the Incompatibility Clause an operative force in the Government by freeing the entanglement of the federal bureaucracy with the Legislative Branch."); *Richardson*, 418 U.S. at 202 ("[R]esolutions of any doubts or ambiguities should be toward protecting an individual's stake in the integrity of constitutional guarantees rather than turning him away without even a chance to be heard.").

[61] *Schlesinger*, 418 U.S. at 235 (quoting United States v. SCRAP, 412 U.S. 669, 687–88 (1973)).

Court went a step further by narrowing Establishment Clause taxpayer standing in *Valley Forge*.[62] In that case, a group of taxpayers and citizens challenged the transfer of a federal government-owned hospital to a religious organization pursuant to the Federal Property and Administrative Services Act, which authorized the executive branch to dispose of surplus property.[63] The plaintiffs alleged that the transfer of the property violated the Establishment Clause on the ground that it constituted government aid to religion.[64] Noting that the Establishment Clause ought not to be regarded differently than any other constitutional provision for the purposes of standing,[65] the Court held that the plaintiffs lacked standing because they sued merely as taxpayers interested in ensuring that government conform to its constitutional duties, failing to identify any personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees."[66] The Court distinguished *Flast* by stating that the plaintiffs in *Valley Forge* were not challenging a congressional statute authorized by the taxing and spending power but rather an executive decision—through the Department of Health, Education and Welfare—to transfer government property authorized by the Property Clause.[67]

Justice Brennan, in his dissenting opinion, admonished the Court for its contrived narrowing of *Flast* to challenges of Congressional spending power, noting the inherent contradiction of the Court's artificial distinction between the two cases.[68] Specifically, he noted that in *Flast* the plaintiffs challenged the executive action of the Department of Health, Education and Welfare, exactly as in *Valley Forge*.[69] Justice Brennan offered a scathing rebuke of the majority's abstruse reading of *Flast* and federal standing doctrine in public actions, accusing the Court of "attempt[ing] to distinguish this case from *Flast* by wrenching snippets of language from our opinions . . . [and creating] tortuous distinctions . . . [that] are specious,

[62] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

[63] *Id.* at 469.

[64] *Id.*

[65] *Id.* at 484 ("[W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States.").

[66] *Id.* at 485.

[67] *Id.* at 479.

[68] *Id.* at 510 (Brennan, J., dissenting).

[69] *Id.* at 491 ("[T]he [majority] opinion utterly fails . . . to explain why this case is unlike *Flast v. Cohen* . . . and is controlled instead by *Frothingham v. Mellon*.") (citations omitted); *see also id.* at 512 ("Whether undertaken pursuant to the Property Clause or the Spending Clause, the breach of the Establishment Clause, and the relationship of the taxpayer to that breach, is precisely the same."). In fact, the named defendant in *Flast* was Wilbur Cohen, Secretary of the Department of Health, Education and Welfare. Flast v. Cohen, 392 U.S. 83, 85 (1968).

at best: at worst . . . pernicious to our constitutional heritage."[70] Justice Brennan suggested that traditional standing doctrine should be modified to fit the cases—rather than be mechanically followed—in order that the judiciary might redress government wrongdoing that might otherwise go unchecked. This philosophy—mirroring that of Justice Douglas[71] as well as the state courts which have developed public interest standing models[72]—would not ultimately prevail in the federal courts. Instead, the Court, with few exceptions, continued its trend of limited judicial access to plaintiffs in public actions after *Valley Forge*.

B. Hein*: Further Narrowing of the* Flast *Exception to the Preclusion of Federal Taxpayer Standing and the Current State of Public Action Litigation in the Federal Courts*

After *Richardson*, *Schlesinger*, and *Valley Forge*, taxpayer standing in the federal courts appeared permissible only if the plaintiff challenged a government expenditure as violating the Establishment Clause. Moreover, the *Flast* precedent itself seemed to be on shaky ground.[73] It was within this jurisprudential framework that the Court, last Term, decided *Hein v. Freedom from Religion Foundation, Inc.*[74] In *Hein*, the Court held that plaintiff-taxpayers did not have standing under *Flast* because the challenged expenditures were not made pursuant to an Act of Congress, but rather were made under general appropriations to the Executive Branch to fund day-to-day activities.[75]

The executive branch appropriations that the plaintiffs in *Hein* challenged were funding President Bush's White House Office of Faith-Based and Community Initiatives and similar offices in various federal departments; these offices sponsored conferences throughout the country to educate faith-based organizations about the availability of federal funding.[76] The plaintiffs, as federal taxpayers, claimed that the executive branch violated the Establishment Clause by "organizing conferences at which faith-based organizations . . . are singled out as being particularly worthy of federal funding . . . and the belief in God is extolled as

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[70] *Valley Forge*, 454 U.S. at 510 (Brennan, J., dissenting); *see also id.* at 494 n.5 ("When the Constitution makes it clear that a particular person is to be protected from a particular form of government action, then that person has a 'right' to be free of that action; when that right is infringed, then there is injury . . . within the meaning of Art. III.").

[71] *See supra* notes 41–45, 59–61 and accompanying text.

[72] *See, e.g.*, *infra* Parts IV, V.

[73] Note, however, that *Flast* was reaffirmed in Bowen v. Kendrick, 487 U.S. 589, 618 (1988) (holding that, under *Flast*, taxpayers had standing to challenge the constitutionality of the Adolescent Family Life Act, which provided grants conditioned on specific types of counseling to prevent teenage pregnancy).

[74] Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007).

[75] *Id.* at 2566 (plurality opinion).

[76] *Id.* at 2560.

distinguishing the claimed effectiveness of faith-based social services."[77]

Relying on *stare decisis* to "leave *Flast* as we found it,"[78] Justice Alito, writing for a plurality of three Justices, held that the suit did not fall under the narrow exception that *Flast* had created to the traditional rule against taxpayer standing established in *Frothingham*.[79] The Court held that the plaintiffs failed to satisfy the first prong of *Flast*'s nexus test—requiring that there be a nexus between taxpayer status and the type of legislative action attacked—because the challenged expenditures were neither expressly authorized nor mandated by any specific congressional enactment.[80] Not only did the plurality refuse to extend the *Flast* holding to discretionary executive branch expenditures, it also interpreted *Richardson*, *Schlesinger*, and *Valley Forge* as barring taxpayers from challenging acts of executive discretion.[81]

Fearing a flood of litigation in the federal courts, Justice Alito noted that expanding *Flast* to purely executive expenditures would subject every federal action—including conferences and speeches—to a challenge by any taxpayer under the Establishment Clause, since "almost all Executive Branch activity is ultimately funded by some congressional appropriation."[82] Justice Alito noted, as Justice Kennedy did in his concurrence,[83] that there were significant separation of powers concerns inherent in public action litigation.[84] Further, he stated that relaxing standing requirements would lead to an expansion of judicial power, and that "lowering the taxpayer standing bar to permit challenges of purely executive actions 'would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.'"[85]

Justice Scalia, in a vigorous concurrence joined by Justice Thomas, challenged the Court: "Either *Flast* . . . should be applied to (at a minimum) *all* challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated."[86] Justice Scalia himself would choose the latter course,

[77] *Id*.

[78] *Id.* at 2572. Justice Alito noted that *Hein* does not occasion the court to reconsider the *Flast* precedent, since the issue is whether *Flast* should be extended, not whether it should apply. *Id.* at 2571. As Justice Alito asserts, "[i]t is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic. That was the approach that then-Justice Rehnquist took . . . in *Valley Forge*, and it is the approach we take here." *Id.*

[79] *Id.* at 2571–72.

[80] *Id.* at 2566.

[81] *See id.* at 2568–69 (noting that "the *Flast* exception has largely been confined to its facts").

[82] *Id.* at 2569.

[83] *Id.* at 2572 (Kennedy, J., concurring).

[84] *Id.* at 2570.

[85] *Id.* (quoting United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

[86] *Id.* at 2573–74 (Scalia, J., concurring).

effectively overriding *Flast*.[87] Fearing that a liberal taxpayer standing model would "[transform] . . . courts into 'ombudsmen of the general welfare,'"[88] he urged the Court to overrule *Flast*, which he believed created a precedent that was "wholly irreconcilable" with Article III limitations on federal court justiciability.[89]

Justice Souter's dissent, joined by three other Justices, argued that there was no rationale "in either logic or precedent" to the illusory distinction between legislative and executive causation of injury, where standing was granted in the former but not the latter case.[90] Indeed, Justice Souter asserted that both logic[91] and precedent[92] militated that *Flast* be followed. The dissent also questioned why the plurality demonstrated greater deference to executive action than to legislative action.[93] Justice Souter noted that in this unmanageable view of the principle of separation of powers, "if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away."[94]

Thus, *Hein* was yet another in a long line of Supreme Court cases—*Richardson*, *Schlesinger*, and *Valley Forge*, among others—that have denied public action litigation on standing grounds. Moreover, the conservative makeup of the current Court demonstrates that such a rigid formulation of standing in the public action context will be strictly adhered to for years to come. However, the plurality's rationale in *Hein*—in particular, the line it drew in distinguishing the case from *Flast*—was unpersuasive and arbitrary. The plurality in *Hein* was afraid that if the

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[87] *Id.* at 2574. Justice Scalia criticized the plurality for "laying just claim to be honoring *stare decisis* . . . [while simultaneously] beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive." *Id.* at 2584.

[88] *Id.* at 2582 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 487 (1982)).

[89] *Id.* at 2574.

[90] *Id.* at 2584 (Souter, J., dissenting). Justice Brennan, in his *Valley Forge* dissent, voiced similar concern about the Court's distinction between actions of the legislative branch and those of the executive branch:

> [I]t is difficult to conceive of an expenditure for which the last government actor, either implementing directly the legislative will, or acting within the scope of legislatively delegated authority, is not an Executive Branch official. The First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance.

Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 511 (1982) (Brennan, J., dissenting).

[91] *See* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2585 (2007) ("[T]here is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion.").

[92] *See id.* at 2586 ("[In *Bowen*,] we recognized the equivalence between a challenge to a congressional spending bill and a claim that the Executive Branch was spending an appropriation, each in violation of the Establishment Clause.").

[93] *Id.*

[94] *Id.*

plaintiffs were allowed to challenge any federal expenditure on Establishment grounds, then the federal courts would invariably be flooded with claims scrutinizing nearly everything an administration did.[95] But this fear only exists because of the confusion regarding Establishment Clause jurisprudence; the Court has yet to settle on any coherent approach to such cases. Thus, the floodgates fears expressed by the Court are a result of its own doing, and can only be ameliorated by clearer, more consistent rules regarding standing in public action cases.

The line drawn by the Court followed only by three Justices comprising the plurality shows the Court's tendency to ground its decisions too much in precedent as opposed to constitutional principle and coherence.[96] Rather than defending the line he has drawn, Justice Alito merely argued that the language in *Flast* appeared to distinguish congressional and executive actions, and that subsequent cases—*Richardson*, *Schlesinger*, and *Valley Forge*—have incorporated such a distinction.[97] Although the distinction between congressional and executive expenditures is illusory,[98] it seems this was the only decision the Court could have made given the logic it followed—adhering strictly to the doctrine of *stare decisis*.[99] However, the premise underlying such a distinction is inherently flawed. Notably, a provision in the Constitution's Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[100] This mandates that expenditures from the Treasury must be approved by statute to ensure democratic accountability. Therefore, for an executive program to be funded, it must, in essence, be a congressional program as well. So, what logically follows is that if *all* government expenditures owe their legitimacy to congressional authorization, it makes no sense to distinguish between expenditures Congress explicitly directed and those which arise from executive discretion.

The impact *Hein* will have on the Court's jurisprudence in public action litigation is clear. This precedent leaves open an area of government action that likely cannot be challenged in the federal courts. It forecloses an entire class of individuals from suing for violations of the

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[95] *See id.* at 2569 ("Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation or speech—to Establishment Clause challenge by any taxpayer in federal court.").

[96] *See supra* notes 86–94 and accompanying text.

[97] Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2568–69 (2007).

[98] *See supra* notes 90–94 and accompanying text.

[99] *See Hein*, 127 S. Ct. at 2569 (noting that such a distinction between executive and legislative action had already been made by the Court in *Valley Forge*).

[100] U.S. CONST. art. I, § 9, cl. 7.

Establishment Clause.[101] Moreover, although the Court did not formally overturn *Flast*, in effect it weakened it to such a degree that it has become virtually inapplicable and irrelevant. The Court allowed for a bypass that routes around *Flast*—that is, general appropriations can be provided to executive departments that, in their discretion, may be used to support religious programs. This incentivizes Congress to avoid explicitly expressing its policy choices, acting instead covertly through executive discretion in order to fall under the auspices of *Hein* rather than *Flast*. Also, this would allow the executive branch to enact policy choices simply by deciding how to spend a blank check offered by Congress. This outcome and the lessening of congressional accountability that would result from the increase in disbursing money as general appropriations rather than through congressional spending would undermine separation of powers and non-delegation principles. Thus, the Court's dubious line-drawing in *Hein* raises serious concerns about the federal standing model and its unevenness in adjudicating public interest actions.

With these concerns revealed, the rest of this Note will explore the spectrum of standing doctrines in the states, with particular emphasis on those states which utilize liberal approaches to public interest actions.

III. STATE SYSTEMS OF STANDING: A SPECTRUM OF DOCTRINES AND POLICY CONSIDERATIONS

A. *Overview of State Standing Doctrines and Introduction to Public Interest Standing in the States*

Unlike federal taxpayers in federal courts, municipal taxpayers and state taxpayers in nearly every state have standing to sue in public action cases, with variations by jurisdiction in terms of the source and content of such taxpayer standing requirements.[102] Moreover, many states also have common law-derived alternative standing doctrines that allow citizens or taxpayers to sue on behalf of the public interest in cases involving issues of great constitutional importance.[103]

State courts are not bound by Article III,[104] and, as such, many state standing doctrines diverge from the federal model of standing discussed in

[101] The states discussed in Parts IV and V address the issue of whether such a foreclosure, in fact, *necessitates* judicial review. *See infra* Parts IV, V.

[102] *See* Hershkoff, *supra* note 4, at 1854–55 (noting that taxpayers in almost every state can challenge public expenditures without a showing of a particularized injury).

[103] *See infra* Parts IV, V.

[104] *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability.").

Part II of this Note.[105] These states maintain some form of injury-based standing as a threshold test of justiciability,[106] but differ from the federal system by, for example, issuing advisory opinions,[107] granting standing to taxpayers challenging the misuse of public funds,[108] resolving moot disputes,[109] and authorizing citizen standing in matters of significant public importance, which is the focus of this Note.[110]

In granting public interest standing, these jurisdictions focus on, among other factors, both the character of the issue and the character of the litigant to determine whether or not to grant standing to a non-Hohfeldian litigant. The character of the issue factor queries whether the issue is of great public or constitutional importance and whether there is a pressing need to get the particular public interest vindicated by the judiciary. The character of the litigant factor deals with the capacity of the putative plaintiff to be the best advocate for the public interest involved, both in the sense that he or she shows a connection with the question presented, and he or she possesses the competence and seriousness necessary to be a good advocate. It also considers whether the provision in question would go unchallenged if such plaintiff were denied standing.

Public interest standing doctrines vary by state as a result of differences in historical developments, economic and social considerations, states' governing structures, and states' jurisprudential concerns. Despite the differences, these state courts share a commitment, within a discretionary framework, to vindicating shared constitutional interests where legislative activity or executive action or inaction have led to injuries that are not specific to individual litigants, but rather where "the legal right [the litigants] seek to enforce is not the correlative of a legal

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[105] *See supra* Part II. Despite the divergent trend in many states, a number of jurisdictions adhere to a strict injury-based standing analysis that derives in part from the Article III federal model. *See, e.g.,* Ferguson Mech. Co., Inc. v. Dep't of Pub. Works, 282 Conn. 764 (2007); Goto v. D.C. Bd. of Zoning Adjustment, 423 A.2d 917 (D.C. 1980); Henderson v. Miller, 592 N.E.2d 570 (Ill. App. Ct. 1992); Mich. Citizens for Water Conservation v. Nestlé Waters N. Am., Inc., 479 Mich. 280 (2007); City of Chattanooga v. Davis, 54 S.W.3d 248 (Tenn. 2001); Goldman v. Landsidle, 262 Va. 364 (2001).

[106] *See, e.g.,* Utah Chapter of Sierra Club v. Utah Air Quality Bd., 148 P.3d 960, 972 (Utah 2006).

[107] *See* Hershkoff, *supra* note 4, at 1844–52 (discussing state courts that issue advisory opinions).

[108] *See supra* note 102 and accompanying text.

[109] *See* Hershkoff, *supra* note 4, at 1859–61 (discussing state courts that resolve moot disputes).

[110] *See, e.g.*, Trustees for Alaska v. State, 736 P.2d 324 (Alaska 1987); Sears v. Hull, 961 P.2d 1013 (Ariz. 1998); Ho'opulapula v. Bd. of Land and Natural Res., 143 P.3d 1230 (Haw. 2006); State *ex rel*. Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978 (Ind. 2003); Tax Equity Alliance for Mass. v. Comm'r of Revenue, 672 N.E.2d 504 (Mass. 1996); Stewart v. Bd. of County Comm'rs of Big Horn County, 573 P.2d 184 (Mont. 1977); Cunningham v. Exon, 276 N.W.2d 213 (Neb. 1979); State *ex rel*. Clark v. Johnson, 904 P.2d 11 (N.M. 1995); State *ex rel*. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999); State *ex rel*. Howard v. Okla. Corp. Comm'n, 614 P.2d 45 (Okla. 1980); Sprague v. Casey, 550 A.2d 184 (Pa. 1988); Stumes v. Bloomberg, 551 N.W.2d 590 (S.D. 1996); Jenkins v. Swan, 675 P.2d 1145 (Utah 1983); Wash. Natural Gas Co. v. Pub. Utility Dist. No. 1 of Snohomish County, 459 P.2d 633 (Wash. 1969).

duty owed to them."[111]

State courts with public interest standing doctrines have been successful in balancing the need to address important constitutional issues with the need to limit the judiciary's interference with other branches of government.[112] The proliferation of alternative judicial practices in these states raises questions about conventional assumptions regarding judicial capacity and restraint, the role of courts in the interpretation and enforcement of constitutional norms, and the idea of inherent limitations to adjudication.[113] What is it about the state judiciary, or more generally the governing structure of the states, that make state courts more hospitable to a public interest standing model than the federal courts? An analysis of prudential and policy considerations is necessary to adequately address this inquiry.

B. *Policy Considerations: Differences between Federal and State Courts*

1. *Textual Differences between Federal and State Constitutions*

The constitutional source of federal justiciability doctrine rests in Article III's "case or controversy" requirement, which the Court has interpreted as restricting the business of federal courts to "questions presented . . . in a form historically viewed as capable of resolution through the judicial process."[114] However, state courts have noted that the "case or controversy" requirement in Article III does not exist in many state constitutions, and that such states are not bound by the same justiciability

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[111] Hershkoff, *supra* note 4, at 1854. Conversely, in the federal courts, constitutional and prudential limitations, reflecting separation of powers concerns, have led to a policy of denying standing in cases where the vindication of public rights is sought without evidence of direct injury to the litigant. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) ("[I]gnoring the concrete injury requirement . . . would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch . . . . Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.").

[112] Hershkoff, *supra* note 4, at 1854. "Because state constitutions include many substantive social and economic provisions, taxpayer [and citizen] standing provides an important mechanism for regulatory enforcement and policy elaboration . . . . It also affords state courts opportunities to reshape government structures in light of evolving needs." *Id.* at 1855 (footnote omitted).

[113] The Supreme Court itself has acknowledged the legitimacy of granting standing in cases of great public importance, where direct injury may be untenable: "There would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime." Raines v. Byrd, 521 U.S. 811, 828 (1997). *See generally* INTERNATIONAL ACADEMY OF COMPARATIVE LAW, STANDING TO RAISE CONSTITUTIONAL ISSUES: COMPARATIVE PERSPECTIVES (Richard S. Kay ed., 2005) (detailing the standing doctrines of twelve countries in the context of challenges regarding the constitutionality of government acts, including countries with doctrines similar to the public interest standing doctrines in the states, such as Canada, which has a discretionary doctrine that grants standing to litigants in cases where such litigants possess no particularized, concrete injury distinct from the general public).

[114] Flast v. Cohen, 392 U.S. 83, 95 (1968).

limitations as their federal counterparts.[115] Accordingly, the absence of Article III language, or its functional equivalent, is taken to correlate with an increase in the scope of judicial review related to legislative and executive actions in states with liberal standing doctrines.[116]

Many state courts diverge even further from Article III jurisprudence as a result of additional textual differences. For example, some state constitutions possess "open court" provisions that guarantee public access to the courts and restrict the state legislature's power to regulate judicial authority.[117] Moreover, unlike the federal Constitution, every state constitution has gone through substantial amendment over the years, and thus explicitly provides for more public rights and interests that state courts must accordingly interpret and enforce.[118] Consequently, many commentators agree that "these new forms of property have 'generated pressure to increase judicial control of administrative conduct beyond what could be fairly assimilated within the Hohfeldian framework' that current federal justiciability doctrine accepts."[119]

2. *Electoral Accountability of State Judges*

As explained in Part II of this Note, the separation of powers doctrine has historically played an essential and often dispositive role in the federal system of standing.[120] The significance of the separation of powers policy in federal justiciability doctrine is based, in part, on the institutional structure of the federal government, namely that of a single President aided by administrative agencies, a bicameral Congress elected by majoritarian process, and Article III courts that are unelected, independent, and (theoretically) apolitical.[121]

State government institutions differ markedly from the federal structure, and thus the separation of powers doctrine plays a different, far less pivotal role in state courts' systems of standing.[122] For example, state

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[115] *See, e.g.*, Fernandez v. Takata Seat Belts, Inc., 108 P.3d 917, 919 (Ariz. 2005) ("We have previously concluded that 'the question of standing in Arizona is not a constitutional mandate since we have no counterpart to the case or controversy requirement of the federal constitution' . . . and thus, when addressing questions of standing 'we are confronted only with questions of prudential or judicial restraint.'") (quoting Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona, 712 P.2d 914, 919 (Ariz. 1985)); Keller v. Flaherty, 600 N.E.2d 736, 738 (Ohio Ct. App. 1991) ("Ohio has no constitutional counterpart to Section 2, Article III.").

[116] *See infra* Parts IV, V.

[117] Hershkoff, *supra* note 4, at 1880.

[118] *Id.* at 1881.

[119] *Id.* at 1882 (quoting Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 279–80 n.14 (1984)).

[120] *See supra* Part II (discussing the key Supreme Court decisions from the last eighty-five years that shaped the federal standing model in the realm of public interest actions).

[121] Hershkoff, *supra* note 4, at 1883.

[122] *Id.* at 1886 ("Although separation of powers shows marked variation in the fifty states, one can draw general distinctions between the state systems and the federal system that implicate justiciability and challenge many of the assumptions underlying federal doctrine as applied to state courts.").

court judges are perceived as more actively engaged in the political process than their Article III federal counterparts because they are popularly elected in all but a few jurisdictions,[123] have often had prior legislative experience as state legislators, and participate to a greater degree in shaping the law.[124] Hence, the court system carries a "democratic portfolio."[125] Generally speaking, state court judges—many of whom are without the protection of a life tenure—are more politically dependent than federal court judges.[126] Further reflecting the political accountability of state judges is the fact that state judicial districts tend to be smaller than their federal equivalents.[127] Accordingly, state judges are likely to be more closely tied to their local communities and respond more actively to local issues.[128] Because state judges are closer to and more familiar with local problems, and are the products of local political processes, they may be better equipped than federal judges to work effectively with other branches of government in developing new constitutional resolutions and to deal with the fiscal ramifications of such decisions.[129]

An elected judiciary, among other factors, also provides for state

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Professor Hershkoff notes that the balance of power among the branches of government within the states' governing systems tends to be more diffuse than that of the federal governing system, which emphasizes the importance of clear delineations among the branches: in states, "[p]ower is instead diffused horizontally across the branches, as well as vertically between the states and myriad local units, reflecting . . . a 'principle of shared, rather than completely separated powers . . . a system of separateness with interdependence, autonomy with reciprocity.'" *Id.* at 1905 (quoting Shirley S. Abrahamson, Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence, Washington D.C., (Dec. 13, 1996), 12 ST. JOHN'S J. LEGAL COMMENT. 69, 71 (1996)).

[123] Hershkoff, *supra* note 18, at 1158; *see id.* ("The fact of judicial election . . . alter[s] the political vulnerability of state judges, subjecting them to a kind of popular veto that in theory sets a boundary or tether on judicial decisionmaking.").

[124] *See* Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 414 (1999) ("Thirty-nine of the fifty states presently provide a measure of political accountability for judges through some form of election."); Hershkoff, *supra* note 4, at 1939 ("The local and populist decisionmaking devices that characterize nonfederal lawmaking increase the opportunities for factions to seize control of political power, necessitating oversight that might include judicial review."); Hans A. Linde, *The State and Federal Courts in Governance: Vive La Difference!*, 46 WM. & MARY L. REV. 1273, 1286 (2005) ("[S]tate courts are closer to politics than their federal colleagues, whether the state judges are elected or appointed.").

[125] Hershkoff, *supra* note 4, at 1887.

[126] *Id.*; *see also* John C. Reitz, *Standing to Raise Constitutional Issues as a Reflection of Political Economy*, *in* STANDING TO RAISE CONSTITUTIONAL ISSUES: COMPARATIVE PERSPECTIVES 257, 285 (Richard S. Kay ed., 2005) ("Most state court judges are elected for terms, rather than appointed for life like the federal judges, making them arguably more democratically responsive and more suitable to wield the expanded lawmaking power, which liberal standing rules confer.").

[127] Hershkoff, *supra* note 18, at 1887.

[128] *Id.* at 1168.

[129] *Id.*; *see* Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 976 (1985) ("[S]tate judges are systematically exposed to and experienced in the legal institutions of their states . . . . [and] are much more likely than are their federal counterparts to know or be able to learn readily what is out there, how it came to be, and how well or badly it works.").

courts' "inherent" or "plenary" authority.[130] While federal district courts—which only possess jurisdiction authorized by Congress pursuant to Article III, Section 1 of the federal Constitution[131]—have limited and constrained authority, state judicial power is more expansive in scope and breadth. The idea of a state judiciary's inherent authority lends credibility and democratic legitimacy to a state court's independent and activist role in shaping public policy and engaging in public interest decision-making.[132] Thus, even where a state constitution or statutory scheme does not provide for an explicit grant of jurisdiction, a state court's plenary power gives it a persuasive rationale for expanding its jurisdictional scope to cases involving non-Hohfeldian litigants.

3. *Prevalence of Positive Rights in State Constitutions*

There is a greater specificity in state constitutional provisions relative to federal provisions; that is, state constitutions provide for positive rights that mandate action on the part of the state government, whereas the federal Constitution only provides negative rights by restraining government action as a means of addressing issues of federalism and separation of powers.[133] State constitutions address a wider range of social and economic issues than the federal Constitution, including public schooling, welfare, and environmental regulation.[134] These state provisions encourage and often depend upon judicial involvement for their interpretation and enforcement. In fact, many state courts display a willingness to grant standing in cases where a litigant does not suffer a direct injury but where judicial review is otherwise necessary because the case involves "a controversy [that] is of substantial public importance, immediately affect[ing] significant segments of the population, and [that] has a direct bearing on commerce, finance, labor, industry, or agriculture."[135]

While federal justiciability doctrine reflects deference to Congress and the Executive regarding policymaking and enforcement, state courts are

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[130] Hershkoff, *supra* note 4, at 1888.

[131] "The judicial Power of the United States, shall be vested in one supreme Court, and *in such inferior Courts as the Congress may from time to time ordain and establish*." U.S. CONST. art III, § 1 (emphasis added).

[132] *See* Hershkoff, *supra* note 4, at 1888 ("[S]tate courts emphasize the importance of such [plenary] authority to maintaining their independence relative to the other branches and to the people.").

[133] *See id.* at 1889–90 ("[B]ecause state constitutions often include positive rights and regulatory norms, their texts explicitly engage state courts in substantive areas that have historically been outside the Article III domain.").

[134] *Id.* at 1839.

[135] Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 83 P.3d 419, 424 (Wash. 2004); *see* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972) ("State courts settle contests over public offices, pass on the propriety of proposed public expenditures and even of proposed constitutional amendments, often at the suit of mere 'taxpayers.'").

often more engaged in these aspects of governance.[136] This is due in large part to the fact that state constitutions reflect less faith in state legislatures than the federal Constitution does in Congress; state constitutions tend to impose substantive and procedural requirements on legislative activity, often seen in the area of state fiscal authority.[137] Also, through popular mechanisms such as referendums and initiatives, state constitutions are more easily amendable than the federal Constitution.[138] Through such amendments, state constitutions have expanded the list of rights and interests that state courts may interpret.[139] Accordingly, a state legislature's failure to adhere to such explicit constitutional demands invokes the judiciary's role as an elaborator of the constitutional mandate and vindicator of the public interest.[140] Therefore, state courts play a pivotal role in the vindication of public rights and the public interest by being more actively engaged in protecting the people from government's constitutional violations.

4. *Lack of Federalism Concerns in State Courts*

Federalism deals with the proper boundary between national and state or local governmental affairs. The federalist structure of government—that is, the distinctive vertical power division between the federal and state governing institutions—is implicated in various provisions of the federal Constitution.[141] The Supreme Court has traditionally adhered to the recognition of federalist constraints and the principle of comity that favors state sovereignty over federal judicial authority.[142] Article III judicial restraint in the area of state sovereignty serves federalism values by

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[136] Hershkoff, *supra* note 4, at 1891–92.

[137] *See id.* at 1894 ("[S]uch provisions alter the dynamics of lawmaking, implicating the state courts in the resolution of certain governance questions that are largely outside the Article III experience.").

[138] *See* Hershkoff, *supra* note 4, at 1888 (citing John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 13 (1988)).

[139] Hershkoff, *supra* note 4, at 1881. Conversely, the federal Constitution "leaves the vast majority of social decisions to elected officials. It does not specify whether taxes should be high or low. It neither requires nor forbids governments to offer welfare benefits . . . [and] [i]t does not specify what government departments should exist and how they should be structured; that is for Congress to decide." Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 125 (2007) (citations omitted).

[140] *See* Hershkoff, *supra* note 18, at 1156 ("Unlike federal courts, state courts are frequently counted on to resolve constitutional questions that implicate the courts directly in day-to-day political issues and that encourage them to act as interdependent members of state government.") (internal quotation omitted).

[141] For example, Article I states that "[a]ll legislative Powers herein granted shall be vested in . . . Congress." U.S. CONST. art. I, § 1. The implication is that Congress can act only if there is clearly vested authority, with all other governance left to the states. Further clarifying this and other federalist implications within the Constitution, the Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[142] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 713–15 (1999) (noting that the federal system created by the Constitution preserves the sovereign status of the states).

promoting self-governance and accountability.[143]

While federalism exists on the federal level to temper the scope of federal courts' judicial review, it does not have such an effect on state courts.[144] The decision of a particular state court, which binds only the people of that state, is viewed as having more democratic legitimacy and local relevance than the decision of its Article III federal counterpart.[145] Moreover, a state court's ruling often fosters public dialogue between the branches of state government and the people, whereas the "finality of federal constitutional adjudication" often tends to halt public discourse in its tracks.[146]

State constitutions are readily subject to revision through a number of procedural mechanisms absent from Article V in the U.S. Constitution,[147] such as the citizen initiative, which allows a minority of a state's electorate to put a proposed constitutional change on the ballot for consideration by the entire electorate.[148] Consequently, state court judges exercise, in the words of one commentator, "a greater willingness to experiment with legal norms, on the assumption that their judgments comprise only the opening statement in a public dialogue with the other branches of government and the people."[149] Such a judicial approach explains the prevalence in state courts of public interest litigation challenging the constitutionality of government actions.

As this analysis has demonstrated, the prevalence of public interest standing in state courts is a result of the extent to which the states' governing institutions and the balance of such institutions often differ markedly from that of the federal structure. It is with this as a background that the next parts of this Note—Parts IV and V—explore the characteristics of select states' public interest standing doctrines through an in-depth case study.[150]

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[143] Hershkoff, *supra* note 4, at 1900–01.

[144] *See* Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 278 (1998) ("Whereas states occupy an essential role in the American constitutional system, there is no equivalent principle of federalism . . . in state constitutionalism."); *see also* Hershkoff, *supra* note 18, at 1168 ("State courts themselves cite an absence of federalism concerns, to justify both their enforcement of positive rights . . . and their use of non-Article III interpretive techniques.").

[145] Hershkoff, *supra* note 4, at 1902.

[146] *See id.* ("State courts can thus serve an agenda-setting function that produces greater democratic discourse and encourages the participatory values associated with federalism."); *see also* Hershkoff, *supra* note 18, at 1169 ("[S]tate courts, working collaboratively with the elected branches, afford citizens greater opportunities to participate in the process of governance.").

[147] *See* U.S. CONST. art. V (requiring either two-thirds of both Houses of Congress or an application from two-thirds of the states to propose a constitutional amendment, and further requiring three-fourths of the states by legislative vote or by convention for such constitutional amendment to be ratified).

[148] Hershkoff, *supra* note 18, at 1163 (discussing the citizen initiative).

[149] *Id.* (internal citation omitted).

[150] *See infra* Parts IV, V. The case study approach by which these Parts are framed is unique to the area of state justiciability research. As Professor Hershkoff stated, "[f]uture empirical research

IV. PUBLIC INTEREST STANDING IN SELECT STATES: *CHARACTER OF THE ISSUE* AS BASIS FOR JUSTICIABILITY

As Part II showed, the Supreme Court's constrained approach to public actions sweeps so broadly that it renders some constitutional provisions judicially unreviewable and thus futile as limitations on government power. Conversely, the state courts surveyed in Parts IV and V display a common jurisprudential thread grounded in the rationale that the courts *must* hear those public interest cases meeting the criteria of their respective public interest standing doctrines in order to ensure that portions of the state constitutions are not left unenforceable. The doctrines demonstrate the idea that judicial review is a necessary component of the states' systems of limited government powers; there would be no effective check on the elected branches without such review.[151] Though this public rights approach is unlikely—and perhaps even unfit—to be applied in the federal courts, it seems an appropriate approach in the states in cases where the constitutional provision at issue protects societal rights, rather than merely individual rights.[152] Through the use of public interest standing models, this approach limits judicial review in public actions to circumstances where it is necessary to protect collective, societal rights while simultaneously ensuring that constitutional limitations on governmental power are judicially enforced.[153]

The states that possess public interest standing doctrines focus on various factors by which to grant or deny public interest standing under their respective models. These factors form a mosaic by which the courts use their discretion to balance the competing interests involved in the context of public interest cases. While the courts often weigh the multiple factors equally, the states selected for the purposes of this Note can be used to illustrate two key factors—the character of the issue and the character of the litigant.

New Mexico and Ohio are two states that aptly illustrate the first

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could usefully focus on the extent to which states currently exercise nonfederal approaches to justiciability doctrine, and the relation between existing state institutional structures and the scope of the judicial function." Hershkoff, *supra* note 4, at 1842.

[151] *See* Jaffe, *supra* note 18, at 1284 ("Intervention in [public actions] may rest not so much on the 'judiciality' of the issue as on the lack of an alternative forum: When the claimant is not likely to obtain justice elsewhere, the judiciary is justified in running the risks of straining its competence.").

[152] The fact that public interest standing models work in the states, whereas there is no equivalent in the federal system, is likely the result of the differences between state and federal courts discussed in Part III, *supra*. *See also* Lawrence Gene Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1391 (1978) ("[I]ts defense must lie in characteristics of the state courts, ostensibly not shared by the federal courts—familiarity with local conditions and state law, the ability to fashion rules and relief confined in scope to their own states, [and] closeness to the state's legislative and political processes.").

[153] *See* Hershkoff, *supra* note 4, at 1919 ("Granting standing or hearing some other form of public action also has expressive value, conferring status and legitimacy on self-defined groups of litigants, with consequent positive effects on public discourse and public policy.") (internal citations omitted).

factor—the character of the issue as a basis for the determination of whether to grant or deny standing to non-Hohfeldian litigants in public interest cases. This factor deals with (1) whether the issue involved in the litigation is of great public or constitutional importance, and (2) whether there is a great public need to have the interest or rule vindicated by the judiciary, as opposed to leaving the issue to be addressed through the political process.[154] Thus, a balancing of competing interests and a weighing of costs and benefits to both the public and to the judiciary—its independence and autonomy—are considered by these state courts on a case-by-case basis in the implementation of their discretionary standing doctrines.

A. *New Mexico: Public Importance Doctrine*

As a well-established exception to its traditional doctrine of injury standing, New Mexico's "public importance doctrine" provides a discretionary grant of standing for private parties who otherwise lack standing under the traditional framework.[155] The doctrine offers private litigants—as taxpayers, citizens, or voters—an opportunity to present to the judiciary a grievance that may be generalized in nature. However, for the issue to be of sufficient "public importance," it must involve a government action that allegedly interferes with "the essential nature of state government guaranteed to New Mexico citizens under their Constitution—a government in which the 'three distinct departments, . . . legislative, executive, and judicial,' remain within the bounds of their constitutional powers."[156] Thus, New Mexico's judiciary has developed a doctrine that, while limited by separation of powers concerns, provides it with a more active role than its federal counterpart in the adjudication of cases involving the public interest.

In *State ex rel. Clark v. Johnson*, the New Mexico Supreme Court granted standing to plaintiffs on the basis of the fundamental importance of the constitutional issues involved.[157] The court held that it had jurisdiction

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[154] In one of his well-known articles, legal scholar Louis L. Jaffe proposed a similar scheme of judicial discretion in public actions based on the character of the issue:

> We might look for our discriminant to the character of the claim asserted. Since the moving party is a citizen, the suit may be most appropriate when he purports to assert interests which are of peculiar citizen concern. "Citizen concern" might be conceived of in terms of demands for the enforcement (1) of norms generally accepted as appropriate for the proper day-to-day conduct of government, or (2) of norms basic to the political and social process and to the citizen's participation in it, particularly where the political process itself does not reliably enforce the claim.

Jaffe, *supra* note 18, at 1296.

[155] State *ex rel*. Clark v. Johnson, 904 P.2d 11, 17–18 (N.M. 1995).

[156] State *ex rel*. Coll v. Johnson, 990 P.2d 1277, 1284 (N.M. 1999) (quoting N.M. CONST. art. III, § 1).

[157] *Clark*, 904 P.2d at 18.

to issue a writ of mandamus and a declaratory judgment in a case where the plaintiffs—in their capacity as voters and taxpayers of the state—sought, under the Indian Gaming Regulatory Act (IGRA), to preclude the governor from implementing gaming compacts and revenue sharing agreements entered into with Indian tribes and pueblos.[158] The plaintiffs alleged that the governor lacked the constitutional authority to commit the state to the compacts and agreements because he was attempting to exercise legislative authority contrary to the state constitution's separation of powers doctrine.[159] The court concluded that the public importance doctrine applied since the plaintiffs asserted that the governor had exercised the state legislature's authority, in direct violation of the constitutionally-based separation of powers requirement.[160] Highlighting one of the underlying discretionary justifications for the public importance doctrine, the court noted that in resolving the constitutional issues involved, it would "contribute to this State's definition of itself as sovereign."[161] *Clark* serves as an example of a state court's active role in policing the boundaries within a constitutional system of government.

Similarly, in *State ex rel. Taylor v. Johnson*, the court granted standing under the public importance doctrine to private litigants in an action for mandamus, challenging the power of the executive branch, specifically the Governor and Secretary of New Mexico Human Services Department, to effect an overhaul of the state's public assistance system without legislative participation.[162] The case involved an issue of constitutional magnitude: whether the executive branch had exceeded its constitutional authority in enacting and implementing welfare regulations, in violation of the state constitution's separation of powers doctrine.[163] Thus, the court noted that the case—rather than involving the merits of public assistance reform—concerned the "sanctity of the New Mexico Constitution and the judiciary's obligation to uphold the principles therein."[164] Drawing a comparison with *Clark*, the court applied the public importance doctrine in granting standing to the plaintiffs, noting that where the government actors' actions implicate separation of powers considerations, and where "[t]he balance and maintenance of governmental power is of great public concern," the application of such doctrine is appropriate where traditional standing might not exist.[165] This decision, as with the decision in *Clark*, highlights the New Mexico judiciary's active role in adjudicating issues of

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[158] *Id.* at 17–19.
[159] *Id.* at 15.
[160] *Id.* at 18.
[161] *Id.*
[162] State *ex rel.* Taylor v. Johnson, 961 P.2d 768, 771 (N.M. 1998).
[163] *Id.*
[164] *Id.*
[165] *Id.* at 773.

constitutional import, especially where the resolution of such issues affect a majority of citizens and where the government action at issue implicates the separation of powers doctrine.

However, due to the activist approach that the court takes in *Clark* and *Taylor*, these decisions could be construed as resembling advisory opinions, an illegitimate form of judicial review in New Mexico.[166] Thus, while the public importance doctrine is theoretically sound and objective, in practice it leaves a great deal—perhaps too much—discretion in the hands of judges, where somewhat subjective line-drawing inevitably occurs in distinguishing between those public actions worthy of adjudication and those that are not. Another concern is that in deciding whether the doctrine applies, judges must be sure to separate the issue of standing from the merits of the case, a difficult task for any adjudicator. Despite these concerns, the benefits of the doctrine—increasing judicial access to those who present issues of public import, interpreting the constitution and ensuring that such constitution is adhered to by government actors—outweigh the potential for abuse and overreaching by the judiciary. Moreover, despite the New Mexico judiciary's openness toward non-Hohfeldian litigants, it has expressed a cautious approach to the invocation of the public importance doctrine. The New Mexico Supreme Court, for instance, has conveyed that if a litigant's generalized allegation of governmental wrongdoing did not involve a clear legal duty on the part of the government to execute the actions he or she sought to be performed, public interest standing would not be granted.[167] Thus, despite some concerns as to its application, the case law indicates that New Mexico has maintained a doctrine of public interest standing which successfully limits judicial review in public actions to circumstances where it is necessary to protect the collective rights of its citizens.

B. *Ohio: Public Right Doctrine*

In its "public right doctrine," Ohio recognizes an expansive, liberal standing definition as an alternative to its traditional injury standing model.[168] The doctrine applies where the object of a mandamus and/or prohibition action is to procure the enforcement or protection of a public right (as opposed to a purely private right), such as where a plaintiff asserts that a coequal branch of government has exceeded its constitutional

[166] U S W. Commc'n, Inc. v. N.M. State Corp. Comm'n, 965 P.2d 917, 920 (N.M. 1998).

[167] *See, e.g.*, State *ex rel*. Coll v. Johnson, 990 P.2d 1277, 1284 (N.M. 1999) (holding that plaintiffs—state legislators, private citizens and a non-profit corporation—did not have standing under the public importance doctrine to challenge the legality of legislation authorizing Indian gaming in the state).

[168] State *ex rel*. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1082–83 (Ohio 1999).

authority.[169] In such a public action, it is sufficient that the litigant is an Ohio citizen and by extension interested in the proper execution of state laws.[170] Ohio courts have applied the public action doctrine with restraint, however, invoking it only in those "exceptional circumstances that demand early resolution."[171]

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, the Ohio Supreme Court granted standing under the public right doctrine to organizations and private citizens in a mandamus action challenging the constitutionality of a legislative enactment amending statutes and rules relating to tort and other civil actions.[172] The court noted that in the federal system of standing, the necessity of showing actual injury exists regardless of whether the plaintiff seeks to enforce a private or public right.[173] The court added, however, that because Ohio state courts are not bound by limitations upon standing imposed by the U.S. Constitution, they are "free to dispense with the requirement for injury where the public interest so demands."[174]

When issues sought to be litigated are of great public importance or interest, it has been the court's long-standing practice to entertain a public action where no rights or obligations peculiar to named plaintiffs are involved.[175] In granting plaintiffs standing, the court in *Sheward* concluded that the instant case was a "public action" in that the plaintiffs had alleged that the legislature had attempted to usurp the judiciary's power through its attempt at reforming the state's tort system.[176] Thus, the citizenry's interest in keeping the state's judicial power in the hands of the judiciary, where it had been constitutionally vested by the people, was invoked.[177] Moreover, the case dealt with an issue of "great public importance," in that it involved a challenge to the constitutionality of legislative enactments on the grounds that such enactments directly and

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[169] *Id.* at 1083.

[170] *Id.* at 1083; *see also* State *ex rel*. Meyer v. Henderson, 38 Ohio St. 644, 649 (1883) ("[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator need not show that he has any legal or special interest in the result.").

[171] *Sheward*, 715 N.E.2d at 1111 (Pfeifer, J., concurring); *see also* Jaffe, *supra* note 18, at 1314 ("[T]he public action is conceived as an action to vindicate the general public interest. Not all alleged illegalities or irregularities are thought to be of that high order of concern.").

[172] *Sheward*, 715 N.E.2d at 1084–85.

[173] *Id.* at 1081.

[174] *Id.*

[175] *See, e.g.*, State *ex rel*. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1083 (Ohio 1999). ("[T]he public action is *fully conceived* in Ohio as a means to vindicate the general public interest.") (emphasis added); State *ex rel*. Newell v. Brown, 122 N.E.2d 105, 107 (Ohio 1954) ("Where a public right . . . is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship relation to such public right. This doctrine has been *steadily adhered to* by this court over the years.") (emphasis added).

[176] *Sheward*, 715 N.E.2d at 1084.

[177] *Id.*

broadly operated to deny the courts of judicial power.[178]

Sheward demonstrates the active role of the Ohio court system in the adjudication of public interest cases, especially when separation of powers concerns are raised. However, *Sheward* might also be interpreted as a power struggle between the judiciary and the legislature over the issue of tort reform. The court may have acted more out of a fear of losing its power than out of a desire to vindicate the public interest. Again, as with New Mexico's public importance doctrine, Ohio's public right doctrine vests a great deal of discretion with the judiciary, for better or for worse. Additionally, it might be argued that the doctrine fails to adequately separate the issue of standing from the merits of the case—of course, such a distinction might be impractical in determining standing in public action cases.

The public right doctrine was also applied in *State ex rel. Newell v. Brown*, a case involving a litigant—as citizen, taxpayer, and elector—who filed an action in prohibition seeking to prevent the Ohio Secretary of State and the members of the county board of elections from placing the names of certain candidates for the office of various judgeships on ballots.[179] The court asserted that "as a matter of public policy, a citizen of a community does have such an interest in his government as to give him the capacity to maintain a proper action to enforce the performance of a public duty affecting himself as a citizen and citizens generally."[180] Because the plaintiff was a citizen of the state, because the issue—the constitutionality of the actions of public officials—was a public right of great public import, and because the relief sought was the enforcement of a public duty by such public officers, the court granted standing to the plaintiff to hear the merits of the case. Although it is possible that a litigant more directly affected by the government action, such as an opposing candidate, might have been a more appropriate litigant, there is no indication in the opinion that such a litigant had brought or was likely to have brought the claim. Furthermore, because the election was to occur within a month of this decision, it appears that the court was not, in light of "public policy," willing to wait for another litigant to bring the claim. Thus, this seems a prudent decision, fitting the public right doctrine's designation of an "exceptional circumstance[] that demand[s] early resolution."[181]

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[178] *Id.* at 1104.

[179] *Newell*, 122 N.E.2d at 106. Similarly, in the context of a taxpayer action, the court held that the plaintiff-taxpayer had standing to enforce the public's right to the proper execution of city charter removal provisions, regardless of any private or personal benefit he may have gained. State *ex rel.* Cater v. North Olmsted, 631 N.E.2d 1048, 1055 (Ohio 1994).

[180] *Newell*, 122 N.E.2d at 107.

[181] State *ex rel*. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1111 (Ohio 1999) (Pfeifer, J., concurring).

V. PUBLIC INTEREST STANDING IN SELECT STATES: *CHARACTER OF THE LITIGANT* AS BASIS FOR JUSTICIABILITY

The states discussed in Part IV illustrated the first key factor—the character of the issue—in the determination of whether to grant or deny standing to non-Hohfeldian litigants.[182] Similarly, the states in Part V—Utah and Alaska—focus on a number of factors in determining whether to grant standing in public actions, including both the character of the issue and the character of the litigant.[183] These two states are highlighted here because they aptly illustrate the second key factor—the character of the litigant. These courts' public interest standing doctrines address the question of whether the plaintiff is the best litigant to proceed with a given challenge, and if not, whether such constitutional or public issue would go unchallenged if such plaintiff is denied standing. Moreover, the cases focus on the capacity of the plaintiff to show some connection to the issue and the competence with which such plaintiff can advocate on behalf of the public.[184] As with the state courts which base their standing determinations on the character of the issue, these state courts must balance competing interests and address separation of powers considerations, and thus their respective doctrines are flexible and implemented on a case-by-case basis.

A. *Utah: Public Interest "Alternative" Standing Test*

In its public interest "alternative" standing test, Utah recognizes public interest standing in the absence of traditional injury standing in cases where the plaintiff is an "appropriate party" and where the issues asserted are "of sufficient public importance to balance the absence of the traditional standing criteria."[185]

The Utah Supreme Court has stated that an "appropriate party," for purposes of standing under the alternative test, is one that has the "interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions" and where the issues are not likely to be raised if the party is denied standing.[186] Moreover, there may be more than one "appropriate party" in a given case, and thus the alternative standing test is such that a court does not determine which party is the *most* appropriate in comparison to any other, but rather, in the interests of justice, which parties are appropriate to facilitating a full and fair

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[182] *See infra* text accompanying notes 155–81.

[183] *See infra* Parts V.A, V.B.

[184] *See* Jaffe, *supra* note 18, at 1314 ("[E]ven in states which allow public actions, the plaintiff may be able to secure judicial intervention only if he can bring himself within the class of persons specially entitled to sue.").

[185] Utah Chapter of Sierra Club v. Utah Air Quality Bd., 148 P.3d 960, 974 (Utah 2006) (citation omitted) [hereinafter *Sierra Club I*].

[186] Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983).

adjudication of the dispute.[187] The recognition that more than one party may be an appropriate one to litigate an issue serves the underlying purpose of the alternative standing test—"to ensure that relevant issues are raised by a party who can effectively address them."[188] To attend to the potential problem of an overburdened judiciary, the alternative standing test affords a court the discretion to require multiple parties raising similar issues to collaborate on their briefing.[189]

"If the party is not an appropriate party, the court's inquiry ends and standing is denied."[190] However, if the "appropriate party" requirement is met, the court then considers whether the issue is of "sufficient public importance in and of [itself]" to warrant a grant of standing.[191] This determination requires that the court, in its discretion, regard the issue as being of sufficient constitutional significance and that it would not be more appropriately addressed by either the legislative or executive branch of government through the political process.[192]

In *Utah Chapter of the Sierra Club v. Utah Air Quality Board* ("*Sevier*"), the Utah Supreme Court granted the Sierra Club and other environmental organizations standing under both the traditional and alternative standing tests.[193] The Sierra Club sought review of the Utah Air Quality Board's denial of its petition objecting to the Utah Division of Air Quality's permit authorizing the expansion of a power plant.[194] The court held that as an environmental group concerned about the expansion of the plant, the Sierra Club was an "appropriate party" for purposes of the alternative test because it had the requisite interest to effectively aid the court in developing and analyzing the relevant legal and factual questions.[195] More specifically, as an entity committed to the protection of the environment, the Sierra Club and its members were held to have had an interest in ensuring that the development and operation of the plant comply with all the applicable environmental laws and administrative procedures related to the plant's expansion in order to prevent illegal pollution or

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[187] *See Sierra Club I*, 148 P.3d at 972–73 ("[T]he notion that a court must find the *most* appropriate party . . . is unnecessary and counter-productive. We think that in many cases . . . there will be more than one party interested in the outcome of the case who can effectively raise issues that would otherwise escape review.") (emphasis in original).

[188] *Id.* at 973.

[189] *Id.*

[190] *Id.* at 974.

[191] *Jenkins*, 675 P.2d at 1150.

[192] Utah Chapter of Sierra Club v. Utah Air Quality Bd., 148 P.3d 960, 973 (Utah 2006) ("The more generalized the issues, the more likely they ought to be resolved in the legislative or executive branches.").

[193] *Id.* at 972. In a case issued concurrently with *Sevier*, the Utah Supreme Court held that the Sierra Club had standing under both the traditional and alternative standing tests to challenge the expansion of the Intermountain Power Plant. Utah Chapter of the Sierra Club v. Utah Air Quality Board, 148 P.3d 975, 982 (Utah 2006) [hereinafter *Sierra Club II*].

[194] *Sierra Club II*, 148 P.3d at 979.

[195] *Sierra Club I*, 148 P.3d at 974 (citing *Jenkins*, 675 P.2d at 1150).

environmental degradation.[196] Underscoring the fact that under the alternative standing test more than one litigant can be an appropriate party in a particular case, the court held that although another litigant, Citizens' Group—which comprised a large group of Sevier County citizens who lived near the proposed plant site—was an appropriate party in *Sevier*, that fact did not alter the Sierra Club's status as an appropriate party; its contribution to the litigation did not duplicate that of the Citizens' Group but rather presented its own distinct issues and perspective.[197]

Regarding the alternative standing test's second inquiry—that is, whether the issue was of sufficient public importance to warrant a grant of standing—the court in *Sevier* held that the issue of whether the plant proposal complied with all applicable federal and state environmental laws was, in fact, an issue of "significant public importance."[198] Moreover, given the plant's propensity for emitting hazardous chemicals and its proximity to homes and recreational areas, the court determined that the Sierra Club's request for compliance of federal and state law was best addressed by the judicial branch of government since the legislative and executive branches had already addressed such issues in passing the federal Clean Air Act.[199]

Sevier offers the most comprehensible articulation by Utah's judiciary of its alternative public interest standing test. Because the plaintiffs were granted standing under the traditional standing test, it appears as though the court's cogent discussion of the alternative test was dicta. The fact that the court discussed at length the alternative test despite the plaintiffs having passed muster under the traditional model shows the significance of the alternative test in the court's jurisprudence. The court might also have detailed the alternative test, which has evolved over the years, so as to address any confusion or inconsistencies regarding its application by lower courts.

In *D.A.R. v. State*, the Utah Appellate Court denied standing under the alternative test.[200] The case involved a challenge by a citizen who admitted engaging in conduct that violated the state's sodomy and fornication statutes—though he had never been prosecuted for such violations—requesting a declaratory judgment that the statutes were "null and void."[201] The court held that the plaintiff failed both prongs of the alternative standing test because he was not an appropriate party to bring the case and the issue he raised was not of sufficient public importance to warrant a

[196] *Id.*
[197] *Id.*
[198] *Id.* at 972, 974 (citation omitted).
[199] *Id.* at 974–75.
[200] D.A.R. v. State, 133 P.3d 445 (Utah Ct. App. 2006).
[201] *Id.* at 446–47.

grant of standing.[202]

Regarding the question of whether the plaintiff—who had not been formally charged with any offense under the sodomy statutes—was an appropriate party to litigate the issue of the constitutionality of such statutes, the court noted that those individuals whom the state had actually charged with sodomy faced a greater risk under the statutes, and therefore had a "'greater stake in the resolution of the issue.'"[203] Thus, it was these potential litigants, rather than the plaintiff, who could more effectively aid the court in "developing and reviewing all relevant legal and factual questions."[204] Accordingly, the court determined that the issue was, in fact, likely to be raised by such potential litigants even if the plaintiff was denied standing.[205]

The court in *D.A.R.* also held that the issue raised was not of sufficient public import to warrant a grant of standing to the plaintiff since the state seldom enforced the sodomy and fornication statutes; in the rare instances where the state had used the statutes, there were no intimations of a systemic problem requiring judicial intervention.[206] The court concluded that because the alleged injury to the plaintiff was of an abstract nature, it must be widespread among the public for the issue involved to be of sufficient public concern to meet the demands of the alternative standing test.[207]

Thus, although non-Hohfeldian litigants in public interest actions are given a second chance at standing under Utah's alternative standing test, such litigants might still be denied standing if the court finds that other litigants can better serve the public interest. The court showed restraint in *D.A.R.*, proving that when applied properly, Utah's alternative standing test adequately balances the competing interests involved in the public action context: on one side, the vindication of the public interest and the need for a check on government illegalities; and, on the other side, the conservation of judicial resources and the need for a proper separation of powers between the branches of government.

B. *Alaska: Citizen-Taxpayer Standing for Issues of "Public Significance"*

Through its common law, Alaska has developed an alternative standing test in addition to its traditional injury standing test that can be invoked in cases involving challenges made by litigants, in their capacity

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[202] *Id.* at 449–50.

[203] *Id.* at 450 (citation omitted).

[204] Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983).

[205] *See D.A.R.*, 133 P.3d at 450 (stating that the court will "'await a more appropriate representative of the concerns raised [by Plaintiff]'") (citation omitted).

[206] *Id.*

[207] *Id.*

as citizens or taxpayers, who raise issues of "public significance."[208] To establish citizen-taxpayer standing, a plaintiff must meet two requirements: first, the issue presented to the court must be one of "public significance," which Alaskan courts interpret broadly to include most constitutional issues;[209] second, the plaintiff must be an "appropriate party" to bring the case, meaning he or she is "a true and strong adversary, even if the conduct in question did not directly affect [him or her]."[210]

Signifying commonality with the test of appropriateness in Utah's public interest standing system,[211] Alaskan courts determine whether a plaintiff is an "appropriate party" for the sake of citizen-taxpayer standing using three key factors: first, "the plaintiff must not be a 'sham plaintiff' with no true adversity of interest";[212] second, the plaintiff "must be capable of competently advocating his or her position";[213] and third, there must not be a plaintiff more directly affected by the challenged conduct who has or is likely to litigate the issue.[214] Regarding the third factor—whether a party more directly affected has or is likely to bring suit on the issue at hand—the Alaskan Supreme Court has noted that the "mere possibility" that such other party might bring suit does not necessitate a denial of standing to the plaintiff in the instant case.[215] Thus, a court will grant standing to a plaintiff who can advocate his position competently and is adequately represented even where a non-litigant party might have more at stake in the outcome of the dispute.[216]

Noting that standing in Alaska is "interpreted broadly" and that the state's courts have "an approach favoring increased accessibility to judicial forums,"[217] the Alaska Supreme Court granted citizen-taxpayer standing to

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[208] Baxley v. State, 958 P.2d 422, 428 (Alaska 1998).

[209] *See id.* ("A plaintiff who raises constitutional issues is likely to meet this requirement [of public significance].").

[210] *Id.*

[211] *See supra* notes 186–89 and accompanying text.

[212] *Baxley*, 958 P.2d at 428. In one case applying citizen-taxpayer standing, the Alaska Supreme Court stated that an example of a "sham plaintiff" is a party "whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action." Trs. for Alaska v. State, 736 P.2d 324, 329 (Alaska 1987).

[213] *Baxley*, 958 P.2d at 428. This adversity requirement is similar to the requirement in Utah's alternative standing test that a plaintiff has "the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions." Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983). Moreover, there is no clear evidence that a non-Hohfeldian plaintiff is any less capable than traditional plaintiffs at adequately representing a collective, public interest. In fact, these plaintiffs may even represent such interests *better* than traditional plaintiffs. *See, e.g.*, Hershkoff, *supra* note 4, at 1936 ("[A] traditional Hohfeldian plaintiff, focusing on his own distinct injury, may distort the court's construction of a full and fair record on public law issues that have important radiating effects."); Segall, *supra* note 47, at 369 ("[I]deological, public interest plaintiffs who do not suffer personal injury often present more concrete adverseness and better developed records than traditional plaintiffs.").

[214] Baxley v. State, 958 P.2d 422, 428 (Alaska 1998) (citing *Trs. for Alaska*, 736 P.2d at 329).

[215] *Id.* at 429.

[216] *Id.*

[217] *Trs. for Alaska*, 736 P.2d at 327 (internal quotation marks omitted).

a coalition of environmental, Native, and fishing groups in *Trustees for Alaska v. State*.[218] The plaintiffs sought a declaratory judgment challenging the state's mineral leasing system as a violation of the Alaska Statehood Act's mineral leasing requirement.[219] Addressing whether the case presented an issue of public significance, the court held that public interest in the environmental protection of mineral resources in land selected from the federal government under the Statehood Act was of sufficient public importance to grant standing.[220] In support of the court's determination that the case presented an issue of public significance, it noted that, should the plaintiffs prevail, the state would have to alter its method of making state land available for mining, subsequently affecting approximately 50,000 existing mining claims.[221] The court also cited the plaintiffs' allegations that the state was illegally giving up more than $100,000 yearly in royalties under the current system, and that the state was at risk of forfeiting vast areas of state lands to the United States.[222]

The court found that the plaintiffs were appropriate parties to bring the suit, and noted that the plaintiffs were well-represented by competent counsel who zealously presented their position.[223] The court also held that the litigants were not "sham plaintiffs;" they clearly possessed sincerity in their opposition to the state's mineral disposition system. Additionally, there were no other actual or potential litigants who might be more directly interested in the validity of the state's system.[224] In making this determination, the court stated that the critical issue was whether the more directly interested potential plaintiff—the Attorney General—had sued or seemed likely to sue in the foreseeable future, rather than simply whether he *might* sue at some unknown point in the future.[225] The Attorney General had not sued, and there were no indications that he planned to, so the court held that the plaintiffs satisfied Alaska's test for citizen-taxpayer standing and thus were appropriate parties to bring suit in the case.[226]

While a federal court might have left the issue to the political process, the Alaskan judiciary demonstrated its active role in the vindication of the public interest. Though the court ultimately granted citizen-taxpayer standing, the step-by-step analysis it took exhibits its cautious approach in these cases. This demonstrates that, as with New Mexico, Ohio, and Utah,

[218] *Id.* at 330.
[219] *Id.* at 326–27. More specifically, plaintiffs alleged that the state had incorrectly interpreted restrictions to apply only to lands known to contain minerals at the time of the state selection and had failed to require royalty or rent payments in leases of lands. *Id.* at 332.
[220] *Id.* at 330.
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*

the judiciary in Alaska has developed a workable doctrine that provides the courts with an active role in the adjudication of public actions without simultaneously disrupting the balance of powers within the state governance structure.

Similarly, in *Sonneman v. State*, the Alaska Supreme Court granted citizen-taxpayer standing to a litigant who challenged the constitutionality of a statutory amendment.[227] This statutory amendment terminated the practice of rotating the order of candidates' names on election ballots, replacing it with a random selection of the order of candidates' names.[228] The court first held that the constitutional issues involved—the plaintiff's fundamental right to vote in his capacity as a citizen of the state, and the integrity and fairness of public elections—were of sufficient public significance to pass muster under the first inquiry of the citizen-taxpayer standing test.[229] The court then held that the citizen was an "appropriate party" to bring the suit. The court found that the citizen-taxpayer had preserved his constitutional arguments on appeal; that he was a competent advocate to challenge the constitutionality of the statutory amendment; that the parties were truly adverse; and finally, that there was no evidence that anyone who might be more directly affected by the statutory amendment was in the process of challenging it.[230]

As with *Trustees for Alaska*, the court in *Sonneman* granted standing in a case that might have been best left to the political process. However, the court has also shown restraint by refusing to apply citizen-taxpayer standing in the public action context. For example, the court denied citizen-taxpayer standing in *Ruckle v. Anchorage School District*, a case in which it refused to grant standing to a taxpayer challenging the state's bidding process for school bus transportation contracts.[231] The denial of standing turned on the fact that Laidlaw, the former school bus service provider for the district which had been outbid by another bus provider, was more directly affected by the challenged conduct and had already filed a nearly identical suit.[232] The court stated that although a plaintiff, in his or her capacity as a citizen and taxpayer of the state, might be an appropriate party in a public bidding case, because Laidlaw had already raised "similar, if not identical" claims against the school district in its lawsuit,

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[227] Sonneman v. State, 969 P.2d 632, 634 (Alaska 1998).

[228] *Id.* at 636; *see also* Coghill v. Boucher, 511 P.2d 1297, 1304 (Alaska 1973) (granting citizen-taxpayer to registered voters challenging certain proposed vote-counting procedures, because, as the court noted, "a retreat to restrictive notions of standing . . . would not advance the public's vital interest in maintenance of the integrity of vote-tallying procedures during statewide elections. Denial of standing . . . would have the effect of unduly limiting the possibility of a popular check upon executive control of the election process").

[229] *Sonneman*, 969 P.2d at 636.

[230] *Id.*

[231] Ruckle v. Anchorage Sch. Dist., 85 P.3d 1030, 1037 (Alaska 2004).

[232] *Id.*

allowing Ruckle to proceed with her claims would be "unnecessarily duplicative" and would waste judicial resources.[233]

Much like other state courts that utilize some permutation of a public interest standing test, the court in *Ruckle* demonstrated the caution by which Alaska's courts grant citizen-taxpayer standing, applying a case-by-case approach and a balancing of the competing values of judicial restraint and economy on the one side, and the need for the vindication of the public interest on the other. By exhibiting restraint in applying public interest standing models, state courts avoid the problems of flooding litigation and drained judicial resources that critics often cite.[234]

As a result of the inherent differences between the federal and state judicial systems, discussed in Part III, the state system is more hospitable to public interest standing than its federal counterpart. The state public interest models discussed in Parts IV and V demonstrate both the successes and the challenges that arise in states that utilize doctrines which allow for increased judicial access to non-Hohfeldian litigants. Though such doctrines are unlikely to penetrate federal court jurisprudence, they have proven to be effective mechanisms in the states for providing judicial review of constitutional or statutory provisions that might otherwise be unreviewable.

VI. CONCLUSION

The doctrine of standing is an amorphous, complex, judge-made system by which courts impose restrictions on who can access the judiciary for the adjudication of claims and grievances of both a personal and public nature. In the 2007 Term in *Hein*, the United States Supreme Court continued its trend of limiting standing in the realm of citizen and taxpayer suits aimed at vindicating the public interest.[235] The strict, injury-based standing model that permeates the federal courts is not adhered to by many states, which have created their own unique systems of standing to address issues of constitutional importance. The public interest standing doctrines discussed demonstrate the states' commitment to ensuring that constitutional limitations on governmental power are judicially enforced, while simultaneously limiting such review to public actions where it is absolutely necessary to protect the collective rights of the citizenry. The existence of these various state models demonstrates the difference in the philosophy between these states' courts and the federal courts as to the

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[233] *Id.*

[234] *See* Hershkoff, *supra* note 4, at 1935 ("State courts are well placed to assess governance needs and to adapt judicial access rules, given existing resources and other limitations. State courts can also use ancillary devices to deal with caseload concerns . . . [including using] their administrative power to screen patently frivolous cases from the system . . . .").

[235] Hein v. Freedom from Religion Found., 127 U.S. 2553, 2555–56 (2007).

judiciary's place in a democratic system of government and its role in the vindication of the public interest.