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Heather Elliott

University of Alabama - School of Law, helliott@law.ua.edu

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THE STRUCTURE OF STANDING AT 25: INTRODUCTION TO THE SYMPOSIUM

Heather Elliott*

To proceed in federal court, a plaintiff must show Article III standing: that she has suffered (or will imminently suffer) an injury in fact; that her injury is fairly traceable to the actions of the defendant; and that the remedy she seeks will redress her injury, at least in part.¹ The Court has stated that this test is an “essential and unchanging requirement” of Article III jurisdiction² and is “built on a single idea—the idea of separation of powers.”³

When then-Professor William A. Fletcher published his pathmarking article *The Structure of Standing* in 1988,⁴ the test in this form was of recent vintage. The injury-in-fact requirement had emerged by the early 1970s,⁵ as had aspects of the traceability and redressability requirements,⁶ but the Court did not state the test as a tripartite requirement until the 1980s.⁷ By then, the doctrine had already been subject to criticism from scholars⁸ and even from Justices on the Court itself.⁹

Professor Fletcher’s article set out to explain what lay behind the stated test: that, whatever the Court had said about it, there was an underlying structure that made more sense than the words the Court used. The Court’s wrong turn had been the trans-substantive doctrine of standing: “[T]o think, or pretend, that a single law of standing can be applied uniformly to all

* Associate Professor, The University of Alabama School of Law. The thanks one usually extends in this type of footnote are extended above the line in this Introduction.

1. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

2. *Id.* at 560.

3. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

4. 98 YALE L.J. 221 (1988).

5. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *Data Processing Serv. v. Camp*, 397 U.S. 150, 151–54 (1970).

6. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

7. For example, as late as 1979, in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 120, the Court framed the test as a two-part test: “The crucial elements of standing are injury in fact and causation.” In 1981, the Court stated the test in three parts, injury, traceability, and redress. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 161 (1981).

8. See, e.g., Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1976).

9. *Allen v. Wright*, 468 U.S. 737, 767 (1984) (Brennan, J., dissenting); *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

causes of action is to produce confusion, intellectual dishonesty, and chaos.”¹⁰ Fletcher argued that “standing should simply be a question on the merits of plaintiff’s claim,” and that “we should ask, as a question of law on the merits, whether the plaintiff has the right to enforce the particular legal duty in question,” so that “the answers to standing questions will vary as the substantive law varies.”¹¹

Given the test’s recent vintage at the time of Fletcher’s writing, the Court was in a position to respond. Arguably, *stare decisis* permits the Court to recognize and repudiate recent mistakes more easily than it permits the repudiation of long-standing mistakes.¹² The Court could have adopted Fletcher’s reformulation of—or recognition of the underlying structure of—standing doctrine and, by doing so, brought needed clarification to the law of federal jurisdiction.

Far from repudiating the standing doctrine, however, the Court has solidified and expanded it. The doctrine now applies not only to the determination of jurisdiction at the trial level but also to appeals;¹³ it applies to all remedies that the plaintiff seeks;¹⁴ it has led to the rejection of claims that the Founders would have recognized as squarely within the judicial power of the United States.¹⁵ Even in opinions that produce arguably better outcomes on standing unquestioningly follow the tripartite test.¹⁶ And standing doctrine continues to arise as an issue. In the 2012 Term, the Court faced standing questions in two highly controversial areas of the law—in a challenge to warrantless wiretapping by the federal government,¹⁷ and in the challenges to the federal Defense of Marriage Act and California’s constitutional amendment banning gay marriage.¹⁸

Thus, twenty-five years later, *The Structure of Standing* has become an ever more incisive critique of standing doctrine. It has been cited hundreds

10. Fletcher, *supra* note 4, at 290.

11. *Id.* at 223, 290–91.

12. *E.g.*, *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009) (“Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned. . . . The opinion [we overturn here] is only two decades old, and eliminating it would not upset expectations.”). *But see* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 430–33 (2010) (noting inconsistencies in the Court’s invocation of antiquity as a reason for or against *stare decisis*).

13. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Diamond v. Charles*, 476 U.S. 54 (1986).

14. *City of Los Angeles v. Lyon*, 461 U.S. 95 (1982).

15. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 323 (2008).

16. *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.* 528 U.S. 167 (2000).

17. *Clapper v. Amnesty Int’l. USA*, 133 S. Ct. 1138 (2013).

18. *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

of times by scholars and courts, including the Supreme Court itself.¹⁹ It has been called “simply the best thing ever written on” standing.²⁰ And it inspires this Symposium, as does now-Judge Fletcher himself.

William A. Fletcher graduated *magna cum laude* from Harvard University, earned a second bachelor’s degree as a Rhodes Scholar at Oxford University, and served in the United States Navy for two years before attending Yale Law School.²¹ After obtaining his J.D. from Yale, he was a law clerk to Judge Stanley Weigel of the United States District Court for the Northern District of California and then to Justice William Brennan of the United States Supreme Court.²² He joined the faculty at Boalt Hall²³ in 1977, where he had a distinguished career as one of our great federal courts scholars. His scholarly work embraces a wide range of federal courts and constitutional law topics, including not only standing doctrine²⁴ but also federal jurisdiction more generally,²⁵ the remedial powers of the federal courts,²⁶ Eleventh Amendment sovereign immunity,²⁷ federal general common law,²⁸ and the relation between atomic bomb testing and the separation of powers.²⁹

Full disclosure: Willy Fletcher was one of my favorite professors at Boalt, where I and other students had the great joy of hearing “his unique and almost diabolical laugh . . . a cross between Dr. Jekyll and Elmer Fudd.”³⁰ I had the great pleasure, in the spring semester of my second year as a law student, to see Professor Fletcher become Judge Fletcher in a

19. Westlaw citation check, September 25, 2013.

20. John C. Jeffries, Jr., *Introduction of Judge William A. Fletcher*, 93 VA. L. REV. 651, 651 (2007).

21. 2 ALMANAC OF THE FEDERAL JUDICIARY (Aspen Publishers et al. eds., 2013), available at 2013 WL 4482311.

22. *Id.*

23. The University of California, Berkeley, School of Law (then known as Boalt Hall, now formally known, much less poetically, as the Berkeley Law Center).

24. In addition to *The Structure of Standing*, Fletcher has published *The Case or Controversy Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263 (1990).

25. William A. Fletcher, *Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word “All” In Article III*, 59 DUKE L.J. 929 (2010); William A. Fletcher, *Common Nucleus of Operative Fact and Defensive Set-Off: Beyond the Gibbs Test*, 74 IND. L.J. 171 (1998).

26. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

27. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); see also William A. Fletcher, *Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (1999); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989).

28. William A. Fletcher, *General Common Law and Section 34 of the Judiciary Act of 1789: The Case of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

29. William A. Fletcher, *Atomic Bomb Testing and the Warner Amendment: A Violation of the Separation of Powers*, 65 WASH. L. REV. 285 (1990).

30. Catherine Shuck, *Remarks from the Investiture of Judge William A. Fletcher*, 87 CALIF. L. REV. 511, 513 (1999).

swearing-in ceremony held at Boalt.³¹ He was sworn in by his mother, the amazing Judge Betty Binns Fletcher of the Ninth Circuit.³² Judge Fletcher taught me much of what I know about Civil Procedure, and my own work on standing doctrine is inspired by and heavily indebted to his insightful scholarship and his generous mentoring. It was thus my delight and honor to organize this Symposium in his honor.

By framing the Symposium as a tribute to Judge Fletcher, I was sure I'd have an easy time recruiting excellent scholars of standing doctrine and the federal courts more generally to participate in today's Symposium. And I was right. In this volume, you will read works by Robert J. Pushaw, Jr., Ernest Young, Maxwell Stearns, Jonathan Siegel, F. Andrew Hessick, and Thomas Rowe. (Tara Leigh Grove of the William & Mary Law School also participated in the Symposium, though the publication of her paper had already been promised to another venue.)

Jonathan Siegel starts with Fletcher's criticism that the injury-in-fact inquiry hides what is always "a normative determination of who should be allowed to seek judicial enforcement."³³ But some proponents of standing doctrine, notably Justice Antonin Scalia, believe that normative inquiry is essential at the threshold stage: only by observing "some universal restriction, independent of the nature of a plaintiff's claim," can the judicial power be kept within constitutional limits.³⁴ Siegel takes as his task the refutation of the Scalia position, in order to strengthen Fletcher's position.

Robert Pushaw and Ernest Young also agree with Fletcher in important ways, but both contend that Fletcher erred in rejecting a trans-substantive notion of standing and in reducing standing entirely to a question of the merits of plaintiff's claim. Pushaw argues that there is a "basic and universally applicable standing principle" which derives from the meaning of the word "Case" in Article III: a plaintiff has a case only if she is *fortuitously* injured.³⁵ Courts must thus engage in an inquiry largely separate from the merits of the plaintiff's claim in order to ensure that the plaintiff has not manufactured her case and is thus improperly attempting to evade the case or controversy limitation on federal judicial power.

Young argues, in contrast, that even if we agree that standing should be primarily a question about the merits of plaintiff's claim, we need some

31. *Id.*

32. The younger Fletcher was nominated to the Ninth Circuit by President Bill Clinton. Sadly, Senate Republicans seized the alleged nepotism of this mother-son pairing on the same federal court of appeals to oppose the nomination; for an entertaining account of this disgraceful episode, see Jeffries, *supra* note 20, at 651-52.

33. Jonathan R. Siegel, *What if the Injury-in-Fact Test Already Is Normative?*, 65 ALA. L. REV. 403, 404 (2013).

34. *Id.* at 405.

35. Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's The Structure of Standing*, 65 ALA. L. REV. 289, 292 (2013).

general rules to help us answer that question.³⁶ First, it is not always an easy question to answer whether a plaintiff *has* a claim on the merits (as the controversial jurisprudence of implied rights of action under *Cort v. Ash* demonstrates). Second, a variety of general principles will need to inform the “more particularized inquiry that Fletcher prescribes.”³⁷ “[T]hose default rules,” Young contends, “will look a lot like the general standing principles that [Fletcher] criticizes.”³⁸

Maxwell Stearns looks at the scholarship spawned by Fletcher’s *The Structure of Standing* and notes that it is divided by a “central dispute . . . whether standing is best understood as furthering a ‘private-rights’ or ‘public-rights’ model of judicial decisionmaking.”³⁹ Stearns defends the private-rights model, and in particular his own social choice explanation of standing’s role in cabining judicial power. When considered from a social-choice perspective, standing doctrine “affect[s] the timing of the judicial lawmaking function” and thus “the value, and specifically the durability, of precedent.”⁴⁰ Without standing, Stearns argues, and its fortuitous effects on the timing of cases, litigants would be able to manipulate the arrival of cases in the federal courts, and hence the precedent created, to the detriment of our Republic.

Andrew Hessick and I take a different Fletcher work as our inspiration. In *The Case or Controversy Requirement in State Court Adjudication of Federal Questions*, then-Professor Fletcher argued that, in federal question cases in state courts, those courts should be obliged to apply the federal Article III case-or-controversy limitations, even though Article III does not generally apply to state courts.⁴¹ If state courts could decide federal questions when the Article III requirements were not met, the United States Supreme Court would be unable to review those determinations.⁴²

Hessick argues for a converse: if the *Erie* doctrine is meant to ensure that federal courts apply the same law as state courts in diversity cases, *Erie*’s logic extends to state laws of standing.⁴³ “Because [state] standing laws dictate the ability of a plaintiff to recover under state law, federal courts hearing cases involving those state rights in diversity cases should also apply state standing laws.”⁴⁴

36. Ernest A. Young, *In Praise of Judge Fletcher—And of General Standing Principles*, 65 ALA. L. REV. 473 (2013).

37. *Id.* at 480.

38. *Id.*

39. Maxwell L. Stearns, *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on Hollingsworth and Windsor*, 65 ALA. L. REV. 349, 353 (2013).

40. *Id.* at 356.

41. Fletcher, *supra* note 24, at 264.

42. *Id.* at 265.

43. F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 423–29 (2013).

44. *Id.* at 418.

I likewise examine the federalism aspects of Fletcher's 1990 article, focusing on federal question cases in federal court that implicate important issues of state governance.⁴⁵ In the recent marriage equality case arising from California, *Hollingsworth v. Perry*, the Court's Article III standing analysis—which rejected standing for California ballot initiative proponents trying to defend California's anti-gay-marriage Proposition 8 in federal court—ignored the federalism issues implications for the California initiative system. I argue, in parallel with Fletcher's 1990 article, that standing doctrine in such cases should take into account federalism concerns, rather than focusing narrowly on injury in fact, causation, and redressability.

Thomas Rowe—who happens to be Judge Fletcher's brother-in-law—celebrates not the twenty-fifth anniversary of the *The Structure of Standing*, but instead the thirtieth anniversary of Fletcher's first article examining the Eleventh Amendment.⁴⁶ Rowe argues that the “diversity explanation” of the Eleventh Amendment put forward by Fletcher and others, while not perfect, provides the best view of the Eleventh Amendment: one that focuses exclusively on the Amendment as a definer of federal subject matter jurisdiction, not a more substantive protection of state sovereign immunity.⁴⁷

Taken together, these works illuminate much of Fletcher's scholarship, and help us understand why Fletcher's academic work flowed so smoothly into judicial work: he is wise, pragmatic, and “animated by a gently stated but deeply felt sense of right and wrong.”⁴⁸ That approach to the law is exemplified by Fletcher's own contribution to this Symposium, his keynote address, *Standing: Who Can Sue to Enforce a Legal Duty?*⁴⁹ In that keynote, Judge Fletcher takes into account his audience (mostly students), gives an incredibly accessible account of standing doctrine (hard to believe, given the almost mystic complexities attributed to the doctrine), and gives a number of engaging yet powerful examples to support his argument. Dozens of students told me later that Judge Fletcher's had been the best speech they'd seen in law school.

45. Heather Elliott, *Federalism Standing*, 65 ALA. L. REV. 435 (2013).

46. Thomas D. Rowe, Jr., *Exhuming the “Diversity Explanation” of the Eleventh Amendment*, 65 ALA. L. REV. 457 (2013) (examining William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983)).

47. *Id.*

48. Stephen McG. Bundy, *Remarks from the Investiture of Judge William A. Fletcher*, 87 CALIF. L. REV. 522 (1999).

49. 65 ALA. L. REV. 277 (2013).

* * *

What could be better than organizing an event to recognize one of your favorite people for his great work and having such terrific results? I couldn't be happier. Many people contributed to this success, and I take the opportunity now to thank them.

We were honored to have Judge William H. Pryor of the United States Court of Appeals for the Eleventh Circuit introduce Judge Fletcher's keynote speech. Other federal judges attended the Symposium, including Judge William Acker and Judge Abdul Kallon of the United States District Court for the Northern District of Alabama. We were honored with their presence.

The Symposium could not have occurred without the unstinting support of former Dean Ken Randall and of the University of Alabama School of Law. I would particularly like to thank Noah Funderburg, Claude Arrington, Brenda McPherson, Candice Robbins, Jami Gates, Karen Shaw, Bethany Galbraith, Terry Davis, and Bill Bellan for their unflagging attention to all the details necessary to make an event like this a success. Thanks also to all the members of the Law School community who attended the Symposium. Finally, thanks go to the *Alabama Law Review*, and in particular Scott Frederick, Jessica Boyd, Forrest Phillips, and Anna Twardy for getting the pieces into print.

