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OHIO'S STANDING REQUIREMENTS AND THE UNWORKABLE PUBLIC-RIGHTS EXCEPTION

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"Standing is not an urban legend, a myth, or a mere concept. It is a means to access government."[1]

I. INTRODUCTION

Although filing a lawsuit is the first technical step in litigation, standing is the first substantive step to a lawsuit. It is the initial gate through which a litigant must pass in order to air his or her grievance before a court. When a court determines a litigant is without standing, it refuses to hear the case, despite the fact that "the claim may be correct," because it has determined the litigant advancing it is "not properly situated to be entitled to its judicial determination."[2] Generally, in both state and federal court, a litigant will have standing if she demonstrates a (1) concrete (2) personal injury (3) caused by the defendant (4) which can be redressed by the court. Thus, standing doctrines focus largely on the party bringing the claim, not on the claim itself.[3]

Federal standing doctrine derives mainly from Article III of the United States Constitution, which states there must be a "case or controversy" before a court can hear a claim.[4] Federal standing doctrine is complex and changing. State courts are not required to follow federal standing requirements; however, most states do so voluntarily.[5] But, states remain free to carve out their own standing exceptions, or to impose heightened standing requirements where they see fit.

Ohio is an example of a state that follows federal standing but has carved out an exception to the general, or "traditional," standing requirements. Under its public-rights exception, Ohio standing does not require a plaintiff to show actual personal injury in order to sue, so long as he presents or alleges "rare and extraordinary" issues that threaten

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1. State ex rel. Ullmann v. Husted, 70 N.E.3d 502, 507 (Ohio 2016) (O'Neill, J., dissenting).

2. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.

3. *Id.*

4. U.S. CONST. art III, §2.

5. Brief of Amici Curiae Ohio Law Professors in Support of Defendant-Appellants JobsOhio, et all. at 3, ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St. 3d 520 (Ohio 2014). "Ohio courts, following the lead of their federal brethren, have similarly adhered to formal standing requirements, not only to protect the State's deep interest in preserving the separation of powers, but also to ensure the efficient presentation and pursuit of cases by the parties, and to guard against issuing advisory opinions." *Id.*

serious public injury.[6] If he does so, he may bring suit on behalf of the public, despite not being personally harmed by the alleged action.

This article details the creation of and murky history of the public-rights exception in Ohio. Part II gives a general overview of standing. It identifies the basic standing requirements imposed on federal courts by the Supreme Court, and compares these standing requirements with Ohio's. Part III addresses Ohio's public-rights exception. It evaluates *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, which established the public-rights exception.[7] It additionally evaluates more recent Ohio cases which address the exception—*ProgressOhio*, *Walgate,* and *Husted*—in an attempt to identify and evaluate any changes made to the exception, since its creation.[8] Part IV critiques the exception's ambiguous meaning and argues the Supreme Court of Ohio should abandon it, as it is both unworkable and ultimately undefinable. It evaluates arguments for and against loosened justiciability standards, acknowledging that while relaxed standards may work elsewhere, Ohio's public-rights exception's undefined parameters make it unworkably vague; further, it violates separation of powers principles by conflating the judiciary with the legislative branch, and, finally, it impermissibly infringes on the legislative branch, as is the sole province of the Ohio General Assembly to create specialized standing rules. Part V concludes by reiterating the importance of justiciability broadly, and standing specifically, in the efficient resolution of appropriate cases.

II. FEDERAL STANDING AS COMPARED WITH OHIO STANDING

Standing is a complex topic whose main requirements have changed substantially over the years. The following section briefly highlights the three key requirements for federal standing: injury, causation, and remedy. It outlines some of the problems courts face in evaluating these requirements. It then addresses Ohio's standing requirements, compares them to the federal requirements, and introduces the public-rights exception.

A. Federal Standing Requirements

Generally, federal standing exists where a plaintiff has "a concrete and ripe injury" that was the result of allegedly unlawful conduct

6. State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1079 (Ohio 1999).

7. *Id.*

8. ProgressOhio.org, Inc. v. JobsOhio, 13 N.E.3d 1101 (Ohio 2014); State ex rel Ullmann v. Husted, 70 N.E.3d 502 (Ohio 2016); State ex rel. Walgate v. Kasich, 59 N.E.3d 1240 (Ohio 2016).

engaged in by the defendant, that the court can redress by hearing the controversy and issuing an appropriate remedy.[9] Standing must exist at the time the plaintiff files suit, and a court may disregard subsequent events which cure plaintiff's initially deficient standing.[10]

In the context of governmental action, which *ProgressOhio* addresses, standing goes hand-in-hand with litigation asserting the illegality of some governmental action.[11] Plaintiffs often sue under the theory that the executive or administrative action taken by a government official "goes beyond the limits of statutory authorization or constitutional limits," or that a statute the official acted under "exceeds constitutional limits."[12] Conversely, plaintiffs sue under the theory that an elected official has refused to take an action they are required to take as an elected official.

Standing requirements spring from two sources: constitutional and prudential. Constitutional requirements are derived from the text of Article III and are mandatory, while prudential factors are court-made limitations that are "flexible" and may be relaxed by courts when necessary.

B. Constitutional Standing Requirements

The Supreme Court has articulated a threefold test of standing under Article III of the United States Constitution.[13] Article III gives jurisdiction to courts to hear "cases" and "controversies."[14] From this language, the Supreme Court has held that a plaintiff must show: (1) a distinct and palpable injury to himself; (2) that this injury is caused by the challenged activity; and (3) that this injury is apt to be redressed by a remedy that the court is prepared to give.[15] While these requirements tend to blend together, the focus of courts remains on the injury prong.[16]

One major problem with this threefold test is that these justiciability requirements are unclear from the start, and, further, they "have generated a large number of cases and an enormous amount of academic commentary,"[17] which has added to the challenges "that inevitably beset

9. Michael Solimine, *The Ohio Constitution—Then and Now: An Examination of the Law and History of the Ohio Constitution On the Occasion of its Bicentennial: Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531, 532 (2004).

10. WRIGHT & MILLER, *supra* note 2.

11. *Id*.

12. *Id.*

13. *Id.* at § 3531.4.

14. U.S. CONST. art III, § 2.

15. WRIGHT & MILLER, *supra* note 2, at § 3531.4.

16. *Id.*

17. Solimine, *supra* note 9, at 533.

every attempt to articulate and apply any clear principles of standing."[18] While cases and academic commentary often illuminate unclear standards in other areas of law, the cases addressing standing have done just the opposite—they have further muddied the already foggy "standing" water.

The first prong—injury—requires the plaintiff to arrive at the courthouse with some presently existing, tangible damage. Like all prongs of the threefold test, the injury prong has developed significantly over the years. Generally, however, injury itself is not contested, even in public litigation cases, as the injury is usually apparent.[19] Standing is readily found when the injury is asserted to self or property.[20] The difficulty with injury arises because the injury prong blends with the third prong—the inquiry into whether the court can and should remedy the wrong.[21] Present injury "shades into the risk of future injury, or the denial of an opportunity that might not have led to a desired benefit," turning "[i]njury itself" into "a term of the standing art."[22]

The second prong—causation—presents similar problems. The causation prong has been described as "slippery," and there is "tension" between conceptual and pragmatic approaches to causation.[23] Within the topic of standing, as in other areas of law, causation is subject to both uncertainty and manipulation.[24] Because of the uncertainty surrounding causation, judges may be tempted to use it as an excuse to avoid deciding a case.[25] In the words of Justice Brandeis, justiciability doctrine provides ample opportunities for "not doing," and causation easily provides one such opportunity.[26]

Finally, the third prong—redressability—is "no more stable than the other two."[27] The plaintiff must prove that some personal benefit will result from a remedy that the court can give.[28] One of the problems courts have in granting remedy is that "predictions of remedial benefit may be skewed so as to recognize, deny, or simply confuse standing," meaning that, similar to the causation prong, courts frequently

18. WRIGHT & MILLER, *supra* note 2, at § 3531.

19. *Id.* at § 3531.4.

20. *Id.*

21. *Id.*

22. *Id.* The Supreme Court "has long required a plaintiff to assert more than the 'generalized interest of all citizens in constitutional governance' to have standing." Brief of Amici Curiae, *supra* note 5, at 5.

23. WRIGHT & MILLER, *supra* note 2, at § 3531.5.

24. *Id.*

25. *Id.*

26. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1835 (2001).

27. WRIGHT & MILLER, *supra* note 2, at § 3531.6.

28. *Id.*

manipulate the uncertainty of the remedy prong in order to recognize or refuse to recognize standing.[29]

C. Prudential Standing Factors

The prudential factors of standing are "non-constitutional in nature," and therefore may be relaxed when necessary. There are a number of prudential requirements, and a discussion of each is beyond the scope of this article. One important factor, however, is that litigants cannot plead only generalized grievances, and they ordinarily may advance only their own rights and not the rights of third parties.[30]

D. Broader Concerns of Justiciability

Aside from the practical difficulties the individual prongs present, there exists a broader difficulty with standing—in part because standing is one of the core concepts of justiciability; it therefore addresses the "proper scope" of the court's role in our system of government. One commentator believes problems with standing can be attributed to the unstable nature of public opinion on this topic; as, at any time "judges, lawyers, and society at large divide on the proper role to be played by the courts in addressing large public issues."[31] Opinion may shift, for a time, in favor of judicial activism, with the majority of people (lawyers and non-lawyers alike) believing the judiciary should have a livelier and more involved role in deciding political controversies. At other times, the majority view may favor judicial restraint, believing the role of the judiciary should be narrowly confined, and judges should defer to the legislature in almost all circumstances. Unfortunately, these broad divisions and changing opinions are stuffed "into the narrow terminology of standing."[32]

Broader issues of the evolving and changing nature of justiciability influence the way courts view the subsets of justiciability: ripeness and mootness. Ripeness refers to the readiness of a case for litigation.[33] Depending on the political climate of the time, courts may feel pressured to decide cases that are not entirely "ripe," or a case that addresses a political concern, lest a "plaintiff's real injury go without redress or

29. *Id.*

30. Solimine, *supra* note 9, at 533.

31. WRIGHT & MILLER, *supra* note 2.

32. *Id.*

33. "For instance, if a statute has not yet harmed a party but may do so in the future, the case is not ripe for judicial review." Basil M. Loeib, *Abuse of Power: Certain State Courts Are Disregarding Standing And Original Jurisdiction Principles So They Can Declare Tort Reform Unconstitutional,* 84 MARQ. L. REV. 491, 496 (2000).

public officials be allowed to continue an unlawful course of conduct."[34]

This pressure to decide a politically-charged case clashes with judicial restraint, as there are often just as many reasons not to decide difficult issues of broad public importance. A single litigation "may not provide sufficient information to support a wise decision" and "[a]n improvident decision may harm more or less narrow classes of individuals who are not before the court," botching matters that are much better left to the political organs of society.[35] In this light, standing serves to "ensure that a court will render its decision in ideal conditions—in a fact-specific controversy where the court cant test its principles and precedents against real facts" and real people, with real consequences for those real people.[36]

All of the above issues—the individual prongs of standing (and their evolving nature), the broader concerns of justiciability (and its evolving nature), along with the particular concerns of ripeness and mootness (and their own instability, based on political climate)—contribute to the intricacy of standing. These issues additionally substantiate the criticism that federal standing is "no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits."[37]

E. Ohio Standing Requirements

State standing law, for the most part, voluntarily mirrors federal standing law.[38] This is true in Ohio as well, despite the fact that the language of the Ohio Constitution is not analogous to Article III's language. The Ohio Constitution vests "the judicial power of the state" in the courts. [39] It reads, "The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law."[40]

Because Ohio's constitution has been interpreted roughly in line with the federal constitution, Ohio's traditional standing exists in roughly the same terms as federal traditional standing—where a plaintiff has "alleged such a personal stake in the outcome of the controversy, as to

34. WRIGHT & MILLER, *supra* note 2.

35. *Id.*

36. Brief of Amici Curiae, *supra* note 5, at 7.

37. WRIGHT & MILLER, *supra* note 2.

38. Brief of Amici Curiae, *supra* note 5, at 4-5. "This Court [Ohio Supreme Court], in turn, has held that federal principles of standing apply to cases brought in Ohio state courts." *Id.*

39. OHIO CONST. art. IV, § 1.

40. OHIO CONST. art. IV, § 4(B).

ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[41] That is, a plaintiff must have (1) an injury that takes the form of a "personal stake in the controversy," and is therefore not just a generalized grievance shared by the majority of the population, (2) that can be redressed by the court.

Additionally, because states remain free to craft their standing requirements as they see fit, they may require additional factors in certain situations.[42] For example, Ohio has added three requirements when a plaintiff wants to attack the constitutionality of a piece of legislation. These added requirements are: (1) the private litigant "must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general;" (2) that "the law in question has caused the injury;" (3) and that the relief requested will redress the injury.[43]

Conversely, states may relax standing requirements when appropriate. Ohio has created a particularly unique exception to traditional standing requirements, called the "public-rights" exception. This exception lessens the general threshold of standing in certain circumstances; it "departed from federal doctrine" by "lower[ing] the thresholds of justiciability" when the issue brought by the litigant is of a certain magnitude.[44] The exception allows a plaintiff to bring suit despite the fact that he or she has suffered no personal injury if the suit falls within the "rare and extraordinary" situation where the public interest is at stake.[45] Thus, it allows a plaintiff to bring a generalized grievance, if the issue is of enough importance to the public at large.

III. CASES ESTABLISHING THE PUBLIC-RIGHTS EXCEPTION

The following section describes and evaluates the Ohio cases establishing or modifying the public-rights exception. It begins with *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, which established the exception. It then examines more recent cases, which loosely address the exception without significantly modifying or further defining it, but also without finding standing under it. It concludes by summarizing where the exception is today, based on the current case law addressing it.

41. State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1081 (Ohio 1999).

42. Brief of Amici Curiae, *supra* note 5, at 3.

43. *Sheward*, 715 N.E.2d at 1081.

44. Solimine, *supra* note 9, at 532.

45. The Supreme Court of Ohio refers to this exception as a "means to vindicate the general public interest." *Sheward*, 715 N.E.2d at 1083.

A. The Founding Public-Rights Case: State ex rel. Ohio Acad. of Trial Lawyers v. Sheward

Sheward established the public-rights exception in Ohio's standing doctrine. In *Sheward*, the plaintiffs-relators[46] filed an original action in prohibition and mandamus against six Ohio common pleas court judges, in their official capacities and as representing those similarly situated.[47] Plaintiffs-relators challenged the constitutionality of Am.Sub.H.B. No. 350, a comprehensive and lengthy tort-reform bill.[48] In their complaint, plaintiffs-relators asserted eight claims, but their primary claim was that the bill constituted an improper legislative usurpation of judicial power, and was therefore an intrusion into the exclusive authority of the judiciary, in violation of various sections of the Ohio Constitution.[49] More specifically, they argued the bill violated Ohio's separation of powers principals by reenacting a piece of legislation previously found unconstitutional by the Supreme Court of Ohio. Defendants filed motions to dismiss, arguing the plaintiff-relators lacked standing.[50] Defendants argued the plaintiffs-relators failed to allege the kind of personal injury necessary for standing in Ohio, and that they merely pleaded "insufficient generalized public interest" which did not meet the personal injury requirement.[51]

The court found both that the plaintiffs-relators had standing and that the bill was unconstitutional "in toto."[52] On the standing issue, the court allowed the action to proceed as a "public action," the goal of which is

46. The plaintiffs-relators were: The Ohio Academy of Trial Lawyers (OATL), Ohio AFL-CIO, Richard Mason, and William A. Burga. *Id*. at 1062. A "relator" is someone who files a mandamus or quo warranto proceeding, a proceeding which requests someone show by what warrant they hold an office or position. Black's Law Dictionary, available at: http://thelawdictionary.org/relator/.

47. *Sheward*, 715 N.E.2d at 1062.

48. *Id.* Am.Sub.H.B. No. 350, 146 Ohio Laws, Part II, 3867, was passed by the Ohio Senate on September 11, 1996, and by the Ohio House of Representatives on September 26, 1996. The bill was then signed into law by former Governor George Voinovich on October 28, 1996. It took effect on January 27, 1997. The bill attempted civil justice reform in Ohio. It amended, enacted, and repealed over one hundred sections of the Ohio Revised Code dealing with laws on torts and other civil actions. The changes addressed: the interest on judgments, immunity and liability of political subdivisions, liability for the condition of premises open to the public for accessing growing agricultural produce, sales of securities and class action requirements there for joint and several liability, contributory and comparative fault, assumption of risk and apportionment of damages, among many other things. *Id*. n2 and n6.

49. *Id.* at 1062.

50. *Id.*

51. *Id*. at 1080.

52. *Id.* at 1088; The court found the legislation unconstitutional for intruding upon judicial power by declaring itself constitutional, reenacting legislation the Court previously struck down as unconstitutional and by interfering with the Court's right to set court procedure. Because of these violations, the bill violated Ohio Constitution's separation of powers provision. *Id* at 1076.

to enforce a "public right."[53] It held it would entertain a public action in "the rare and extraordinary" case in which plaintiffs challenge the constitutionality of a legislative enactment "on grounds that it operates, directly and broadly, to divest the courts of judicial power."[54] Finally, the court held that outside of the case at hand (dealing with legislation infringing upon the judicial role), where a plaintiff brings an action, the object of which "is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result, it being sufficient that relator is an Ohio citizen and, as such, interested in the execution of the laws of the state."[55]

In creating the exception, the court discussed traditional standing at length, in an effort to justify its departure from it. It addressed the way in which standing intersects with broader concerns of justiciability and the role of the court in our system of government. It explained that "standing embodies general concerns about how the courts should function in a democratic system,"[56] and that these concerns "become more acute" when "there may be an intrusion into areas committed to another and coequal branch of government."[57] Here, the court implied that although the role of the court is generally limited to deciding only actual cases or controversies that come before it (generally involving private parties), it needs to step out of these narrow bounds when the legislature assumes judicial authority.[58] It cautioned that this power to declare legislative acts unconstitutional is a "power burdened with a duty," not a higher power or act of superior wisdom on the part of the court.[59] For this reason, the court further warned, when the private rights of a person or property are not at issue, the court must be careful that it is not "simply asked to regulate the affairs of another branch of government."[60]

The court further explained the need for additional requirements when challenging the constitutionality of legislation. In the majority of cases brought by a private person, the overarching question revolves around whether that person has enough of a stake in the controversy so "as to

53. *Id*.

54. *Id*. at 1079.

55. *Id.* at 1084-1085.

56. *Id.* at 1080.

57. *Id* at 1081. "It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advise upon potential controversies. The extension of this principle includes enactments of the General Assembly." *Id* at 1080.

58. *Id.*

59. *Id* at 1081.

60. *Id.*

ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[61] So, when a private person wants to attack the constitutionality of a piece of legislation, the court must toe a fine line in order to avoid invading the rights of another coequal branch. For this reason, the court has held that the private litigant "must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different" from the injury suffered by the general public.[62] Further, of course, the litigant must show that the law in question caused the injury, and that the relief he requests of the court will redress the injury.[63]

After outlining these background standing principles, the court explained its break with federal standing requirements. It explained that although the federal requirement for injury is "grounded" in the constitutional requirements of Section 2, Article III of the U.S. Constitution, federal standing is not binding on state courts, as "[the Ohio Supreme Court is] free to dispense with the requirement for injury where the public interest so demands."[64] While standing requirements are binding in federal courts, standing in state courts is merely "a self-imposed rule of restraint."[65] So, according to the court, states need not "become enmeshed in the federal complexities and technicalities" of standing, which impede the swift adjudication of valid claims.[66] Instead, the court explained, state courts can dispense with these frustrations in favor of "just and expeditious determination on the ultimate merits."[67] Thus, the court clarified that it could, and should, cast off the burden of federal standing and craft an exception in the interest of public justice.

The court further suggested that this new exception is not novel in Ohio jurisprudence. It claimed to have a longstanding tradition of allowing issues to be litigated "in a form of action that involves no rights or obligations peculiar to named parties" when they "are of great importance and interest" to Ohio's population.[68] It explained this tradition in terms of "public" versus "private" rights. It held that where a public right, as differentiated from a purely private right, is involved, the

61. *Id.*

62. *Id.*

63. *Id*.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1082. For example, a litigant has the right to sue to enforce the performance of a public duty, because, as a matter of public policy, a "citizen does have such an interest in his government as to give him capacity to maintain a proper action to enforce the performance of a public duty affecting himself and citizens generally." *Id* at 1083.

citizen suing "need not show any special interest therein" and may sue simply as a citizen.[69] Finally, the court clarified that the public-rights doctrine exists independent of any statute authorizing it.[70]

Applying the newly-formed exception to the case at hand, the court held that, because the bill usurped judicial authority, the issues in this case were of enough importance to the public to justify allowing plaintiffs-relators to bring the action as a public action. The court held that the people of Ohio, through their constitution, "delegated their judicial power to the courts, and have expressly prohibited the General Assembly from exercising it."[71] In the court's view, if the General Assembly could reenact legislation previously held unconstitutional by the court and could require the courts to treat those pieces of legislation as valid and uphold them, "'the whole power of government would be at once become absorbed and taken into itself by the legislature.'"[72]

The dissenting judges emphasized that the plaintiffs-relators lacked traditional standing and the court therefore should not have heard the case, let alone create the exception. As one commentator notes, although the dissenting justices were "not directly addressing the prior 'public rights' cases of the court," the dissent "appeared to argue that the majority had improperly expanded the scope of the public-rights exception."[73]

B. ProgressOhio v. JobsOhio

In *ProgressOhio*, the Supreme Court of Ohio held that ProgressOhio, a nonprofit organization, did not have standing to sue JobsOhio, a "public-private development corporation" which, in essence, privatized the former Ohio Department of Development as a way to attract greater economic activity to the state.[74] ProgressOhio alleged JobsOhio violated constitutional prohibitions on spending, corporate creation, and corporate investment.[75]

The court analyzed standing both in terms of traditional standing and public-rights standing. It first held that the plaintiffs lacked standing under traditional standing requirements; it believed ProgressOhio had no

69. *Id*. at 1083; *see also* State ex rel. Cater v. N. Olmstead, 631 N.E.2d 1048, 1054-1055 (1994) (holding a taxpayer has standing to enforce the public's right to proper execution of city charter removal provisions, whether or not he receives any private or personal benefit).

70. *Sheward*, 715 N.E.2d at 1083.

71. *Id.* at 1084.

72. *Id.*

73. Solimine, *supra* note 9, at 539.

74. Joshua Crabtree, *Behind Closed Doors: An Argument for State Constitutional Standing to Challenge Public—Private Development Corporations,* 76 OHIO ST. L.J. 1423, 1423 (2015).

75. ProgressOhio.org, Inc. v. JobsOhio, 13 N.E.3d 1101, 1103 (Ohio 2014).

direct, personal stake in the outcome of the case.[76] It held that mere "ideological opposition" to a program or legislative enactment is not enough to satisfy standing.[77] So, because ProgressOhio did not prove a personal stake in the outcome, it therefore lacked the direct injury necessary to give it common-law standing.[78]

Additionally, addressing the public-rights exception, the court found appellants did not qualify for it. It found they did not present an issue of public interest important enough to fall under the *Sheward* exception.[79] The court explained that the public-rights exception is extraordinary; it eviscerates the personal-injury prong of standing, as it "provides that 'when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties.'"[80] Because it is an abrogation of the traditional injury-prong, in order to succeed in bringing a public-rights case, the litigant "must allege 'rare and extraordinary' issues that threaten serious public injury." It explained that, even if likely illegal, not "all allegedly illegal or unconstitutional government actions rise to this level of importance."[81] Thus, the court implied that plaintiff's claim fell into this latter category—even if the legislation they challenged was illegal or unconstitutional, it was not extraordinary enough to qualify.

Finally, plaintiff's action was a declaratory-judgment action, and the public-rights exception applies only to original actions in mandamus and or prohibition. Therefore, aside from the fact that the litigants did not present a rare and extraordinary issue justifying use of the exception, they brought the wrong kind of action.

Thus, *ProgressOhio* seems to "narrow[] the public-right doctrine to apply only to original actions in mandamus and/or prohibition" that present the kind of rare and extraordinary public issues needed to invoke the exception.[82]

C. State ex rel. Walgate v. Kasich

In *Walgate*, a number of plaintiffs, both private and institutional, sued Ohio Governor John Kasich and various Ohio lottery organizations

76. *Id*. at 1103.
77. *Id.*
78. *Id.*
79. *Id.* at 1104.
80. *Id*. at 1105.
81. *Id.*
82. State ex rel. Ullmann v. Husted, 70 N.E.3d 502, 507 (Ohio 2016) (O'Neil, J., dissenting).

(collectively "the state").[83] Plaintiffs raised 17 claims in their amended complaint, and sued under the theory that numerous pieces of legislation, which established casinos in Ohio, were unconstitutional.[84]

The Supreme Court of Ohio held only one of the litigants had standing to sue. Plaintiffs alleged standing based on the "negative effects of gambling."[85] The court rejected this argument, pointing out that "negative effects of gambling that appellants allege[d] [did] not constitute concrete injuries to appellants that are different in manner or degree from those caused to the general public, [and] were not caused by the state's conduct, and cannot be redressed by the requested relief."[86] Similarly, it held they did not have standing based on status as an Ohio public school teacher or parent, or as contributors to "special funds" for schools.[87] It analyzed all of their standing claims under traditional standing requirements, and did not address the public-rights exception.

The dissent did address the public-rights exception, arguing it should

83. State ex rel. Walgate v. Kasich, 59 N.E.3d 1240 (Ohio 2016). Plaintiff-appellants were "Robert L. Walgate Jr., David P. Zanotti, the American Policy Roundtable ("Ohio Roundtable"), Sandra L. Walgate, Agnew Sign & Lighting, Inc. ("ASL"), Linda Agnew, Paula Bolyard, Jeffrey Malek, Michelle Watkin-Malek, Thomas W. Adams, and Donna J. Adams." *Id.* at 1243-1244. They filed a complaint in the Franklin County Court of Common Pleas, and were originally "seeking a declaratory judgment, injunctive relief, and a writ of mandamus. In January 2012, those parties, along with plaintiffs-appellants, Joe Abraham and Frederick Kinsey, filed an amended complaint in the case. The amended complaint named as defendants (appellees here) Governor John R. Kasich; the State Lottery Commission; the interim director and members of the State Lottery Commission; the Casino Control Commission; the chairman, vice chairman, executive director, and members of the Casino Control Commission; and Ohio Tax Commissioner Joseph W. Testa (collectively, "the state")." *Kasich*, 59 N.E.3d at 1244.

84. "The first ten claims relate to the constitutionality of VLTs and H.B. 1, the act that authorized them. Those claims allege, in part, that (1) VLT operation exceeds the state's authority to conduct lotteries, (2) the lottery commission will violate the constitution by not conducting VLT games in their entirety, (3) the net proceeds of VLT games will be distributed in an unconstitutional manner, (4) allowing VLTs to be operated by racing facilities will violate the prohibition against the state's financial involvement in private enterprise, (5) H.B. 1 violates the one-subject rule of Article II, Section 15(D) of the Ohio Constitution , and (6) in enacting H.B. 1 the General Assembly failed to comply with the requirement in Article II, Section 15(C) of the Ohio Constitution that each House consider every bill on three different days.

Claims 11 through 16 in the amended complaint challenge legislative actions that relate to Ohio's four casinos, particularly H.B. 277 and H.B. 519. Included in these are claims that legislation pertaining to the commercial-activity tax, casino-license fees, and tax exclusion for promotional gaming credits, as well as legislation allowing for multiple casino facilities in one city and graduated payments of the required initial investment, exceeded the legislature's constitutional authority.

The final claim in the amended complaint is that Article XV, Section 6 of the Ohio Constitution, H.B. 1, H.B. 277, and H.B. 519 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by granting a monopoly to the gaming operators whom the state approved." *Id.* at 1244.

85. *Id* at 1245.

86. *Id.* at 1247-1248.

87. *Id.* at 1251.

have applied to give the litigants standing, regardless of the substantive strength of their claims. Justice Pfeifer argued, "[t]his case is of great interest to the public" because it involved a piece of legislation in which "over 3,000,000 Ohioans cast a vote."[88] Because of the importance of the legislation, based on the voter turnout, "the litigants deserve the right to be heard."[89] Thus, Justice Pfeifer implied (without explaining fully) that "rare and extraordinary" issues are presented, thus triggering the exceptions application, where plaintiffs challenge the constitutionality of legislation that a mass amount of citizens voted for.[90]

Justice Pfeifer addressed the argument that, if the exception were applied here, it would open the courtroom doors to anyone who wanted to challenge any piece of legislation. He argued that while Ohioans should not have the unlimited ability to challenge provisions of the Ohio Constitution, the court should not be concerned with an "avalanche of cases asserting public-rights standing" because the court has shown previously that it is able "to reject frivolous, inconsequential, or inane claims."[91] Here, he believed the court should hear the claim because the litigants brought before the court "significant and important issues that affect millions of Ohioans."[92] For this reason, the court "should not throw up its hands and sputter 'but these people have not suffered a differentiated harm.'"[93]

D. State ex rel. Ullmann v. Husted

In *Husted*, a plaintiff again attempted to challenge the JobsOhio act; the court again refused to find standing. It held that the trial court properly dismissed a citizen's mandamus action, as the citizen lacked standing under the public-rights exception and alleged no concrete injury which would give her traditional standing.[94] She alleged the act was illegal because Ohio's wholesale liquor business funded JobsOhio, so those who purchase liquor in Ohio are "forced" to fund JobsOhio.[95]

The Court rejected this argument. It first addressed the general

88. *Kasich*, 59 N.E.3d at 1255 (Pfeifer, J., dissenting).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id*. at 1255.

93. *Id.*

94. State ex rel. Ullmann v. Husted, 70 N.E.3d 502, 504 (Ohio 2016);*Id.*; A citizen's mandamus action is a petition to a superior court, requesting it issue an order to a lower court, government body or corporation, requiring or forbidding it from doing something; The JobsOhio act, as mentioned elsewhere in this article, authorized the creation of a nonprofit organization for the purposes of promoting economic development, job creation, retention, and training, and recruiting business to Ohio.

95. *Id.* at 504. State ex rel. Ullmann v. Husted, 70 N.E.3d 502, 504 (Ohio 2016).

requirements for standing, and differentiated them from the public-rights exception. It said that "traditional standing 'requires litigants to show, at a minimum, that they have suffered "(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief."' [96] Further, standing depends not on the merits of the plaintiff's claim, but rather on "'whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case.'"[97] The court then articulated the *Sheward* exception to the "personal stake" (injury) requirement.[98] It reiterated that to qualify for this exception, the plaintiff must allege "rare and extraordinary" issues that "threaten serious public injury."[99] Further, the court clarified that the exception only applies to original actions in mandamus or prohibition (as suggested in *ProgressOhio*).

The *Husted* plaintiff alleged she had standing under both the traditional test and the public-rights exception because she was a citizen, taxpayer, business owner, consultant, elector of Ohio, and a person who has purchased alcohol in Ohio in the preceding six months.[100] She asserted that "a private party has standing under the public-right doctrine to seek to force the attorney general to act when a conflict of interest prevents him or her from doing so."[101] The court found she already waived any argument of traditional standing, and even if she had not waived it, she alleged no concrete injury sufficient to satisfy it.[102]

Further, she did not meet the public-rights exception because she misapplied precedent. The precedent she cited—*State ex rel. Trauger v. Nash*—did not support her assertion of public-rights standing.[103] In *Trauger*, the private citizen's mandamus action charged the governor with failing to fulfill his statutory duty to appoint an elector to fill the spot of lieutenant governor.[104] Here, plaintiff alleged R.C. 2733.04 "imposes upon the attorney general the duty to file an action in quo

96. *Id.* at 505.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 506.

102. State ex rel. Ullmann v. Husted, 70 N.E.3d 502, 506 (Ohio 2016).

103. Plaintiff cited State ex rel. Trauger v. Nash, 64 N.E. 558 (1902). In that case, the private citizen's mandamus action alleged the governor failed to fill a vacancy which he was legally bound to fill. Here, however, the plaintiff was alleging that R.C. 2733.04 imposes on the attorney general the duty to file an action in quo warranto. *Id.* at 506. This is incorrect because the duty to file an action in quo warranto is subject to the attorney general's discretion in deciding whether an action can be established by proof. *Id.*

104. State ex rel. Trauger v. Nash, 64 N.E. 558 (1902).

warranto."[105] But, R.C. 2733.04 gives the attorney general discretion to file a quo warranto case when he "has good reason to believe" such a case "can be established by proof."[106] So, *Trauger* did not support her assertion of standing under the public-rights doctrine.[107] Finally, her other public-rights arguments mirrored those made in *ProgressOhio*, and the court determined there that those arguments were insufficient (as they did not allege rare and extraordinary issues that threaten serious public injury).[108]

The dissent, however, argued that without looking at the merits of the plaintiff's claim, the court could not determine that her case did not have issues of great importance to the general public, which would give her standing under the public-rights exception.

E. State ex rel. Food & Water Watch v. State

On January 24, 2018, in a *per curiam* decision, the Supreme Court of Ohio decided *State ex rel. Food & Water Watch v. State.*[109] In it, the court vehemently criticized *Sheward* without overturning it, denouncing its holding as "questionable" and its possible repercussions as "egregious and problematic."[110]

In *State ex rel. Food and Water Watch*, Food and Water Watch ("FWW") and FreshWater Accountability Project ("FWAP") filed a complaint on behalf of their members, requesting a writ of mandamus to compel certain government officials to promulgate rules relating to the storage, recycling, treatment, processing, and disposal of waste associated with oil and gas drilling.[111] Under Revised Code 1509.03(A), the chief of the oil and gas resources management division of the Ohio Department of Natural Resources ("ODNR") "shall adopt" rules regulating the operation of oil and gas wells and production facilities.[112] The rules must address certain drilling safety measures and must govern the issuance of permits for the handling of certain waste materials.[113]

105. State ex rel. Ullmann v. Husted, 70 N.E.3d 502, 506 (Ohio 2016).

106. *Id.*

107. *Id.*

108. *Id.*

109. State ex rel. Food & Water Watch v. State, 100 N.E.3d 391 (Ohio 2018).

110. *Id*. at 398.

111. *Id*. at 393. Respondents-appellants included Rick Simmers, the chief of the oil-and-gas resources-management division of the Ohio Department of Natural Resources, and James Zehringer, the director of ODNR. *Id*.

112. *Id*. at 394

113. *Id*. The rules must address including safety in well drilling and operations, protection of the public water supply, and containment and disposal of drilling and production waste. R.C. 1509.03(A)(1), (2), and (4). The chief is additionally required to adopt rules regulating the storage, recycling, treatment, processing, and disposal of brine and other waste substances. R.C. 1509.22(C).

FFW and FWAP sued under the theory that the ODNR had not issued the rules required by the statute; specifically, they alleged ODNR had not issued rules regulating the permit process for handling and treating waste issued by oil and gas operations.[114] In lieu of issuing rules regulating permits, the ODNR had instead allowed facilities to operate under a "temporary authorization," which was to remain effective until the division chief issued rules under R.C. 1509.22(C).[115]

Adopting a magistrate's suggestion that plaintiffs could not establish traditional standing based on injuries alleged by their members, public-rights standing, or taxpayer standing, the Tenth District Court of Appeals granted summary judgment to the state officials.[116] On appeal to the Supreme Court of Ohio, FFW and FWAP alleged they had standing based on three theories.[117] Relevant to this article is FFW and FWAP's argument that they had standing to force the enforcement of a public right and therefore did not need to show individual interest or injury.[118]

FWAP invoked the public-right exception, but argued that the court should not apply *Sheward*'s "rare and extraordinary" requirement, reasoning that, unlike the relators in *Sheward*, it was not challenging the overall constitutionality of a regulation, but was merely seeking a writ of mandamus to have it performed.[119] The court noted that it has not granted a public-rights exception under *Sheward* in 15 years.[120] It held that "[e]ven assuming that this court would still grant a party a public-right-doctrine exception to standing" in an appropriate case, "FWAP has not met its burden to demonstrate that this case is a 'rare and extraordinary case' worthy of the exception."[121]

Aside from rejecting plaintiffs' argument, the court seems to have constrained *Sheward* further.[122] It described *Sheward* as a "deeply divided" four-to-three decision, one in which the court held it would entertain a public action only in the rare and extraordinary situation

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Finally, the rules must govern permits issued for the handling or brine and "other waste substances." *Id*.

114. *State ex rel. Food & Water Watch*, 100 N.E.3d at 394.

115. *Id*.

116. *Id*. at 395.

117. *Id*. They argued that they met traditional standing requirements by having members injured by the "deprivation of their rights under R.C. 1509.22 and the Ohio Administrative Procedure Act. The court rejected this argument and affirmed the Court of Appeals and found the plaintiffs lacked traditional standing (through their members). It held that the health injuries alleged in the affidavits submitted by plaintiffs members were abstract "or suspected," and were not concrete enough to confer standing under standing's injury prong. *Id*. at 397.

118. *Id.* at 395.

119. *Id*. at 398.

120. *Id*. at 399.

121. *Id*.

122. *Id*. at 398.

where the challenged statute operates "directly and broadly to divest the courts of judicial power."[123] Thus, the court emphasized the contentious nature of the case, the specific facts presented in it, and the extreme narrowness of *Sheward*'s actual holding.

Significantly, the court also addressed the fact that standing exceptions can lead to abuse through unwise and unasked-for judicial policy-making. It discussed the fact that when issues brought before the court are of such importance to the public that they are resolved without standing, it "can unfortunately result in 'political opportunism, allowing the majority to invalidate a disfavored law using a questionable approach.'"[124] It feared "*Sheward* essentially allows this court to engage in policy-making by ruling on the legislation of the General Assembly" where there has been no injury caused by the legislation.[125] Even more suggestively, the court seems to have come close to overruling the case as a whole, describing any authority provided by the case as "at best, questionable."[126] Finally, it harped on the potential for the exception to lead to the court issuing advisory opinions, a result the court described as the "more egregious and problematic abuse," which long-standing Ohio law prohibits.[127]

F. The "current" criteria (as gathered from the original and the more recent cases addressing the exception).

The cases establishing and applying the public-rights exception are not clear on exactly what that exception is or when it can be used. *Sheward* seems to say that the public-rights exception is something Ohio courts have recognized in the past, yet "until 1954 only one of the cases referred to a 'public right,' and in any event the cases are not legion."[128] The following section pieces together the parameters of the exception, as created in *Sheward* and amended in later cases.

Sheward was decided in 1999. It allows for a "public action," in which plaintiffs seek to enforce a "public right" even where the individual has not suffered any injury because of the challenged action. It held the court would entertain these kinds of actions in "the rare and extraordinary" case in which relators challenge the constitutionality of a legislative enactment "on grounds that it operates, directly and broadly, to divest the courts of judicial power." Thus, the exception exists in the

123. *Id*.
124. *Id*.
125. *Id*. at 399.
126. *Id*.
127. *Id*. at 398.
128. Solimine, *supra* note 9, at 543.

"rare and extraordinary" case where a plaintiff (an Ohio citizen or groups of citizens) seeks to vindicate a public right and presents issues of "great importance" that threaten "serious public injury."

ProgressOhio, a case decided in 2014, restated the core language of the exception without doing anything to change it. In *ProgressOhio,* the court described the exception as one that exists only "when the issues sought to be litigated are of great importance and interest to the public" and plaintiffs "must allege 'rare and extraordinary' issues that threaten serious public injury" to qualify for the exception. The only clarity this case may have contributed to the exception is in the court's statement that "Not all allegedly illegal or unconstitutional government actions rise to this level of importance." So, *ProgressOhio* did little more than parrot back the vague language employed by the court in *Sheward*. It did nothing to define what qualifies as a "rare and extraordinary" issue or what passes as a "serious" public injury. It did, however, narrow the public-right doctrine to apply only to original actions in mandamus and/or prohibition.

The court in *Walgate,* decided in March 2016 held a group of plaintiffs did not have standing to sue the state over legislation establishing casinos. The court did nothing in *Walgate* to change or amend the public-rights exception, as it analyzed all of plaintiffs' standing arguments under traditional standing tests. The dissent argued the court erred in ignoring the exception, and that plaintiffs raised issues that were important enough to enough Ohioans to warrant standing under the exception. While the dissent addressed the importance of the issues (in that millions of Ohioans voted on the bill), it did not provide any further guidance on what makes an issue important more generally. How many millions need to vote on an issue to raise it to the level of significance needed to invoke the exception? If only one million, instead of three million, had voted for this bill, would the dissent have considered it important enough? Finally, it similarly did not address the "serious public injury" prong of the exception.

Husted, another case decided in 2016, likewise did little to add to the exception's definition. It held the plaintiff did not have standing under the exception because she misapplied precedent, and her other public-rights standing arguments mirrored those rejected by the court in *ProgressOhio*. Thus, it did nothing to clarify or amend any part of the exception.

Finally, in *Food & Water Watch*, decided in 2018, the court appears to have stood on the precipice of overruling *Sheward*, and instead chose to further undermine its central holding and chip away at its applicability. The court suggested that it will likely never apply *Sheward* again, noting that it has not done so in 15 years and that plaintiffs' issue

did not rise to rare and extraordinary, *even assuming the court would still grant a party a public-right-doctrine exception to standing in any case*. It emphasized that it would entertain a public action only in the rare and extraordinary situation where the challenged statute operates directly (and broadly) to divest the courts of judicial power, that *Sheward* provides questionable authority "at best," and that its use should be avoided so the court does not run afoul of Ohio's prohibition on advisory opinions. Thus, the court here emphasized that *Sheward*'s holding was intended to apply only to situations in which an enactment threatened to divest the judicial branch of its power and that the ground on which it originally stood was "deeply divided" and "questionable."

In sum, the exception exists today in essentially the same amorphous form as it was when *Sheward* was decided. It allows for standing when a plaintiff brings a "public action" in mandamus or prohibition, presenting "rare and extraordinary" issues that threaten "serious public injury."[129]

IV. THE SUPREME COURT OF OHIO SHOULD ABANDON THE PUBLIC-RIGHTS EXCEPTION

The following section addresses a few of the numerous reasons why the Supreme Court of Ohio should abandon the public-rights exception. The reasons begin narrow and broaden, arguing first that practically speaking, the exception is so vague and undefined that it cannot realistically be applied. Next, it addresses broader constitutional concerns, arguing that the exception violates longstanding separation of powers principles by impermissibly expanding the scope of judicial authority, and lastly that the Ohio General Assembly is capable of, and is charged with, the duty of crafting specialized standing rules in enacting legislation.

129. It should be noted that the Supreme Court of Ohio has, in one other instance, granted standing under the public rights exception. In the case of *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 780 N.E.2d 981 (2002), a union and union president sought to prevent enforcement of H.B. 122, a law permitting warrantless drug and alcohol testing of injured workers. The court found standing under the exception because it found the issue presented a public right of sufficient magnitude. The law affected every injured worker in Ohio who sought to participate in Workers' Comp. Further, it affected everyone who worked in Ohio because every worker could be subject to "unreasonable searches," and the right to be free from unreasonable searches constitutes a "core right" (as it is fundamental enough to be embodied in the Bill of Rights). Because the focus of this article is on recent decisions, this decision is not discussed at length. *See* State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp., 780 N.E.2d 981 (2002).

A. The Public-Rights Exception Is Unworkably Vague[130]

Some commentators argue that judicial flexibility in standing is appropriate, for a number of reasons.[131] One key argument in favor this broader conception of justiciability at the state court level is that increased access to the courts will inspire increased political participation "by facilitating adjudicative practices that afford additional avenues for political expression and that provide an alternative point of entry into political life."[132] The argument goes that when people have access to "the public space of the courtroom," they can "find themselves engaged and mobilized through the transformative effects of a deliberative discourse."[133] In this light, courts serve to continually construct and reconstruct social life itself and loosened justiciability gives citizens an increased role in public decisionmaking by giving voice to "dissident and plural views."[134]

Although the ideas above have merit in the abstract, and may work for some state systems and some judicially-crafted standing exceptions, the fact is that Ohio's public-rights exception has proved itself unworkable in practice. The above noted proponent of the loosened theory of justiciability acknowledges that "additional scholarship is necessary to translate these broad aims into doctrinal standards and manageable rules."[135] Unfortunately, Ohio's muddied history with the exception reveals that the public-rights exception is not one such "manageable rule."

The public-rights exception has no set parameters, making it nearly impossible to apply. Sheward itself, the exception's founding decision, defines the public-rights exception in vague, abstract

130. Under Ohio law, precedent may be overturned if it satisfies three requirements. These requirements, as laid out in the Galatis decision, are: "(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." Westfield Ins. Co. v. Galatis, 100 Ohio St. 3d 216, 216-217 (Ohio 2003). Although the following sections only address the unworkability of the exception, arguments can and have been made that *Sheward* satisfies all three of the above requirements. For more information, *see* Brief of Amici Curiae Ohio Law Professors in Support of Defendant-Appellants JobsOhio, et all. at 18-2120, ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St.3d 520 (Ohio 2014).

131. This article addresses a key argument in favor of expanded standing doctrines: increased political involvement by providing an avenue for citizens to involve themselves in the political process and air their differing views. Additional arguments include: the idea that increased access to courts promotes community and "public goods," curbs curb faction-dominated decisionmaking, and cures "adverse externalities and spillovers." For a fuller analysis of all arguments in favor of loosened justiciability, *see* Helen Hershkoff's article, *supra* note 26.

132. Hershkoff, *supra* note 26, at 1917.

133. *Id.*

134. *Id.* at 1919.

135. *Id.* at 1930.

language, referring to "rare and extraordinary issues" threatening "serious public injury." As one commentator notes, "'public rights'" are difficult to objectively define," let alone apply.[136] Yet, neither the Sheward decision nor any later case addressing the exception further defines what kind of issues qualify as "rare" or "extraordinary." Although Sheward sets the exception as narrow, it gives no guidance on when a court should apply the exception.[137] It essentially "sets litigants and jurists down a seemingly endless path of unfettered court access, leaving traditional standing rules in their wake."[138] The problem of how to apply *Sheward* "plagues every case where *Sheward's* public rights exception is invoked."[139]

For example, the plaintiffs in the *ProgressOhio c*ase, while invoking the exception, struggled with how to frame the *Sheward* holding.[140] They argued there was no way of declaring one public right more important than another, and contended that even the drafters of the Ohio Constitution would have disagreed as to what public rights were the most important.[141] If neither the courts, nor plaintiffs, nor, hypothetically, the drafters of the Ohio Constitution, can make sense of the exception, surly jurists cannot be the ones expected to make sense of it all.[142]

The ambiguity and amorphous nature of the exception may be due to the court's extreme desire to strike down the legislation at issue in *Sheward*. One commentator suggests "the court simply desired to address the issue of tort reform and was willing to disregard decades of consistent, sound law in order to do so," instead of waiting for a party with a cognizable injury to challenge the new legislation and striking it down as it had when it initially declared the legislation unconstitutional.[143] Thus, the court created the exception solely for the purpose of reaching the merits of *Sheward*. In this light, *Sheward* is merely part of "the court's on-going trend of controversial discourse and irresponsible judicial activism" and was likely not meant to set down any legitimate exception which could be used or applied in the future.[144]

136. Brief of Amici Curiae Ohio Law Professors in Support of Defendant-Appellants JobsOhio, et all. at 18, ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St. 3d 520 (Ohio 2014).

137. *Id*. at 20,

138. *Id*. at 21.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Jonathan I. Blake, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward: The Extraordinary Application of Extraordinary Writs and Other Issues; The Case That Never Should Have Been,* 29 CAP. U.L. REV. 433, 476 (2001).

144. *Id.* at 477. This idea may be further bolstered by the fact that public rights exceptions are not

Instead, it was a "quick-fix" to the problem at hand—striking down, for the second time, the unconstitutional tort reform bill. The court had neither incentive nor desire to set down anything other than what the exception is today, vague and elusive.

B. The Exception Violates Separation of Powers Principles

Separation of powers is one of the most important governmental constraints, both at the federal and state levels. It is a constitutionally based doctrine designed to uphold the limited role of courts in a democratic society.[145] It ensures that each of the three branches of government function only within its own sphere of power, and that none usurps power reserved for the other two.[146] The Ohio Constitution, like the federal Constitution, adheres to the separation of powers. It abides by the idea that each branch must "endeavor to cabin its powers and responsibilities to those appropriate for the particular branch."[147]

Traditional standing requirements protect the separation of powers. They "are not simply ends in themselves."[148] They both "reflect and enforce the separation of powers."[149] The judicial branch is charged with resolving legitimate legal disputes. Traditional standing, which requires injury, causation, and a remedy which the court can give, "ensure[s] that the judicial branch stays within its authority to decide actual legal disputes rather than opine on abstract, generalized matters dedicated to the legislative branch and the political process."[150] It ensures the court addresses the concrete issue before it—a citizen, injured by defendant, seeking legal redress. Standing rules prevent parties with no personal stake in the outcome from initiating legislation on behalf of the public generally.[151] Were the judiciary to address every question under the constitution, it "might take possession of 'almost every subject proper for legislative discussion and decision" and could lead to stand-offs between the

a trend in other jurisdictions. Instead, "[s]ince *Sheward* was decided, other States have declined to adopt such an exception." Brief of Amici Curiae, *supra* note 5, at 20.

145. John Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993).

146. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818 (1997). The Ohio Constitution, modeled after the federal one, similarly respects the bounds of separation of powers.

147. Brief of Amici Curiae, *supra* note 5, at 9.

148. *Id*. at 5.

149. *Id*.

150. *Id.*

151. *Id*. at 8.

branches of government.[152] One commentator described the Sheward decision as "an external clash between the legislature and the judiciary . . . over the proper scope of judicial power."[153] This commentator believed "both branches fired their best shots in stubborn attempts to assert their respective fortitude."[154] This result—branches "firing shots" at each other—is what separation of powers was designed to prevent.

Traditional standing rules not only protect the separation of powers, they also ensure that decisions overturning pieces of legislation carry their proper weight. The court undoubtedly has a responsibility to determine the constitutionality of actions by the other branches of government. This "power of constitutional adjudication is secured exclusively in the judiciary as a check upon the other branches of government."[155] However, this duty is served best "when the parties present a genuine dispute to the judiciary, not a request for an advisory opinion."[156] The judiciary can best carry out its duty to check the other branches when presented with a concrete injury, as its decision will carry the full weight and power of judicial authority, having come from the "ideal" judicial process. Citizens should not be able to invoke the judicial system in order to serve the purposes of interest groups or to resolve ideological differences through "concerned bystanders," instead of through those who are actually affected by a judgment.[157]

In addition, practically speaking, traditional standing ensures that the limited resources of the court system are used properly.[158] Justiciability "serves a signaling function" to plaintiffs, deterring some

152. *Id*. at 6. Further, Ohio standing requirements should always mimic federal ones. The "logical interpretation in the state constitution is that it tracks federal standing requirements" *Id*. at 9. The Ohio Constitution does not allow for advisory opinions, although the constitutions of many other states do. Additionally, the Supreme Court of Ohio has disclaimed the right to make advisory opinions. *Id*. So, "neither the plain text of the Ohio Constitution nor any information about the adoption, ratification, or original public meaning of the relevant provisions justifies departure in Ohio from the application of federal standing requirements." *Id*. Finally, the court "has a long history of following federal standing requirements when interpreting what grounds must be shown for a plaintiff to bring a case in Ohio courts" *Id*. at 10. The Supreme Court of Ohio adheres to federal cases from 1910 to the present time. Where the provisions of the two constitutions are similar and there is no reason to differ their interpretations, the Court has interpreted the Ohio constitution in line with federal standing precedent. *Id*.

153. Basil Loeib, *Abuse of Power: Certain State Courts are Disregarding Standing and Original Jurisdiction Principles So They Can Declare Tort Reform Unconstitutional,* 84 MARQ. L. REV. 491, 491 (2000).

154. *Id.*

155. *Id.* at 504.

156. Brief of Amici Curiae, *supra* note 5, at 8.

157. *Id.*

158. *Id.* at 32.

from and encouraging others to file claims.[159] Relaxed standing requirements changes this signal, thus increasing the number of suits filed "without ensuring their merit."[160] Were citizens able to challenge legislation simply as taxpaying citizens, they could "simply carry [] political fight[s] to the courts" and overload the courts' dockets.[161] This concern becomes particularly acute when one considers the fact that state courts already manage larger dockets than federal courts do. With relaxed standing, added burden on state courts "could cause the allocation of judicial resources to shift in unfair and inefficient ways."[162] The judicial system's decisions carry the most weight both when they address concerns that fall squarely within the scope of their duty and when their resources can be appropriately focused on these concerns they are charged with resolving.

While traditional standing protects separation of powers, the public-rights exception blurs the line between the judicial and legislative branches. The exception allows the court to decide the constitutionality of a legislative act where the person asking for review of the act has not been genuinely affected by it in any way. In essence, the person has a generalized grievance dressed up as a legal matter, seeking the court to resolve what the legislature is charged with dealing with. The *Sheward* court overreached its constitutional bounds, and essentially "enable[d] the court to embody its opinion in law—the *exclusive* province of the legislature."[163]

C. The Ohio General Assembly Has The Power To Grant Non-Traditional Standing

Not only is it the General Assembly's duty to create substantive law, but it also has the authority to grant specialized standing. Ohio's General Assembly is the lawmaking body of the state. As such, it has the power, when enacting legislation, to craft specialized standing which would allow citizens to invoke the power of the courts even when they are not personally injured by the legislation.[164] Much like Congress can in enacting federal legislation, Ohio's General Assembly has the power to "cloak parties with the degree of personal interest necessary to satisfy standing requirements" by enacting a statute allowing them to sue, where traditional standing doctrine

159. Hershkoff, *supra* note 26, at 1932.

160. *Id.*

161. Brief of Amici Curiae, *supra* note 5, at 4.

162. Hershkoff, *supra* note 26, at 1932.

163. Blake, *supra* note 124, at 479.

164. Brief of Amici Curiae, *supra* note 5, at 3.

would bar their suit.[165]

Further, Ohio's history shows that the legislature is willing to do this, as there are a number of situations in which the General Assembly has granted specialized standing.[166] In one instance, it has authorized county taxpayers to sue in some cases where the county prosecutor fails to do so.[167] Thus, there is already a degree of flexibility built into standing doctrines, which allows non-injured parties to invoke the power of the courts.[168]

Finally, the legislature is in a better position than the judiciary to "weigh the necessity, and the advantages and disadvantages, of such provisions."[169] A court, when deciding a case, is under significant time constraints; a legislature, when writing and debating legislation, is not. Ultimately, plaintiffs need personalized grievances to come before the judiciary, but "No one needs standing to petition the political branches (legislative and executive) to enact, repeal, enforce or not enforce laws or policies."[170] Generalized grievances, shared by the public at large, should always channel through the political process.

V. CONCLUSION

To many, justiciability exists in the abstract, as some vague and looming concept of "the role of the courts," to be discussed and debated in a classroom as an "academic indulgence."[171] Standing, however, has real implications in the practical, day-to-day workings of courts across the nation, and in Ohio specifically. Standing, ripeness, mootness, and all the other subsets of justiciability "serve as gatekeepers to the state courthouse."[172] They determine whether significant public questions can be brought before a court, and, if so, who may bring them and at what time. Undoubtedly, public questions involving the constitutionality of certain pieces of legislation can and should make their way before the judiciary. However, those bringing these questions need to be the right parties—that is, they need to be parties legitimately affected, in a concrete way, by the issue they bring. Exceptions to this rule conflate the branches of government and take from the legislature its duty to craft specialized standing rules. The

165. *Id.* at 12.

166. *Id*. at 13. Additionally, the legislature "has authorized municipal taxpayers who seemingly lack traditional standing to bring suit when the municipality decides not to do so" in R.C. 733.59. *Id.*

167. *Id*. *See also* R.C. 309.13.

168. Brief of Amici Curiae, *supra* note 5, at 13.

169. *Id*.

170. *Id.* at 6.

171. Hershkoff, *supra* note 26, at 1838.

172. *Id*.

Sheward exception, hastily forged in the need of a passing moment, and impossible to define or apply outside of that moment, is an unsustainable departure from traditional standing, and should be abandoned as such.