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TAXPAYER STANDING: MAINTAINING SEPARATION OF POWERS WHILE ENSURING DEMOCRATIC ADMINISTRATIVE ACTION

DANIEL GARNAAS-HOLMES*

Abstract: In a landmark 2007 decision, the U.S. Supreme Court expanded its standing doctrine. Traditionally, the U.S. standing doctrine has been narrow, relying largely on the “cases and controversies” language of Article III of the U.S. Constitution. This doctrine has precluded third-party or taxpayer suits concerning administrative action. This Note compares the U.S. standing doctrine to that of South Africa, which has a much broader notion of who may bring suit. South Africa’s history with apartheid and distrust of government has led to a liberal standing doctrine in which any individual aggrieved by administrative action may bring suit to receive a written explanation from the offending agency. By exploring the doctrines, this Note argues that a similar type of standing in the United States would serve to democratize administrative action while still ensuring a constitutional separation of powers.

INTRODUCTION

On November 29, 2006, the U.S. Supreme Court heard oral arguments in *Massachusetts v. Environmental Protection Agency* (EPA).¹ The issue was whether the Administrator of the EPA had authority to regulate air pollutants associated with climate change under section 202(a)(1) of the Clean Air Act.² Despite the lack of attention given to the issue of standing in the parties’ briefs, much of oral arguments were devoted to discussion of whether states, local governments, and private organizations have standing to sue the EPA over policies with which

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¹ No. 05–1120 (U.S. Nov. 29, 2006).

² Br. for the Pet’r at (I), *Massachusetts v. Env’tl. Prot. Agency* (EPA), No. 05–1120 (U.S. filed Aug. 31, 2006) [hereinafter Br. for the Pet’r]; see 42 U.S.C. § 7521(a)(1) (2000).

they disagree.³ When the Court released its decision in April 2007, it devoted nearly half of the written opinion to the standing issue.⁴ Indeed, the Chief Justice's dissent addressed only the standing issue and never reached the merits.⁵ To the surprise of many, the court held that Massachusetts had standing to bring suit against the EPA.⁶ The ability of states and taxpayers to bring suit against the federal government to express grievances with national policy decisions is hardly a new issue, especially in the realm of environmental policy.⁷ Although *Massachusetts v. EPA* concerned environmental regulation, its attention to standing refocused the debate on an old question: whether administrative action can accord with public wishes while avoiding the separation of powers problems inherent in judicial review of executive action.⁸

Although much attention has been given to the issue of taxpayer standing in a purely domestic context, there has been less attention in a

³ See Br. for Pet'r at (I); Br. for the Fed. Resp'ts, *Massachusetts v. Envtl. Prot. Agency*, No. 05-1120 (U.S. filed Aug. 31, 2006); Br. for the Resp't States, *Massachusetts v. Envtl. Prot. Agency*, No. 05-1120 (U.S. filed Aug. 31, 2006); Transcript of Oral Argument at 4-17, 30-41, *Massachusetts v. Envtl. Prot. Agency*, No. 05-1120 (U.S. Nov. 29, 2006).

⁴ See *Massachusetts v. Envtl. Prot. Agency (EPA)*, 127 S. Ct. 1438, 1452-59 (2007). The Court, however, only addressed standing for the state of Massachusetts, and did not comment on the standing of local governments and private organizations. See *id.* The Court omitted discussion of the latter because only one party needs standing for the suit to go forward. See *id.* at 1441 (*citing* *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

⁵ See *id.* at 1463-71 (Roberts, C.J., dissenting).

⁶ See *id.* at 1458; see also Review & Outlook, *Jolly Green Justices*, WALL ST. J., Apr. 3, 2007, at A14 (expressing surprise at outcome of *Massachusetts v. EPA*); Christopher Beam, *Bench Warming*, SLATE, Apr. 3, 2007, <http://www.slate.com/id/2163362/fr/flyout> (discussing blogger reactions to decision).

⁷ See generally *Lujan v. Nat'l Wildlife Fed'n*, 504 U.S. 555 (1992); *Duke Power v. Car. Env. Study Grp.*, 438 U.S. 59 (1978); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

⁸ A debate existing since the founders deliberated over separation of powers within the Constitution, which later gained scholarly attention and spurred renewed debate after Alexander Bickel published *The Least Dangerous Branch* in 1962. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (arguing judicial review is necessary, but also counter-majoritarian); THE FEDERALIST NOS. 47 (James Madison), 48 (James Madison), 49 (James Madison), 50 (Alexander Hamilton or James Madison), & 51 (Alexander Hamilton or James Madison) (all discussing inclusion of separation of powers principle in U.S. Constitution); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998) (arguing in response to Bickel that judicial review is not counter-majoritarian, but is rather particularly democratic in serving the end of individual liberty); Antonin Scalia, *The Doctrine of Standing as an Essential Element in the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). See also Brian Crossman, Note, *Resurrecting Environmental Justice: Enforcement of EPA's Disparate-Impact Regulations Through Clean Air Act Citizen Suits*, 32 B.C. ENVTL. AFF. L. REV. 599, 641-42 (2005) (arguing U.S. law recognizes citizen suits to enforce EPA procedures).

comparative context.⁹ By comparing the standing doctrine of South Africa—the product of a recently created judicial system drawing on the vast experiences of other nations—with that of the United States, this Note explores ways of making administrative action and subsequent judicial review more democratic.¹⁰ In particular, this Note looks at the process of petitioning for reasons. This process allows citizens adversely affected by administrative decisions to ask administrative agencies to justify and explain their decisions in writing without actually suing the agencies.¹¹

Part I of this Note explains the historical background for the current standing doctrines of the United States and South Africa, paying particular attention to the political context in which the South African doctrine emerged. Part II sets forth the standing doctrines employed in each country, and draws attention to significant differences. Part III explains the doctrinal differences and suggests ways in which the United States can take examples from foreign systems in order to liberalize access to courts without undermining its separation of powers doctrine.

I. BACKGROUND

A. *United States*

Standing in the United States is grounded in the “cases and controversies” language of Article III of the U.S. Constitution.¹² The meaning of this phrase and its interpretation have evolved drastically since the time of the Framers.¹³ In early U.S. jurisprudence, the Court

⁹ See generally Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B.C. INT'L & COMP. L. REV. 1 (1998) (examining standing for private suits in trade contexts); Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643 (1986) (comparing U.S. and U.K. standing); Jon Owens, *Comparative Law and Standing to Sue: a Petition for Redress for the Environment*, 7 ENVTL. LAW. 321 (2001) (discussing standing to sue in environmental cases in multiple countries); Douglas L. Parker, *Standing to Litigate “Abstract Social Interests” in the United States and Italy: Reexamining “Injury in Fact,”* 33 COLUM. J. TRANSNAT'L L. 259 (1995) (comparing U.S. and Italian standing doctrines in cases lacking specific case and controversy).

¹⁰ See Lynn Berat, *The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?*, 3 INT'L J. CONST. L. 39, 43–44 (2005) (discussing South African interim constitution's use of ideas from the United States, Canada, Germany, India and Namibia).

¹¹ See S. AFR. CONST. ch. 2 § 33(2) (Act No. 108 of 1996); Treaty Establishing the European Community, 2006 O.J. (C 321E) 37 [hereinafter EC Treaty].

¹² U.S. CONST. art. III, § 2; see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394 (1988).

¹³ See Winter, *supra* note 12, at 1395.

adopted the English and colonial notion that standing was a matter of bringing an action in a recognized *form*.¹⁴ Chief Justice Marshall adopted this view when he wrote: “[Judicial power] is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case.”¹⁵ One scholar explains this formulation as an adoption and reflection of the common law forms of action used in England and its colonies.¹⁶ Although commentators often focus on standing as a matter of separation of powers, in the early years of the United States, the doctrine more accurately reflected the English common law principal that “where there is a legal right there is also a legal remedy . . . whenever that right is invaded.”¹⁷

Modern U.S. standing doctrine requires an injury in fact, yet prior to the American Revolution, English practice allowed “standingless” suits against illegal government action through writs of mandamus, prohibition, and certiorari issued by the King’s Bench.¹⁸ The King’s Bench was “acting on behalf of the King to superintend lower organs” to redress “refusal or neglect of justice” and “encroachment upon jurisdiction.”¹⁹ In those instances, the injury involved was purely “metaphoric” and encompassed “any infringements of rights of another.”²⁰ As U.S. law diverged in general from English tradition, so too did its standing doctrine.²¹ The term standing lost its original substantive meaning describing the *relationship* between the parties and became a mere *procedural* term.²² Modern U.S. standing doctrine has done away with the notion of “standingless” cases that had been recognized in English common law and has adopted a litigant-specific definition.²³ The doctrine abandons the writ system employed by the King’s Bench, thus decreasing the executive’s control over the functions of lower state organs.²⁴

¹⁴ *Id.*

¹⁵ *Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738, 819 (1824).

¹⁶ Winter, *supra* note 12, at 1395.

¹⁷ *Id.* at 1396 (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES *23).

¹⁸ *See id.*

¹⁹ *See id.* at 1397–98.

²⁰ *See id.* at 1397.

²¹ *See* Winter, *supra* note 12, at 1417.

²² *See id.* at 1422–23.

²³ *See infra* Part II.A (discussing U.S. standing doctrine and requirement of injury to litigant in order to bring suit).

²⁴ *See* Winter, *supra* note 12, at 1397–98; *infra* Part II.A.

B. South Africa

Whereas the United States has been developing its standing jurisprudence for the past two hundred years, South Africa has had just over ten years to develop a body of law on the subject.²⁵ Although South Africa gained its independence in 1961, it was not until the passage of the interim constitution in 1994 that it began to develop its modern jurisprudence.²⁶ In 1993, then President F. W. De Klerk, Nelson Mandela, and the leaders of eighteen other parties endorsed an interim constitution to become effective after the first national election.²⁷ The interim constitution was the result of tedious two-year negotiations between apartheid leaders and representatives of the African National Congress.²⁸ Following Nelson Mandela's election in April 1994, the interim constitution entered into force as planned.²⁹

Because of past political instability and abuses, the interim constitution provided liberal standing to ensure the just administration of the laws and guarantees under the Bill of Rights.³⁰ The interim constitution was an "eclectic and somewhat confused document" borrowing ideas from America, Canada, Germany, India, Namibia, and international law.³¹ As a result of the apartheid rule's exclusion of blacks from the political process and its extensive record of human rights abuses, the interim constitution went to great length to protect human rights and ensure full political participation.³² Both the interim and permanent constitution (South African Constitution, or constitution) embody a broad range of first, second, and third generation rights.³³

²⁵ See LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 241–96 (3d ed. 2000) (discussing political transition, interim constitution, and modern South Africa); Berat, *supra* note 10, at 39–43 (discussing end of apartheid and political setting of drafting of interim constitution); see also Lisa Newstrom, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT'L L.J. 781, at 784–85 (2007) (discussing origins of South African jurisprudence).

²⁶ See Berat, *supra* note 10, at 43.

²⁷ See *id.*

²⁸ See Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power*, 41 ST. LOUIS U. L.J. 1249, 1253–57 (1996).

²⁹ Berat, *supra* note 10, at 43.

³⁰ See Jack Greenberg, *A Tale of Two Countries, United States and South Africa*, 41 ST. LOUIS U. L.J. 1291, 1291–92 (1997) (discussing dramatic reforms in new constitution); Owens, *supra* note 9, at 368.

³¹ See Greenberg, *supra* note 30, at 1291–92; Owens, *supra* note 9, at 368; Sachs, *supra* note 28, at 1253.

³² S. AFR. CONST. Act. ch. 3 (Act N. 200 of 1993) [hereinafter S. AFR. (Interim) CONST.]; Berat, *supra* note 10, at 44.

³³ S. AFR. CONST. ch. 2; S. AFR. (Interim) CONST. ch. 3. First generation rights are those "guaranteeing civil and political freedoms"; whereas, second and third generation rights

Leading up to the adoption of the South African Constitution in 1996, Parliament instituted a program of public participation designed to legitimize the process and ensure that the final draft embodied citizens' hopes and desires.³⁴ Although the commission received over two million submissions, few of them were reflected in the final draft.³⁵ Like the interim constitution, this version drew heavily from the experiences of other nations and international law, often leading to internal contradictions.³⁶ Nonetheless, it was an important step toward ensuring the peaceful future of the nation as well as spurring South Africa's modern jurisprudence.³⁷ Its passage marked the end "of a six year long battle . . . where competing visions of the new South Africa, formed during the decades of struggle, clashed through paragraph after paragraph."³⁸ Yet with its passage, the "honeymoon" period was over—as was the willingness of the populace to defer their demands on the government.³⁹ Justice Albie Sachs of the South African Constitutional Court described the process as one of "transition from a country where law was used to express untrammelled power to one where all power was subjected to law."⁴⁰ Although the transformations have been rapid, commentators note that South Africa has developed an efficient judicial system.⁴¹

Unlike the U.S. judicial system, which vests supreme authority in a single Supreme Court, the South African Constitution divides supreme judicial authority between the Supreme Court of Appeal (SCA) and the Constitutional Court.⁴² The former is the highest court in non-constitutional matters while the latter is the supreme authority on all constitutional matters.⁴³ Since its formation under the interim constitution, the Constitutional Court has struggled to define the procedure for invoking its jurisdiction.⁴⁴ Although the line of rulings on access to the court are complex, the Constitutional Court has affirmed that par-

are those "furthering equality and uplifting the socially disadvantaged." Berat, *supra* note 10, at 57.

³⁴ See Berat, *supra* note 10, at 56.

³⁵ *Id.* (citing Vivien Hart, *Democratic Constitution Making: The South African Experience*, Issues of Democracy, Mar. 2004, available at <http://usinfo.state.gov/journals/itdhr/0304/ijde/hart.htm>).

³⁶ *Id.*

³⁷ See *id.* at 59.

³⁸ SIRI GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 3 (1997).

³⁹ Berat, *supra* note 10, at 59.

⁴⁰ Sachs, *supra* note 28, at 1249.

⁴¹ See Briefing, *South Africa*, ECONOMIST, Mar. 3–9, 2007, at 32.

⁴² S. AFR. CONST. ch. 8 § 166.

⁴³ *Id.* §§ 167, 168.

⁴⁴ See Berat, *supra* note 10, at 46, 48–53.

ties may invoke its jurisdiction either by referral from an appellate court or by direct application.⁴⁵ As a result of the complex rules, the Constitutional Court has a relatively sparse docket, and thus does not face the same concerns of docket overload that the U.S. Supreme Court experiences.⁴⁶ At first glance, therefore, South African courts avoid at least one pragmatic concern stemming from a liberalized standing doctrine.⁴⁷

II. DISCUSSION

A. U.S. Standing Doctrine

The U.S. standing doctrine is rooted in Article III, Section 2 of the U.S. Constitution, which states that “the judicial Power shall extend to all Cases . . . [and] Controversies.”⁴⁸ The Court has interpreted Article III standing to require that (1) the plaintiff have suffered an injury in fact, or at least an imminent harm,⁴⁹ (2) caused by the defendant,⁵⁰ (3) that a favorable court ruling would redress.⁵¹ The Court and commentators suggest such a restrictive standing doctrine ensures the separation of powers, promotes judicial efficiency by maintaining a workable caseload, and improves judicial decision making by providing specific

⁴⁵ *Id.* at 53.

⁴⁶ *See id.* at 50.

⁴⁷ *See id.*

⁴⁸ *See* U.S. CONST. art III, § 2. Treatment of U.S. standing in this Note is relatively brief in light of the vast amount of literature available. *See generally* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Owens, *supra* note 9; Winter, *supra* note 12. *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 60–101 (2d ed. 2002) (describing U.S. standing doctrine).

⁴⁹ *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 25 (1998) (denial of information after Congress created right to such information was sufficient injury); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 887–88 (1990) (two people using lands in vicinity of those adversely affected by federal environmental policy was too general of a harm to establish injury); *United States v. SCRAP*, 412 U.S. 669, 685 (1973) (students claiming injury to forest recreation area from increased pollution caused by government regulatory scheme deemed sufficient injury).

⁵⁰ The harm must at least be “fairly traceable” to the defendant. *See* *Duke Power v. Car. Evtl. Study Grp.*, 438 U.S. 59, 74–78 (1978) (causation requirement satisfied because, but for the Price-Anderson-Act, nuclear reactor would not be built and plaintiffs would suffer no harm); *Simon v. E. Ky. Welfare Rights Org.* 426 U.S. 29, 45–46 (1976) (purely speculative whether new IRS revision, limiting amount of free medical care hospitals were required to provide, was responsible for denial of medical services to plaintiffs; thus no standing).

⁵¹ *See* *Duke Power*, 438 U.S. at 74–78 (but for causation also denotes redressability); *Simon*, 426 U.S. at 45–46 (speculative causation means redressability is also speculative).

controversies that parties will litigate actively.⁵² Chief Justice Marshall, in the first opinion to contemplate the scope of the judiciary's power, wrote: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."⁵³

In addition to the constitutional bar requiring injury and redressability, the U.S. standing doctrine also contains a number of prudential bars to litigation.⁵⁴ Most important to this Note are the bars to general taxpayer and third-party standing.⁵⁵ In delineating these and other prudential bars to standing, the Court has relied heavily on the case and controversy requirements of Article III, Section 2.⁵⁶ The Court addressed the issue in *Frothingham v. Mellon*, in which the plaintiff asserted that the Federal Maternity Act of 1921, providing financial grants to states to reduce maternal and infant mortality, violated the Tenth Amendment's reservation of powers to state governments.⁵⁷ The Court held that a taxpayer's grievance concerning spending of federal funds is too "attenuated" because it is "shared with millions of others [and] is comparatively minute and indeterminate."⁵⁸ Because of such an attenuated link, the Court developed a two-part test to determine the existence of taxpayer standing.⁵⁹ First, "the taxpayer must establish a logical link between the status and the type of legislative enactment attacked."⁶⁰ Second, "the taxpayer must establish a nexus between the status and the precise nature of the constitutional infringement alleged."⁶¹

⁵² See CHEMERINSKY, *supra* note 48, 60–61 (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Baker v. Carr*, 369 U.S. 186, 204 (1962)); O'Connor, *supra* note 9, at 644 (noting separation of powers rationale for strict standing doctrine); Scalia, *supra* note 8, at 894 (arguing standing is a function of separation of powers).

⁵³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1804). It is this notion of separation of powers that Justice Scalia has adopted as the correct interpretation, and to which he urges the Court return. See Scalia, *supra* note 8, at 887–99.

⁵⁴ See *Massachusetts (Frothingham) v. Mellon*, 262 U.S. 447, 486–89 (1923); *Braxton County Ct. v. West Virginia*, 208 U.S. 192, 197 (1892).

⁵⁵ See *Frothingham*, 262 U.S. at 486–89; *Braxton*, 208 U.S. at 197.

⁵⁶ See *Frothingham*, 262 U.S. at 486–89; *Braxton*, 208 U.S. at 197.

⁵⁷ *Frothingham*, 262 U.S. 447.

⁵⁸ *Id.* at 488; see also *Ex parte Levitt*, 302 U.S. 633, 634 (1934) (general interest common to all members of public not sufficient for standing).

⁵⁹ See *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

⁶⁰ *Id.*

⁶¹ *Id.* This means plaintiff must show that Congress is violating a specific constitutional provision rather than simply exceeding the scope of its powers. See CHEMERINSKY, *supra* note 48, at 92.

The Court went further in *Lujan v. Defenders of Wildlife*, holding that Congress cannot authorize standing for general grievances by simply inserting a grant into a particular statute.⁶² The Court struck down such a provision in the Endangered Species Act because it would allow Congress to transfer from the President to the courts the most important duty of the Chief Executive—ensuring “the Laws be faithfully executed.”⁶³ In *Association of Data Processing Service Organizations, Inc. v. Camp*, however, the Court found acceptable congressional authorization of standing for certain people within the “zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”⁶⁴ In *Camp*, the Court held that data processors were within the zone of interests protected by the Bank Service Corporation Act of 1962, which prohibited bank service corporations from “[engaging] in any activity other than the performance of bank services for banks.”⁶⁵ Through its treatment of general grievances, the Court has demonstrated an unwillingness to let Congress appoint every citizen as a sort of private attorney general.⁶⁶

Finally, the Court has recognized standing for associations or organizations only when their members would be injured by the challenged action, or if it has been injured as an entity.⁶⁷ An association cannot, however, seek redress because a government policy is contrary to its views.⁶⁸ As discussed below, this differs from the practice of other countries, such as England, which allow associational standing for watchdog organizations.⁶⁹

⁶² 504 U.S. 555, 573 (1992).

⁶³ *Id.* at 576; see also U.S. CONST. art. II, § 3.

⁶⁴ *Camp*, 397 U.S. at 153; see also *Barlow v. Collins*, 397 U.S. 159, 164 (1970) (finding farmers within zone of interests of statute regulating tenant farmers and assignment of payments under Upland Cotton Program).

⁶⁵ *Camp*, 397 U.S. at 155, 156 (citing 12 U.S.C. § 1864).

⁶⁶ See Owens, *supra* note 9, at 331 n.38.

⁶⁷ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding organization has standing to challenge conduct impeding its ability to attract members, raise revenues, or fulfill its purposes); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (finding national environmental protection organization lacked standing because its members were not injured by construction of ski resort in national park).

⁶⁸ See *Havens Realty*, 455 U.S. at 379; *Morton*, 405 U.S. at 736–41.

⁶⁹ *Regina v. Sec’y of State for Foreign & Comm’n Affairs ex parte The World Dev. Movement Ltd.*, (1995) 1 W.L.R. 386, 393, 396 (Q.B.) (U.K.) [hereinafter *R v. World Dev. Mov’t*]; Owens, *supra* note 9, at 346–47; see *infra* Part IV.

B. South Africa

I. General Standing Doctrine

Prior to the 1994 interim constitution, South African courts adopted a restrictive interpretation of standing.⁷⁰ In fact, the doctrine was markedly similar to the current U.S. doctrine in that litigants could not bring suits on behalf of the general welfare, but rather were required “to have a personal interest in the matter and to have been adversely affected by the wrong alleged.”⁷¹ Current South African standing doctrine, however, is quite broad.⁷² The constitution grants standing to:

- (a) anyone acting in their own interests;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) *anyone acting in the public interest*; and
- (e) an association acting in the interests of its members.⁷³

South African courts have accepted such liberal standing as necessary to enforce the fundamental rights enumerated in chapter 2 of the constitution.⁷⁴

Although the broad standing conveyed by chapter 2, section 33(d) would suggest that the Constitutional Court receives a litany of cases concerning issues of public interest, rarely has the court reached its decision based on the provision.⁷⁵ *Ferreira v. Levin NO & Others* is one of the few cases to discuss the issue, and even then only Justice O’Regan

⁷⁰ Cheryl Loots, *Standing, Ripeness and Mootness*, in 1 CONSTITUTIONAL LAW OF SOUTH AFRICA 7-2 (2d ed. 2002).

⁷¹ *Id.* (citing *Fedsure Life Assurance Ltd. & Others v. Greater Johannesburg Transitional Metro. Council & Others* 1998 (2) SA 1115 (SCA) (S. Afr.)).

⁷² See S. AFR. CONST. ch. 2 § 38; Greenberg, *supra* note 30, at 1292; Owens, *supra* note 9, at 368.

⁷³ S. AFR. CONST. ch. 2 § 38 (emphasis added).

⁷⁴ *Coetzee v. Comitis & Others* 2001 (1) SA 1254 (CC) ¶¶ 17.5–.7 (S. Afr.); *Ferreira v. Levin NO & Others*, 1996 (1) SA 984 (CC) ¶ 165 (S. Afr.); see also S. AFR. CONST. ch. 2 (much broader enumerated rights than U.S. Constitution, including privacy (§ 14), labor relations (§ 23), environmental (§ 24), and housing rights (§ 26)).

⁷⁵ See Loots, *supra* note 70, at 7-11 to -12 (discussing the few Constitutional Court cases giving treatment to the issue).

reached the issue of *locus standi* to claim relief in the public interest.⁷⁶ She described the requirements of the provision as follows:

Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court.⁷⁷

Despite the broad standing of section 33(d), courts often find alternative grounds for standing, thus avoiding any decisions based on section 33(d).⁷⁸

2. Just Administrative Action

The South African Constitution also grants broad standing in cases concerning administrative action.⁷⁹ The constitution embodies a “right to just administrative action that is lawful, reasonable and procedurally fair.”⁸⁰ The provision entitles anyone whose rights have been adversely affected by administrative action to be given written reasons for the action.⁸¹ The provision serves the purpose of guarding against “parliamentary ouster,” so that an Act of Parliament “can no longer oust a court’s constitutional jurisdiction and deprive the courts of their review function.”⁸² The Constitutional Court has characterized the principle as establishing the notion that the executive “may exercise no power and perform no function beyond that conferred upon them by law.”⁸³

⁷⁶ 1996 (1) SA 984 (CC) ¶ 233 (O’Regan, J.) (S. Afr.).

⁷⁷ *Id.* ¶ 234, quoted in Loots, *supra* note 70, at 7-11.

⁷⁸ *Ferreira*, (1) SA 984, ¶ 233 (noting important factor is whether there is another reasonable and effective manner in which challenge can be brought); see also Loots, *supra* note 70, at 7-11 (discussing similarities between South African and Canadian cases).

⁷⁹ See S. Afr. CONST. ch. 2 § 33; S. Afr. (Interim) CONST. § 24(a).

⁸⁰ S. Afr. CONST. ch. 2 § 33(1).

⁸¹ *Id.* § 33(2).

⁸² Jonathan Klaaren & Glenn Penfold, *Just Administrative Action*, in 2 CONSTITUTIONAL LAW OF SOUTH AFRICA 63-22 (2d ed. 2002).

⁸³ *Fedsure Life Assurance Ltd. & Others v. Greater Johannesburg Transitional Metro. Council & Others*, 1999 (1) SA 374 (CC) ¶ 56 (S. Afr.), quoted in Klaaren & Penfold, *supra* note 82, at 63-23.

Prior to the interim constitution, South African administrative law was governed by common law.⁸⁴ Based largely on the principles of rule of law and sovereignty of Parliament, common law allowed actions of a decision-maker to be overturned “if he abused his discretion, failed to properly apply his mind or failed to follow the rules of natural justice.”⁸⁵ This essentially gave free reign to Parliament and the executive during apartheid rule, particularly for laws governing segregation and national security.⁸⁶ The inclusion of the right to just administrative action in the interim and permanent constitutions embodied a “radical sea-change” in administrative law, setting the stage for constitutional supremacy.⁸⁷ Current jurisprudence requires all public power to flow from the Constitution and conform thereto.⁸⁸

The Constitutional Court has addressed each of the separate rights embodied in section 33(a) of the constitution, namely the right to administrative action that is (1) lawful, (2) reasonable, and (3) procedurally fair.⁸⁹ Procedural fairness is a flexible concept embodying two fundamental principles—the right to be heard and the rule against bias.⁹⁰ Although courts have broad latitude to determine procedural fairness, the Constitutional Court has warned that “court[s] should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively.”⁹¹

The concept of reasonable administrative action, as it is now interpreted, did not exist under common law.⁹² The Constitution abrogated the common law doctrines of symptomatic unreasonableness and gross unreasonableness, creating in their stead a doctrine of unreasonableness *per se*.⁹³ Two approaches exist. Under the first, an ac-

⁸⁴ *Id.* at 63-1.

⁸⁵ *Id.* (citing *Fedsure Life Assurance*, 1999 (1) SA 374 (CC) ¶¶ 23 & 28; *Johannesburg Stock Exch. & another v. Witwatersrand Nigel Ltd. & another*, 1988 (3) SA 132 (A) at 152 (S. Afr.)).

⁸⁶ *See id.* at 63-1 to -2.

⁸⁷ Klaaren & Penfold, *supra* note 82, at 63-2.

⁸⁸ *See Pharm. Mfr. Ass'n of S. Afr. & another*. In re Ex parte *President of RSA & Others*, 2000 (2) SA 674 (CC) ¶ 45 (S. Afr.).

⁸⁹ *See* Klaaren & Penfold, *supra* note 82, at 63-25 to -36. Because the issue is given such broad treatment in Klaaren & Penfold, this Note only briefly summarizes the jurisprudence.

⁹⁰ *See id.* at 63-26; *see also Premier, Mpumalanga, & another v. Executive Comm., Ass'n of State-Aided Schs., E. Transvaal*, 1999 (2) SA 91 (CC) ¶ 41 (S. Afr.) (discussing what constitutes procedural fairness).

⁹¹ *Premier, Mpumalanga*, 1999 (2) SA, ¶ 41.

⁹² Klaaren & Penfold, *supra* note 82, at 63-32.

⁹³ *See id.* at 63-32 to -33. Symptomatic unreasonableness did not allow review of unreasonableness itself, but allowed review to the extent that the unreasonableness pointed to the existence of another ground of review. *Id.* at 63-32. Gross unreasonableness is that

tion is reasonable “if there is a rational connection between a legitimate state objective and the means used.”⁹⁴ Under the second, in contrast, an action is reasonable if it is “supported by the evidence before the decision-maker and the reasons given for it, and is ‘rationally connected to its purpose, or objectively capable of furthering that purpose.’”⁹⁵

Parliament provided a tool for enforcement of this right in the Promotion of Administrative Justice Act (AJA).⁹⁶ The AJA was passed “to give effect” to the right to just administrative action by “providing a detailed elaboration of both the scope and content of the rights, as well as providing an institutional framework for their implementation and enforcement.”⁹⁷

a. *Defining Administrative Action*

Before the rights under chapter 2 section 33 and the AJA can be applied, it must first be determined whether a case involves administrative action.⁹⁸ In discerning whether the rights apply, one must look to both the constitution and the AJA.⁹⁹

Under the constitution, administrative action comprises “all action taken by persons and bodies exercising public power.”¹⁰⁰ The SCA interpreted this description to include only those actions in which the body or person is acting in its public capacity, as opposed to acting simply as a private party.¹⁰¹ In *Cape Metropolitan Council*, the court characterized a local authority’s cancellation of an agency agreement as private action because the power to terminate was derived not from its power as an agency, but rather from the tenets of contract law.¹⁰² Thus a state organ must be using its inherent state power for its actions to qualify as administrative.¹⁰³ The concept includes not only administra-

which is particularly egregious. *Id.* (citing *Nat’l Transp. Comm’n & another v. Chetty’s Motor Transp. (Pty) Ltd.*, 1972 (3) SA 726 (A) at 735 (S. Afr.)).

⁹⁴ Klaaren & Penfold, *supra* note 82, at 63-33.

⁹⁵ *Id.* at 63-34 (quoting Cora Hoexter, *The Future of Judicial Review in South African Administrative Law*, 117 S. AFR. L.J. 484, 511 (2000)).

⁹⁶ AJA, Act 3 of 2000.

⁹⁷ Klaaren & Penfold, *supra* note 82, at 63-5 to -6.

⁹⁸ *Id.* at 63-8.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 63-9.

¹⁰¹ *Cape Metro. Council & another v. Metro Inspection Servs. W. Cape CC & Others*, 2001 (3) SA 1013 (SCA) ¶ 18 (S. Afr.).

¹⁰² *Id.*

¹⁰³ See *id.*; Klaaren & Penfold, *supra* note 82, at 63-9 n.1. Examples of such actions include: the withdrawal of education bursaries by organs of the provisional executive; a deci-

tive adjudications, but also administrative rule-making and subordinate legislation.¹⁰⁴

The Constitutional Court has held that three categories of government action do not constitute administrative action under the constitution: legislative action;¹⁰⁵ executive policy decisions;¹⁰⁶ and judicial action.¹⁰⁷ The appropriate inquiry in such cases “is whether the task itself is administrative,” not simply whether it was conducted by the executive branch.¹⁰⁸ Thus, “[W]hat matters is not so much the functionary as the function.”¹⁰⁹ These categories are excluded because they are already regulated by the Constitution and through political participation; it would therefore be inappropriate to characterize them as administrative action.¹¹⁰

While the Constitutional Court has defined administrative action primarily in terms of what it does not encompass, drafters of the AJA directly addressed its entire scope.¹¹¹ To a large extent, the AJA codifies

sion of the Minister of Trade and Industry to compel a business to cease an activity that is under investigation as a harmful business practice and to freeze assets; the determination of a subsidy formula; and the award of a license. Klaaren & Penfold, *supra* note 82, at 63-9.

¹⁰⁴ *Fedsure Life Assurance Ltd. & Others v. Greater Johannesburg Transitional Metro. Council & Others*, 1999 (a) SA, 374 (CC) ¶ 41 (S. Afr.) (resolutions and by-laws passed by municipal council are legislative and not administrative action because council is elected and accountable to voters); *see also* Klaaren & Penfold, *supra* note 82, at 63-10 (discussing *Fedsure Life Assurance*).

¹⁰⁵ *See* Klaaren & Penfold, *supra* note 82, at 63-10 (distinguishing legislative and administrative action); *see also* *Fedsure Life Assurance* ¶ 41.

¹⁰⁶ *See* Klaaren & Penfold, *supra* note 82, at 63-12 (distinguishing executive policy decisions and administrative action); *see also* *President of Republic of S. Afr. & Others v. S. Afrn. Rugby Football Union & Others*, 2000 (1) SA 1 (CC) ¶ 141 (S. Afr.).

¹⁰⁷ *See* Klaaren & Penfold, *supra* note 82, at 63-15 (distinguishing judicial and administrative action); *see also* *Nel v. Le Roux NO & Others*, 1996 (3) SA 562 (CC) ¶ 24 (S. Afr.).

¹⁰⁸ *S. Afrn. Rugby Football Union*, 2001 (1) SA, ¶ 141, *quoted in* Klaaren & Penfold, *supra* note 82, at 63-15.

¹⁰⁹ *Id.*

¹¹⁰ Klaaren & Penfold, *supra* note 82, at 63-16.

¹¹¹ AJA, Act 3 of 2000 s. 1. The AJA provides that:

“[A]dministrative action” means any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect

the Constitutional Court's delineation of administrative action, but in positive terms.¹¹² The AJA breaks administrative action into two groups: (1) that affecting individuals, and (2) that affecting the public.¹¹³ Acts affecting private individuals involve situations

where a person enjoys an expectation of a privilege or benefit of which it would not be fair to deprive him or her without a fair hearing; and secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed.¹¹⁴

Administrative action affecting the public, however, is concerned more with the "general rule-making procedures which must be followed."¹¹⁵ The AJA states that procedural fairness "depends on the circumstances of each case," and in instances affecting either individuals or the public, it sets forth detailed provisions on how agencies must comply with procedural fairness.¹¹⁶ Both sections of the AJA require, among other factors, notice of actions as well as public hearings and an opportunity to comment on actions taken by administrative agencies.¹¹⁷

b. *The Right to Petition for Reasons*

The right to written reasons did not exist under common law, but is embodied in both the constitution and the AJA.¹¹⁸ Drafters of the constitution included the provision because they felt it would promote administrative justice and good decision-making without instigating unnecessary judicial review of the executive branch.¹¹⁹ The underlying theory is that decision-makers who know they may be required to justify their actions in the future will be more likely to consider alternatives

Id. The statute goes on to explain in detail what does *not* constitute administrative action, including executive acts of the President or Provincial Executive, the legislative functions of Parliament, and the judicial functions of courts. *Id.* ss. 1(b)(aa)–(ii).

¹¹² *See id.*

¹¹³ *Id.* ss. 3 & 4.

¹¹⁴ *Premier, Mpumalanga, & another v. Executive Comm., Assoc. of State-Aided Schs., E. Transvaal*, 1999 (2) SA 91 (CC) ¶ 35 (S. Afr.), *quoted in* Klaaren & Penfold, *supra* note 82, at 63-28.

¹¹⁵ *See* Klaaren & Penfold, *supra* note 82, at 63-28.

¹¹⁶ AJA, Act 3 of 2000 ss. 3(2), 3(3)–(5), & 4.

¹¹⁷ *Id.* s. 3(2)(i) (requiring notice of nature and purpose of proposed administrative action; *id.* s. 3(2)(ii) (mandating reasonable opportunity to make representations; *id.* s. 4(a) (providing much the same for administrative action affecting the public).

¹¹⁸ Klaaren & Penfold, *supra* note 82, at 63-35; *see also* S. Afr. CONST. ch. 2 § 33(2) (granting right to petition for reasons); AJA, Act 3 of 2000 s. 5(1) (same).

¹¹⁹ Klaaren & Penfold, *supra* note 82, at 63-35.

while making decisions, and strive to act in accordance with the principles of just administrative action.¹²⁰ Once a citizen has petitioned for reasons, however, it must be determined what constitutes “adequate reasons” under both the constitution and the AJA.¹²¹

Neither the constitution nor the AJA define “adequate reasons”; therefore, South African commentators have looked to U.K. cases, which construe the term to mean “the reasons set out must be reasons which will not only be intelligible but which deal with the substantive points that have been raised.”¹²² South African courts have held the term to require that more drastic action demands more detailed reasons.¹²³ Thus “the degree of seriousness of the administrative act should . . . determine the particularity of the reasons furnished.”¹²⁴ The reason giving provision “serves a satisfactory function, explaining to the affected parties and to the public at large why a particular decision has been made.”¹²⁵ Finally, although the procedure is request-driven in that agencies will not provide reasons until asked, recent legislative trends require that reasons be automatically given in relation to certain decisions.¹²⁶

Article 253 of the EC Treaty provides for a similar procedure in the European Union.¹²⁷ Analyzing EU treatment of the provision provides a more complete understanding of the process. The scope of article 253 is much broader than that embodied in South African law because it applies not only to administrative decisions, but also to legislative acts.¹²⁸ The policy reasons justifying the duty include increasing the transparency of decision-making, helping facilitate judicial review by the European Court of Justice (ECJ), and creating “participation rights.”¹²⁹ The reasons given should include the factual background of

¹²⁰ *Id.*

¹²¹ *See id.* at 63-36.

¹²² *Id.* (quoting *In re Poyser and Mills' Arbitration*, [1964] 2 QB 467 at 487 (U.K.)).

¹²³ *Id.* at 63-37 (citing *Moletsane v. Premier of Free State & another*, 1996 (2) SA 95 (O) at 98G-H (S. Afr.)).

¹²⁴ Klaaren & Penfold, *supra* note 82, at 63-37.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ EC Treaty, *supra* note 11, art. 253 (“Regulations, directives and decision adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reason on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the Treaty.”).

¹²⁸ *See* PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 117 (3d ed. 2003).

¹²⁹ *See id.* at 118, 120.

the measure and the purposes behind it.¹³⁰ In *Germany v. Commission*, the ECJ held it was sufficient to set out in a concise, clear, and relevant manner the principal issues of law and fact on which the action was based so the reasoning that led the Commission to its decision could be understood.¹³¹ Furthermore, the reasons given “must be sufficient to enable the court to exercise its judicial review function,” and the court “will scrutinize the . . . reasoning, annulling the decision if it does not withstand examination.”¹³²

c. Standing to Sue in Administrative Cases and Substantive Remedies

Standing to sue administrative agencies is controlled by chapter 2 section 38 of the constitution, as are all suits concerning infringements on constitutional rights. South African courts have adopted a broad approach to standing in these instances, largely because the nature of administrative cases allows a suit to be brought under any of the five grounds for standing in section 38.¹³³ Unlike other actions giving rise to suits, administrative actions are specifically intended to have public effect.¹³⁴ Further, they affect classes of citizens in a similar manner, often classes that are too poor or disenfranchised to bring the action on their own behalf.¹³⁵

In *Ngxuza & Others v. Secretary of Department of Welfare, Easter Cape Provincial Government & another*, Judge Froneman adopted a liberal approach to standing in administrative cases because:

The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of

¹³⁰ See *id.* at 118 (citing Case 24/62, *Comm'n v. Council*, 1987 E.C.R. 1493; Case 45/86, *Germany v. Comm'n*, 1963 E.C.R. 63).

¹³¹ *Id.*

¹³² *Id.* at 120.

¹³³ See *Ngxuza & Others v. Sec'y, Dep't of Welfare, E. Cape Provincial Gov't & another*, 2000 (12) BCLR 1322 (E) at 1331 (S. Afr.).

¹³⁴ See *id.* at 1328.

¹³⁵ See *Klaaren & Penfold*, *supra* note 82, at 63-38.

public power is in accordance with the principle of legality. All this speaks against a narrow interpretation of the rules of standing.¹³⁶

Although Judge Froneman was willing to uphold the plaintiffs' standing in *Ngxuza* on almost any of the grounds in section 38, plaintiffs ultimately elected to proceed under section 38(3) as a class action suit.¹³⁷ The SCA upheld the applicants' standing on that basis.¹³⁸

Although the liberal standing doctrine allows more judicial intrusion into administrative action, South African courts have been hesitant to impose substantive remedies that substitute the court's judgment for that of the administrative agency.¹³⁹ This reluctance has carried over from the pre-constitution common law period and resembles the separation of powers concerns embodied in U.S. jurisprudence.¹⁴⁰ The Constitutional Court has held that courts should be cautious in providing substantive relief, especially when the relevant decision is of a political nature.¹⁴¹ In *Premier, Mpumalanga, & another v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, Justice O'Regan wrote that "a court should generally be reluctant to assume the responsibility of exercising a discretion which the Legislature has conferred expressly upon an elected member of the executive branch of government."¹⁴²

The AJA also stipulates that substantive remedies should only be available in limited cases.¹⁴³ Although section 8 of the AJA states that remedies may include the setting aside of the administrative action, in most circumstances the court will remit the matter for reconsideration by the administrator.¹⁴⁴ Only in "exceptional cases" will the court substitute or vary the administrative action or direct the administrator to pay compensation.¹⁴⁵ Thus, the likely remedies open to citizens are either to petition for reasons, or, if inadequate reasons are given, hope the

¹³⁶ 2000 (12) BCLR 1322 (E) at 1327 (S. Afr.), *quoted in* Klaaren & Penfold, *supra* note 82, at 63-38.

¹³⁷ *See id.* at 63-38.

¹³⁸ *Permanent Sec'y, Dep't of Welfare, E. Cape, & Others v. Ngxuza & Others*, 2001 (4) SA 1184 (SCA) ¶ 11 (S. Afr.).

¹³⁹ Klaaren & Penfold, *supra* note 82, at 63-39.

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² 1999 (2) SA 91 (CC) ¶ 51 (S. Afr.).

¹⁴³ AJA, Act 3 of 2000 s. 8(1)(c)(ii).

¹⁴⁴ *Id.* s. 8(1)(c)(i).

¹⁴⁵ *Id.* ss. 8(1)(c)(ii)(aa) & (bb).

court will give the administrative agency sufficient instructions on remittance of the matter.¹⁴⁶

III. ANALYSIS

As noted above, the prime concerns underlying a conservative U.S. standing doctrine are: promoting judicial efficiency by maintaining a workable caseload; improving judicial decision-making by providing specific controversies that parties will actively litigate; and the separation of powers doctrine.¹⁴⁷ These concerns can be alleviated, however, without depriving citizens of just administrative action.¹⁴⁸ Before turning to those issues, it is first necessary to discuss some of the practical reasons for the differences between U.S. and South African standing doctrines.

South Africa is neither the only country, nor the only common law tradition, which provides for liberal standing.¹⁴⁹ Australia, the United Kingdom, Canada, India, Pakistan and the Philippines—many of which have common law traditions—provide liberal access to courts.¹⁵⁰ One must take account of two important differences between these countries and the United States: first, almost all except the United States are parliamentary systems; and second, South Africa,¹⁵¹ Pakistan,¹⁵² and the Philippines¹⁵³ have weathered much more political unrest than the United States.¹⁵⁴ The former is important insofar as notions of parliamentary supremacy make it easier for legislatures to alter the legal framework.¹⁵⁵ The latter is particularly critical in the comparison between South African and U.S. standing doctrines because countries facing political instability and corruption are more willing to liberalize

¹⁴⁶ See S. AFR. CONST. ch. 2 § 33(2); AJA, Act 3 of 2000 s. 8.

¹⁴⁷ See CHEMERINSKY, *supra* note 48, 60–61; Scalia, *supra* note 8, at 894 (discussing separation of powers).

¹⁴⁸ See OWENS, *supra* note 9, at 373–74 (discussing concerns over separation of powers).

¹⁴⁹ See RICHARD GORDON Q.C., JUDICIAL REVIEW: LAW AND PROCEDURE 82–83 (1996); LOOTS, *supra* note 70, at 7–11; OWENS, *supra* note 9, at 343–54.

¹⁵⁰ See OWENS, *supra* note 9, at 343–54.

¹⁵¹ Cent. Intelligence Agency, World Factbook: South Africa, <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (last visited May 14, 2008).

¹⁵² Cent. Intelligence Agency, World Factbook: Pakistan, <https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html> (last visited May 14, 2008).

¹⁵³ Cent. Intelligence Agency, World Factbook: Philippines, <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html> (last visited May 14, 2008).

¹⁵⁴ See OWENS, *supra* note 9, at 360–70.

¹⁵⁵ O'Connor, *supra* note 9, at 644 (noting, however, that parliamentary supremacy has done little for legislative efforts to curb judicial review of administrative action).

judicial review to curb political injustice.¹⁵⁶ The liberal standing doctrines of Pakistan and the Philippines, for instance, are directly attributable to difficulties in maintaining faith in the public administration of laws.¹⁵⁷

These practical explanations aside, even in the highly political system of U.S. Government and its litigious society, a liberalized standing doctrine can operate within the confines of a restrictive approach to judicial review.¹⁵⁸ Although U.S. Supreme Court decisions abound with fears of opening the “floodgates of litigation,” adopting a system similar to that embodied in the AJA can be done in a manner sufficient to protect efficient judicial review.¹⁵⁹ For example, one of the most limiting features of South African standing in administrative cases lies in the definition of administrative action.¹⁶⁰

Because administrative actions include only those actions taken pursuant to the agency’s public authority, it precludes actions by administrators that, if done by any other individual or organization, would constitute private actions.¹⁶¹ For example, individuals who are upset because their contract with the government has been terminated would not be allowed to proceed under liberalized standing rules for administrative cases.¹⁶² Rather, the party would already have standing under the common law of contracts.¹⁶³ In *Cape Metropolitan Council & another v. Metro Inspection Services Western Cape CC & Others*, for example, the court held that cancellation of an agency agreement was not an administrative action and the proper remedy could be pursued under common law.¹⁶⁴ By additionally excluding political decisions of the legislature and executive, South African standing law further restricts access to courts, which should assuage the worries of the U.S. Supreme Court.¹⁶⁵

¹⁵⁶ See Owens, *supra* note 9, at 360.

¹⁵⁷ See *id.* at 360–70.

¹⁵⁸ See *id.* at 371–74 (discussing ramifications of liberal standing for sufficient adverse-ness and separation of powers).

¹⁵⁹ See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 435 (2006) (Souter, J., dissenting) (referring to floodgates of litigation); *Sutton v. United Air Lines, Inc.* 527 U.S. 471, 510 (1999) (Stevens, J., dissenting) (same); *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995) (same); *Neb. Press Ass’n. v. Stuart*, 427 U.S. 539, 608 (1976) (same).

¹⁶⁰ See *supra* Part III.B.2.a.

¹⁶¹ See *Cape Metro. Council & another v. Metro Inspection Serv. W. Cape CC & Others*, 2001 (3) SA 1013 (SCA) ¶ 18 (S. Afr.).

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ *Id.* The court distinguished a public administration acting as an administrative authority exercising public power on the one hand, from a public administration acting as a contracting party on the other. *Id.*

¹⁶⁵ See Klaaren & Penfold, *supra* note 82, at 63-9.

U.S. policy-makers could further promote just administrative action while ensuring well-litigated cases and controversies by adopting and modifying a standing doctrine similar to that of chapter 2 section 38 of the South African Constitution.¹⁶⁶ The bar to general organizational standing in the United States exists because the Court desires plaintiffs with a personal stake in the outcome of cases, hence the bar to advisory opinions.¹⁶⁷ Whereas South African law allows standing by any litigant in the public interest, the United Kingdom provides a more limited standing for watchdog organizations.¹⁶⁸ The guiding principle in U.K. courts when analyzing cases of general grievances is to keep “busy-bodies, cranks, or mischief-makers” out of the court room.¹⁶⁹ So long as the parties are devoted to the litigation, courts see less reason to bar their standing.¹⁷⁰ U.K. courts have thus realized that some organizations are sufficiently dedicated to their mission so as to passionately litigate cases to which they are a party.¹⁷¹

Justice Scalia has responded to such suggestions not by attacking the ability of organizations to effectively litigate cases, but rather by arguing that the hearing of such cases violates the separation of powers doctrine.¹⁷² Indeed, he agrees that “often the best adversaries are national organizations . . . that have a keen interest in the abstract question at issue in the case.”¹⁷³ Scalia is not as concerned with the ability of the Court to do its job, so much as with the Court “keep[ing] out of affairs better left to the other branches.”¹⁷⁴ Scalia would require that a litigant be able to establish a particularized harm to a minority of which

¹⁶⁶ See Owens, *supra* note 9, at 347.

¹⁶⁷ See *Muskrat v. United States*, 219 U.S. 346, 362 (1911).

¹⁶⁸ *R v. World Dev. Mov't*, (1995) 1 W.L.R. 386, 393, 396 (Q.B.) (U.K.); Owens, *supra* note 9, at 346–47.

¹⁶⁹ See *World Dev. Mov't*, 1 W.L.R. at 393.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* But see *Dobbs v. Train*, 409 F. Supp. 432, 434–35 (N.D. Ga. 1975), *aff'd*, 559 F.2d 946 (5th Cir. 1977) (finding administrative agencies are not permanently immune from judicial review just because citizens missed narrow window for public comment). Another possibility, mentioned only briefly as it is outside the purview of this Note, is that governments can institute a public ombudsperson to handle disputes involving citizens and administrative agencies. See MARY SENEVIRATNE, *OMBUDSMEN IN THE PUBLIC SECTOR I* (1994); Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 587 (1993). Such individuals exist in the United Kingdom, Scandinavian states, New Zealand, and Poland. See SENEVIRATNE, *supra*, at 1; Utter & Lundsgaard, *supra*, at 587.

¹⁷² See Scalia, *supra* note 8, at 891.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

he is a part.¹⁷⁵ Such an injury sets the litigant apart from the majority, thus making it difficult for him to pursue a remedy through the political branches.¹⁷⁶ Scalia, however, offers the precise reason why such a formulation is ineffective in modern politics—reality.¹⁷⁷ The political process does not always work, and under certain circumstances it is necessary to allow organizations that may or may not be able to identify a specific injury to themselves to force government actors to do their jobs.¹⁷⁸

There are, however, reforms less intrusive into the realm of executive power, namely that of requesting written reasons.¹⁷⁹ U.S. administrative agencies often do produce reasons for their actions; however, there is no process requiring them to do so.¹⁸⁰ The South African procedure for requesting written reasons affords agencies an opportunity to explain themselves in a satisfactory manner before the judiciary intervenes.¹⁸¹ U.S. policy-makers, in creating such a provision, should go beyond the approach taken by South Africa and delineate exactly what constitutes adequate reasons.¹⁸² Whereas South African *courts* have gone on to interpret the provision, U.S. *policy-makers* should give more direction from the start.¹⁸³ Adequate reasons should set out in a concise, clear, and relevant manner the principal issues of law and fact on which the action was based, as required in the European Union.¹⁸⁴ Such reforms would promote both greater transparency and broader access to courts when reasons are insufficient without unduly encroaching on the political branches of government.¹⁸⁵

¹⁷⁵ See *id.* at 895.

¹⁷⁶ See *id.* at 894.

¹⁷⁷ See Scalia, *supra* note 8, at 884.

¹⁷⁸ See Owens, *supra* note 9, at 373.

¹⁷⁹ See S. AFR. CONST. ch. 2 § 33(2); AJA, Act 3 of 2000 s. 5(1); EC Treaty, *supra* note 11, art. 253.

¹⁸⁰ See 68 Fed.Reg. 52,925–31 (2003) (giving reasons for EPA's denial of rule-making petition submitted by petitioners in *Massachusetts v. EPA*). The reasons the EPA gave in that particular instance were: (1) that the Clean Air Act does not authorize the EPA to issue mandatory regulations to address global climate change; and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1450 (2007) (citing 68 Fed.Reg. 52,925–31).

¹⁸¹ See S. AFR. CONST. ch. 2 § 33(2); AJA, Act 3 of 2000 (5)(1); Klaaren & Penfold, *supra* note 82, at 63–35.

¹⁸² See Klaaren & Penfold, *supra* note 82, at 63–36.

¹⁸³ See *id.* at 63–37.

¹⁸⁴ See CRAIG & DE BÚRCA, *supra* note 128, at 118.

¹⁸⁵ See *id.*

CONCLUSION

This Note does not suggest an all-out liberalization of the U.S. standing doctrine. There is no denying that separation of powers is a central and laudable tenet of U.S. constitutional jurisprudence. But it should not stand as a rigid bar to otherwise meritorious claims. Rather, the most vital concern in the realm of taxpayer suits should be promoting democratic and just administrative action. South African law confronts the same obstacles as U.S. law, yet provides liberal grounds for standing. South Africa ameliorates separation of powers concerns, not by restricting access to courts in the first instance, but rather by restricting the remedies available to litigants. Only in rare circumstances will South African courts replace administrative judgments with their own; rather, courts will require agencies to better justify their actions to injured individuals and to the public in general. The true effect of such a policy is to force agencies to analyze thoroughly the options available to them. If requiring administrative agencies to justify actions that adversely affect citizens gives them pause before enacting questionable regulations, such a policy only serves to make administrative agencies more responsive to citizens. Scalia and the Court's injury-specific formulation of standing focuses on what would happen if courts heard cases lacking a particularized injury—encroachment on the political branches. The real concern, however, should be what would happen if courts refuse to hear cases. In many instances, there would be no remedy; the political system often does not work as well as we wish nor as well as the founders intended.

Should the EPA be required to justify all of its policy decisions in writing? Of course not. But it also should not be allowed to shirk its responsibilities, as the Court held it had in *Massachusetts v. EPA*. Only those actions “materially” affecting citizens’ rights would be subject to review under a revised standing doctrine. Thus the EPA should be expected to explain to citizens and local governments why it has taken actions inconsistent with its purpose and mission—an explanation beyond that of “it would be inappropriate at this time.” If current U.S. standing jurisprudence precludes citizens from receiving this information, it needs to be modified.

