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THE FUNCTIONS OF STANDING

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ARTICLES

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The doctrine of standing is said to vindicate the separation of powers guaranteed by the structure of the Constitution. But "separation of powers" is not monolithic, and the Supreme Court has used standing doctrine to promote at least three separation-of-powers functions for the courts: (1) hearing only cases possessing sufficient concrete adversity to make them susceptible of judicial resolution; (2) avoiding questions better answered by the political branches; and (3) resisting Congress's use of citizen suits—and therefore Congress's conscription of the courts—to monitor the compliance of the executive branch with the law.

Whatever the value of those goals, standing doctrine does not effectively serve them. Moreover, standing doctrine—because it is not an effective vehicle for vindicating, or even discussing, separation-of-powers goals—has helped paper over profound disagreements within the Court over the meaning of each of these separation-of-powers functions, disagreements that have persisted since the doctrine began to flourish in the 1960s.

In this Article, I outline the three functions of standing, the debates over the meaning of each function, and the failings of the doctrine in each. I explain the problems caused by the doctrine's failure, positing that criticisms of the doctrine emerge in part from its use in the service of goals it cannot satisfy. I then suggest that these functions deserve more analysis than they receive in the impoverished context of standing analysis, recommend a dramatic scaling back of standing as a tool for separation-of-powers functions, and put forward as an alternative a vibrant abstention doctrine that would place separation-of-powers issues in the foreground. By adopting these recommendations, the Court can stem accusations

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that it uses standing doctrine for disingenuous purposes, provide clearer guidance for the lower courts, and more transparently realize the separation-of-powers functions it seeks to promote.

INTRODUCTION

The Supreme Court has stated that standing "is built on a single basic idea—the idea of separation of powers."[1] But, of course, there is no single "idea" of separation of powers, and the Court has used standing doctrine to pursue several different such ideas.[2] In this Article, I seek to understand what

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

2. Indeed, as I note below, separation of powers was not necessarily seen as a *justification* for standing in *Allen* but was highlighted as a conceptual tool to help judges *apply* the doctrine. *See infra* notes 27-29 and accompanying text.

separation-of-powers functions[3] are served by standing doctrine, what tensions exist within the Court over the meaning of "separation of powers," and how well standing doctrine performs these functions, given the tensions I identify.

The Court seems to mean at least three different things when it uses standing to promote separation of powers. First, and most familiarly, the doctrine helps restrict the cases heard in the federal courts to those that are properly "cases" and "controversies" under Article III.[4] As the Court noted in *Flast v. Cohen*, Article III limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[5] To satisfy such criteria is to make the court's involvement *as a court* proper.[6] The adversity demanded under this view of standing also "sharpens the presentation of issues upon which the court so largely depends for illumination."[7] As I show below, even this seemingly straightforward separation-of-powers purpose—keeping courts to their role qua

3. At least two other scholars of standing doctrine have provided valuable accounts focusing on the "functions" served by standing. *See* Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663 (2007); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995) [hereinafter Stearns, *Historical Evidence*]; Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) [hereinafter Stearns, *Justiciability*]. These are the functions that, they argue, standing *truly* serves (regardless of the Court's assertions), adopting the type of "functionalist" explanation commonly used in the social sciences. *See, e.g.*, Jon Elster, *Functional Explanation: In Social Science*, *in* READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE 403 (Michael Martin & Lee C. McIntyre eds., 1994). Kontorovich, for example, contends that standing serves to prevent inefficient dispositions of constitutional entitlements. Kontorovich, *supra*, at 1666; *see infra* note 129. Stearns emphasizes standing's role in, *inter alia*, limiting the ability of individual litigants to shape the path of doctrinal development. Stearns, *Historical Evidence*, *supra*, at 1315; *see infra* note 156. Here, I focus on the separation-of-powers functions that the Court *asserts* are served by standing doctrine, and ask whether the doctrine serves them.

4. U.S. CONST. art. III, § 2.

5. Flast v. Cohen, 392 U.S. 83, 95 (1968); *see also* Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (quoting same language from *Flast* and identifying as nonjusticiable those cases that have become moot, involve political questions, or request advisory opinions).

6. *See, e.g.*, 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531 (2d ed. 1984) ("Absent constitutional standing, the courts believe they lack power to entertain the proceeding."). So, for example, the Court "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." Liverpool, N.Y. & Phila. Steam-Ship Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885).

7. Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Massachusetts v. EPA, 549 U.S. at 517 (quoting same language from *Baker*); Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (noting that the standing requirement "assur[es] . . . that 'the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982))).

courts—has generated significant disagreement among the members of the Court.

Second, the Court has said, standing doctrine allows the courts to refuse cases better suited to the political process, thus (along with other justiciability doctrines) permitting Article III to "assure that the federal courts will not intrude into areas committed to the other branches of government."[8] Cases are sorted on a rough democratic theory: if an injury is shared by a large group of people, some cases suggest, such a group can and should take its problem to the legislature or the executive branch, not the courts.[9] Thus, the Court frequently "has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."[10] Recent cases indicate a struggle within the Court over the propriety of adjudication when

8. *Flast*, 392 U.S. at 95; *see also* United States v. Richardson, 418 U.S. 166, 179 (1974) ("In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.").

Under this heading also fall cases that raise questions considered too political for the courts to decide; standing gives the courts a way to evade those cases with little fanfare. *See infra* notes 84-86 and accompanying text. One might even argue that standing is used to create a broader political question doctrine: "[under] the political question doctrine, . . . courts should abstain from resolving constitutional issues that are better left to other departments of government, mainly the national political branches." Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1458 (2005). Indeed, some have noted a decline in using the political question doctrine that parallels the expansion of the doctrine of standing. *See, e.g.*, Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303 (1996).

9. *See, e.g.*, *Richardson*, 418 U.S. at 179 ("[T]hat the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied . . . . Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them."); *see also* FEC v. Akins, 524 U.S. 11, 23 (1998) ("Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."). *But see Flast*, 392 U.S. at 111 (Douglas, J., concurring) ("[The individual] faces a formidable opponent in government, even when he is endowed with funds and with courage. The individual is almost certain to be plowed under, unless he has a well-organized active political group to speak for him. The church is one. The press is another. The union is a third. But if a powerful sponsor is lacking, individual liberty withers—in spite of glowing opinions and resounding constitutional phrases.").

10. *Valley Forge*, 454 U.S. at 475 (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975)).

injuries are particularized and yet widely shared.[11] More fundamentally, the cases reveal an ongoing debate within the Court over what it means to facilitate democratic politics.

Third, the Court (and particularly Justice Scalia) has suggested that standing acts as a bulwark against congressional overreaching, preventing Congress from conscripting the courts in its battles with the executive branch.[12] On this view, when Congress creates citizen-suit provisions that permit individual citizens to sue to enforce federal law, the federal courts can be forced into the role of "virtually continuing monitors of the wisdom and soundness of Executive action."[13] Such a role "inevitably produce[s] . . . an overjudicialization of the processes of self-governance."[14] When standing serves to deny access to some fraction of citizen suitors, it thereby limits Congress's ability to conscript the courts in its battles with the executive.[15] This function, in particular, is the subject of profound disagreement within the Court.

The "single idea . . . of separation of powers" thus turns out to be at least three ideas, each of which is contested. In other words, standing doctrine serves at least three masters.[16] How well does it serve these multiple functions?

In this Article, I argue that standing is ill-suited to most of the functions it is asked to serve, and that forcing standing into this variety of roles contributes

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11. *See infra* Part I.B; *see also, e.g.*, *Akins*, 524 U.S. at 23-24 (reviewing generalized-grievance jurisprudence and distinguishing cases involving particularized injury from those involving abstract injury). *Compare* Massachusetts v. EPA, 549 U.S. at 522 ("That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."), *with id.* at 541 (Roberts, C.J., dissenting) ("The very concept of global warming seems inconsistent with this particularization requirement. Global warming is a phenomenon 'harmful to humanity at large,' and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world." (citation omitted) (quoting Massachusetts v. EPA, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in judgment), *rev'd*, 549 U.S. 497 (2007))).

12. *See, e.g.*, *Lujan*, 504 U.S. at 577 ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3.").

13. *Id.* at 577 (internal quotation marks omitted) (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

14. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).

15. The *Lujan* Court makes clear, however, that Congress retains the power to convert de facto injuries into de jure injuries addressable in the courts. *Lujan*, 504 U.S. at 578. In other words, Congress can take an actually existing injury and make it the basis for legal action, even though no such action existed under prior common or statutory law.

16. "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." *Matthew* 6:24 (King James); *see also* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 70 (1984) ("[S]tanding law has been made to serve too many masters.").

to the scathing critiques leveled against the doctrine.[17] Even if standing is properly used for some subset of these functions—for example, in assuring the concrete adversity that enables a court qua court to do its job—the doctrine's broader failings do the Court no favors. Ironically, concepts of separation of powers that were originally introduced into the standing context to "make[] possible the gradual clarification of the law" of standing[18] have instead themselves been muddied.

In Part I below, I delineate the various separation-of-powers functions assigned by the Court to the standing doctrine, demonstrate the conflicts within the cases over the meaning of each function, and then assess the success of the doctrine at performing those functions. I conclude that the doctrine has been asked to serve several functions for which it is profoundly ill-suited, and in so doing has helped generate confusion over the proper role of the federal courts in the constitutional structure.

I demonstrate in Part II that these flaws are not innocuous: using standing in these improper ways causes far more trouble than good. Not only does the inconsistency generated by the doctrine expose the Court to heated criticism, this inconsistency also generates serious difficulties for the lower courts, who have increasingly found refuge in an empty formalism. These separation-of-powers functions embody tensions that should be addressed head-on, and the current problems with standing doctrine obscure rather than clarify those tensions.

Finally, in Part III, I suggest that the Court recognize the multiple functions it has assigned to the standing doctrine, acknowledge that the doctrine serves only one of those functions even minimally, abandon the standing doctrine in most of its current applications, and directly face the separation-of-powers issues now clouded by the vagaries of standing doctrine. Instead of using a constitutional doctrine so plainly flawed, it should develop a vibrant abstention doctrine that permits it to pursue separation-of-powers goals without the obfuscation caused by standing doctrine.[19] In so doing, the Court can cut short accusations that its doctrine of standing is merely a devious method to hidden ends, provide more useful guidance to the lower courts, and achieve the separation-of-powers functions it ultimately decides to promote in ways that are more intelligible.[20]

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17. *See infra* notes 31-37 and accompanying text.

18. *Allen*, 468 U.S. at 752.

19. As I discuss below, *see infra* Part III, abstention has been proposed as an alternative to standing since at least Professor Jaffe's time. *See* Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961) [hereinafter Jaffe, *Private Actions*]; Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) [hereinafter Jaffe, *Public Actions*].

20. I should note what I am not doing in this Article. First, I am not engaging in a close analysis of the tripartite test (injury in fact, causation, and redress) and how that test has been applied in particular cases—for example, whether a particular plaintiff is really injured, or whether a particular defendant truly caused an injury (although my analysis at certain points

I. THE FUNCTIONS OF STANDING

The Court has said that standing is "perhaps the most important" of the justiciability doctrines,[21] which also include ripeness, mootness, political question, and abstention.[22] These doctrines "relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[23] That the Court's power is constrained by such a variety of doctrines reveals the intense attention paid to the limits imposed by the Constitution, both regarding the judicial power and the powers of the federal government more generally.[24]

The requirements of the doctrine may be stated simply (and have been described as "numbingly familiar"[25]): (1) the plaintiff must have suffered an injury in fact; (2) the plaintiff's injury must be fairly traceable to the actions of the defendant; and (3) the relief requested in the suit must redress the plaintiff's injury.[26] Despite the concision of the three-part test, the Court has recognized that the standing requirement "incorporates concepts concededly not

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requires me to suggest strengths or flaws in a given standing analysis). Nor am I engaging in an in-depth historical analysis, a task that has been ably performed by others. *See, e.g.*, James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1 (2001); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

Finally, I am not fully engaging the argument (as Professors Epstein, Pushaw, and others have) that the Court has the wrong view of the role of the Court in the separation of powers. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Richard A. Epstein, *Standing and Spending—The Role of Legal* and *Equitable Principles*, 4 CHAP. L. REV. 1 (2001); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996). Instead, I recognize the multiple and inconsistent strands in the separation-of-powers theories underlying much of standing doctrine and recommend that the Court deal with those problems directly, rather than through the flawed tool of standing doctrine.

21. *Allen*, 468 U.S. at 750; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

22. *See generally* 13 WRIGHT, *supra* note 6, § 3529 (discussing justiciability).

23. *Allen*, 468 U.S. at 750 (internal quotation marks omitted) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)).

24. For further discussions of separation of powers under the United States Constitution, see NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004); THE FEDERALIST NOS. 47-48 (James Madison); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986); Pushaw, *supra* note 20; and Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

25. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

26. *See, e.g.*, *Lujan*, 504 U.S. at 560-61.

susceptible of precise definition."[27] Indeed, the *Allen* Court hoped that grounding the doctrine in separation of powers would aid the lower courts:

> The absence of precise definitions . . . hardly leaves courts at sea . . . . [T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers. *It is this fact which makes possible the gradual clarification of the law through judicial application.* . . . [B]oth federal and state courts have long experience in applying and elaborating in numerous contexts the pervasive and fundamental notion of separation of powers.[28]

Thus the link to separation of powers emerged primarily as an interpretive tool: courts evaluating a tricky standing question would be guided by considerations of separation of powers in answering that question, resulting in more consistent decisions over time.[29]

Despite the Court's hopes, the doctrine has proven notoriously difficult to apply. As Professor Pierce has demonstrated empirically, lower courts resolving standing questions have produced contradictory results: cases with essentially the same facts come out in wildly different ways, and the reasons invoked to support those outcomes vary dramatically in their invocation of the Court's separation-of-powers reasoning.[30]

Such unpredictability has generated extensive controversy. Critics have argued that the doctrine is "incoherent,"[31] is "manipulable" and permeated with "doctrinal confusion,"[32] lacks a historical basis,[33] amounts to a decision on the merits in the guise of a threshold jurisdictional inquiry,[34] is akin to substantive due process,[35] "act[s] as a[] . . . pointless constraint on courts,"[36] and cloaks in

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27. *Allen*, 468 U.S. at 751.

28. *Id.* at 751-52 (emphasis added).

29. Indeed, the *Duke Power* Court described this concern for the "proper—and properly limited—role of courts in a democratic society" as a "general prudential concern[]," not a constitutional mandate. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80 (1978) (internal quotation marks omitted) (quoting Warth v. Seldin, 442 U.S. 490, 498 (1975)).

30. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

31. Fletcher, *supra* note 25, at 221.

32. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988).

33. *See, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418-25 (1988).

34. *See, e.g.*, Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977).

35. *See, e.g.*, Sunstein, *supra* note 32, at 1480 (arguing that a strict view of standing produces results much like that of the *Lochner* era, "when constitutional provisions were similarly interpreted so as to frustrate regulatory initiatives in deference to private-law understandings of the legal system"); *see also* Fletcher, *supra* note 25, at 233 ("[O]ne may even say that the 'injury in fact' test is a form of substantive due process."); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992) [hereinafter Sunstein, *What's Standing*] ("[T]he injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process.").

technical doctrine what are actually normative decisions about the proper scope of government action.[37] Indeed, dissenting members of the Court have accused majorities of using standing as a "cover" for improper analysis,[38] and have described the extremes of standing analysis as a "word game played by secret rules."[39] The Court itself has even stated that "[s]tanding has been called one of the most amorphous [concepts] in the entire domain of public law,"[40] in part because the words "cases" and "controversies" "have an iceberg quality, containing beneath their surface simplicity submerged complexities."[41]

Whatever the validity of these criticisms, I want to ask a simple question: does the doctrine perform well or even adequately the jobs the Court assigns to it?[42] If standing is "built on a single basic idea—the idea of separation of powers," does it serve that idea?[43]

As I demonstrate below, it does not. To begin with, there is no single "idea" of separation of powers. Instead, to use the term "separation of powers"

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36. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 75 (2007) (discussing standing and other justiciability doctrines).

37. *See, e.g.*, William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 249 (2001) (arguing that the Court, using standing doctrine, has promoted both more and less assertive roles for courts as gatekeepers, most recently embracing "a more limited and deferential judicial standing role"); Nichol, *supra* note 16, at 70, 101 (1984) (noting, in addition to separation-of-powers issues, that standing cases have implicated federalism and localism issues); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 305 (2002) [hereinafter Nichol, *Standing for Privilege*] (contending that the injury-in-fact standard "should neither be used to restrict the powers of Congress to authorize jurisdiction, nor to force Article III authority into channels marked principally by the Justices' own unexamined and unexplained preferences").

38. Allen v. Wright, 468 U.S. 737, 767 (1984) (Brennan, J., dissenting).

39. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

40. *Id.* at 99 (majority opinion) (internal quotation marks omitted) (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 498 (1966) (statement of Professor Paul A. Freund)).

41. *Id*. at 94.

42. It will be clear from the way I pose this question that I do not believe that the tripartite test is compelled by the Constitution; at a minimum, its use in all the circumstances to which it has been applied is not compelled. The Court has developed the tripartite standing test to put into operation the "case or controversy" provision of the Constitution. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341-42 (2006) ("[N]o 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. . . . The case-or-controversy requirement thus plays a critical role, and Article III standing . . . enforces the Constitution's case-or-controversy requirement." (citation and internal quotation marks omitted) (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997) and Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004))). If that test does not help the Court achieve the goals it believes are embodied in the Constitution's restriction of the judicial branch to cases or controversies, it should change course, subject to the demands of stare decisis and precedent. *See infra* Part III. As Professor Sunstein has said, "article III requires a case or controversy, but whether there *is* a case or controversy is something on which, with respect to standing, article III is silent." Sunstein, *supra* note 32, at 1474 (emphasis added).

43. *Allen*, 468 U.S. at 752.

is to paper over a variety of principled disagreements about the proper balance of the powers of the three branches. Standing is not built on a single idea, but on *several* ideas of separation of powers, each of which is internally contested.

At least three such ideas are visible in the cases. First, standing doctrine is used to ensure that a particular plaintiff has a sufficient stake in the controversy he brings before the court to justify the court's action; I will call this the "concrete-adversity" function.[44] Second, standing doctrine is used to prevent the federal courts from engaging in decisions that are better made by the political branches, which I will call the "pro-democracy" function.[45] Third, the doctrine works to prevent Congress from conscripting the courts to fight its battles against the executive branch—the "anticonscription" function.[46]

That standing serves several functions would not be fatal, of course, if it served those functions well. But, as I show below, standing does only a minimally adequate job in promoting concrete adversity[47] and an abysmal job in promoting democracy[48] and preventing conscription.[49] As it turns out, injury in fact, causation, and redressability do not identify plaintiffs in a way helpful to the Court's separation-of-powers goals.

In the rest of this Part, I discuss each function of standing in turn, assessing how useful standing doctrine is in each context. I demonstrate that the doctrine has been stretched to serve separation-of-powers functions for which it is ill-designed, and thus fails in many contexts to promote the very principles that are said to justify its existence.

A. *The Concrete-Adversity Function*

"[T]he question of standing in the federal courts is to be considered in the framework of Article III[,] which restricts judicial power to 'cases' and 'controversies.'"[50] In its most familiar manifestation—and its only plausible function—standing doctrine ensures that the federal courts hear only those disputes characterized by the kind of adversary relationship that makes a legal "case" or a "controversy."

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44. *See infra* Part I.A.

45. *See infra* Part I.B.

46. *See infra* Part I.C.

47. *See infra* Part I.A.2.

48. *See infra* Parts I.B.2 and I.B.3.

49. *See infra* Part I.C.2.

50. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970); *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) ("Article III standing . . . enforces the Constitution's case-or-controversy requirement." (internal quotation marks omitted) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004))).

1. *The doctrine of standing is said to restrict the courts to cases in which they act qua courts*

The Court has observed that Article III's "case or controversy" provision limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[51] A dispute that satisfies Article III thus has at least two sides, each of which has a stake in winning, and the doctrine of standing ensures that the plaintiff has such a stake.[52, 53]

When these criteria are satisfied, the court's involvement *as a court* is proper, and when they are not, "the courts believe they lack power to entertain the proceeding."[54] So, for example, the Court said more than a century ago that it "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies."[55] So-called "advisory opinions" are forbidden, as are cases where parties collude to manufacture adversity that does not truly exist.[56]

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51. Flast v. Cohen, 392 U.S. 83, 95 (1968); *see also* Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (quoting identical language from *Flast I*).

52. Of course, as Professor Chayes argued in his path-marking article, modern litigation is characterized by a departure from the traditional binary model:

> The characteristic features of the public law model are very different from those of the traditional model. The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.

Chayes, *supra* note 20, at 1284.

53. The standing of defendants is typically not analyzed, presumably because, assuming that the plaintiff has standing, the defendant risks an adverse judgment and thus clearly has the requisite stake in the action. *See* 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902 n.3 (2d ed. 1991).

54. 13 WRIGHT ET AL., *supra* note 6, § 3531; *see also id.* § 3531.3 (discussing arguments for and against standing doctrine generally).

55. Liverpool, N.Y. & Phila. Steam-Ship Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885).

56. So, for example, the Court famously refused to resolve the constitutionality of certain legislation when Congress empowered named individuals to sue for that purpose. Those individuals did not sue "for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." Muskrat v. United States, 219 U.S. 346, 357 (1911). Without such a concrete stake, it was improper for the Court to determine the constitutionality of the law, because the Court lacks "revisory power over the action of Congress" unless "the rights of the litigants in justiciable controversies require the court" to exercise that power. *Id.* at 361. Thus, the Court concluded, "[t]his attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends." *Id.* Similarly, the Court responded to questions submitted by Thomas Jefferson regarding

The Court has repeatedly invoked this function of standing. In *Baker v. Carr*, for example, the Court said that "the gist of the question of standing" is whether "the appellants [have] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[57] In that case, the plaintiffs contended that a state voting apportionment statute violated equal protection; they had standing because they "s[ought] relief in order to protect or vindicate an interest of their own, and of those similarly situated. . . . They are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes."[58]

As the *Baker* case makes clear, concrete adversity is valued because it is believed to promote better litigation. The Court echoed this value in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, emphasizing the role of standing doctrine in "assur[ing] that the most effective advocate of the rights

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various treaties and laws by stating that "[t]he lines of separation drawn by the Constitution between the three departments of the government—their being in certain respects checks upon each other— . . . are considerations which afford strong arguments against the propriety of our extrajudicially deciding the[se] questions." Letter from John Jay to George Washington (Aug. 8, 1793), *in* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 93 (4th ed. 1996). The *Flast* Court addressed both separation-of-powers concerns and concrete adversity:

> When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. However, the rule against advisory opinions also recognizes that such suits often are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests. Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

Flast, 392 U.S. at 96-97 (citations omitted) (internal quotation marks omitted).

As Professors Tushnet and Siegel have noted, however, the rule against advisory opinions has lost much of its force since the passage of the Declaratory Judgment Act in 1934, ch. 512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. §§ 2201-2202 (2006)). *See* Siegel, *supra* note 36, at 117-119; Tushnet, *supra* note 34, at 677.

57. Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (quoting same language from *Baker*); Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (1992) (Stevens, J., concurring) (same); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978) (same). In *Flast*, the Court noted that standing works to ensure true adversity: "[T]he standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits or those which are feigned or collusive in nature." *Flast*, 392 U.S. at 100 (citation omitted).

58. *Baker*, 369 U.S. at 207-08 (internal quotation marks omitted) (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)). As some have noted, the actual injury asserted by voters is often vanishingly small. *See, e.g.*, Nichol, *Standing for Privilege*, *supra* note 37, at 309-10 (emphasizing that, given the infinitesimal chance of any particular vote affecting the outcome of an election, any particular voter's claim of injury based on voting is essentially a de minimis injury).

at issue is present to champion them."[59] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court emphasized that a plaintiff with standing provided the "essential dimension of specificity" needed to make a case susceptible of judicial resolution.[60] As recently as 2007, in *Massachusetts v. EPA*, the Court has emphasized the importance of "the proper adversarial presentation."[61]

This function of standing emphasizes the jobs courts do and the tasks courts perform, regardless of whether doing those jobs or performing those tasks interferes with the other constitutional branches. Thus, the injury requirement of the doctrine "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[62]

The rhetoric of these cases thus links standing to good judicial decision making.[63] The Court has even noted that standing is useful as a resource allocation tool: "Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake."[64]

Indeed, in earlier cases, the doctrine of standing is seen, not as a constitutional command, but as a prudential limitation[65]—a court *could* hear a

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59. 438 U.S. at 80.

60. 429 U.S. 252, 263 (1977) (internal quotation marks omitted) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974)).

61. 549 U.S. 497, 517.

62. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); *see also* 13 WRIGHT ET AL., *supra* note 6, § 3531.3 (noting further value of standing doctrine in preventing unnecessary *and wrong* decisions that, given stare decisis, would have pernicious downstream effects).

63. *See, e.g.*, *Baker*, 369 U.S. at 204 (1962). In *Schlesinger v. Reservists Committee to Stop the War*, the Court explained:

> Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.

418 U.S. at 220-21 (footnote omitted).

64. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000).

65. The *Flast* Court, for example, asked whether *Frothingham v. Mellon*, 262 U.S. 447 (1923), established a constitutional rule of standing barring suit by taxpayers and concluded it did not. Flast v. Cohen, 392 U.S. 83, 91-94 (1968). In *Frothingham*, the Court denied standing to federal taxpayers because their interest was "comparatively minute and indeterminable"; the *Frothingham* Court left undisturbed, however, cases permitting suit by municipal taxpayers, because *those* taxpayers contributed a larger share to a smaller pot.

case that failed to provide concrete adversity, but it would be a bad idea because it would lead the court to do a bad job. On this view, standing is a tool that helps the Court assess whether a particular lawsuit involves the kind of "case" or "controversy" that courts hear, rather than a doctrine commanded by Article III.

It should be no surprise, then, that in cases involving this function of standing, the separation-of-powers rhetoric is sparse. The most stringent analysis is provided by Justice Stevens in his concurring opinion in *Duke Power*, where he explains why it is so important for courts to keep to cases and controversies:

> [M]y view of the proper function of this Court, or of any other federal court, in the structure of our Government is more limited. We are not statesmen; we are judges. When it is necessary to resolve a constitutional issue in the adjudication of an actual case or controversy, it is our duty to do so. But wherever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength.[66]

Justice Kennedy echoes this concern in his concurring opinion in *Lujan v. Defenders of Wildlife*, where he states:

> An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.[67]

The concrete-adversity function thus does serve separation of powers, but it does so by focusing on courts as creatures of Article III, *not* on how Articles I and II might constrain Article III. Even in such a limited context, however,

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Frothingham, 262 U.S. at 486-87. Thus, the *Flast* Court concluded, "[t]his suggests that the petitioner in *Frothingham* was denied standing not because she was a taxpayer but because her tax bill was not large enough." *Flast*, 392 U.S. at 93. In addition, the *Frothingham* court blocked taxpayer suits primarily because to do otherwise "might open the door of federal courts to countless such suits." *Id.* That, the *Flast* Court stated, "suggests pure policy considerations." *Id.* The taxpayers in *Flast* were then permitted to proceed.

It should be noted that, while the rhetoric in *Flast* is sweeping, its reach has been limited. "[I]n the four decades since its creation, the *Flast* exception [to the usual ban on taxpayer standing] has largely been confined to its facts." Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2568-69 (2007). The *Hein* case itself continued that tradition: "We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it." *Id.* at 2571-72. *Hein* involved a challenge to President George W. Bush's "faith-based initiatives." The Court distinguished *Flast* by emphasizing that the program challenged there was funded directly by Congress, while President Bush had used discretionary funds—with no direct congressional involvement—to pay for his program. *Id.* at 2565-68.

66. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 103 (1978) (Stevens, J., concurring).

67. 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).

Justices have managed to disagree over the true separation-of-powers goal to be pursued. Most notably, in *City of Los Angeles v. Lyons*, Justice Marshall in dissent contended that the majority was taking too impoverished a view of the traditional role of the court.[68] In *Lyons*, the Court held that the plaintiff—who had previously been the victim of a dangerous chokehold at the hands of the police, and sought damages for himself and an injunction against future use of chokeholds—had to demonstrate standing for each form of relief he sought.[69] Because Lyons could not show a reasonable chance that he would be subject to a chokehold in the future, the Court concluded, he lacked the requisite stake in injunctive relief, particularly because any such injunction would require the federal courts' ongoing oversight of the Los Angeles Police Department: "The individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis. But this is not the role of a federal court, absent far more justification than Lyons has proffered in this case."[70]

But, according to Justice Marshall, this was an unwarranted limitation on the traditional powers of the courts:

> Standing has always depended on whether a plaintiff has a personal stake in the outcome of the controversy, not on the precise nature of the relief sought. . . .
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> . . . .
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> . . . Moreover, by fragmenting a single claim into multiple claims for particular types of relief and requiring a separate showing of standing for each form of relief, the decision today departs from this Court's traditional conception of standing and of the remedial powers of the federal courts.[71]

Justice Marshall argued that the majority's position was not supported by "the fundamental policy underlying the Art. III standing requirement—the concern that a federal court not decide a legal issue if the plaintiff lacks a sufficient personal stake."[72] Lyons undoubtedly had such a personal stake, having suffered at the hands of the police in the past. Because Lyons's damages claim required resolution of the same constitutional question that would form the predicate for the injunction, there was no reason to preclude injunctive relief, and the determination thereon should be left to the traditional equitable discretion of the court.

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68. 461 U.S. 95, 122-23 (1983) (Marshall, J., dissenting).

69. *Id.* at 97-98, 109-111. This is now commonplace. *See, e.g.*, *Laidlaw*, 528 U.S. at 185.

70. *Lyons*, 461 U.S. at 113.

71. *Id.* at 114, 122-23 (Marshall, J., dissenting) (citation and internal quotation marks omitted).

72. *Id.* at 125 (internal quotation marks omitted).

As I hope is already clear, the claim that "standing is built on a single basic idea—the idea of separation of powers"[73] hides a multitude of disputes over what that idea is.

2. *It is plausible, but not particularly useful, to use standing to ensure concrete adversity*

If standing doctrine is good for anything, it is good for assuring concrete adversity. By requiring injury in fact and causation, the doctrine helps to assure that plaintiffs and defendants have rational bases for pursuing lawsuits and thus will be motivated to argue well. There is a plausible connection between the injury-in-fact test and the personal stake it is meant to ferret out.

Standing thus serves this separation-of-powers function, though whether it *effectively* serves this function is a good question. Professor Driesen, for example, has convincingly argued that the requirement of concrete injury, however much it is invoked to assure the Court that a concrete dispute is before it, rarely ends up informing the Court's merits analysis.[74] In other words, despite the Court's repeated insistence that the plaintiff have a concrete injury because it is essential to the Court's functioning that he have one, the plaintiff's injury is not then used to help the Court do its job. Instead, Driesen contends, the concrete injury requirement serves primarily a formal role: the injury is used to show that the Court's power is properly invoked and is rarely discussed further.[75] Thus, despite the plausible connection between concrete injury and good judging, the connection in reality is far more tenuous.

Similarly, if the concrete-adversity test is meant to guarantee, for example, the best advocacy, as the Court has suggested,[76] standing doctrine does not provide that guarantee. As then-Judge Scalia noted, someone who undoubtedly has standing may well do a poor job of arguing his case, while a national public interest organization with no concrete stake may provide a court with the most helpful arguments.[77, 78]

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

74. David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004).

75. *Id.* at 839-55.

76. *See* Massachusetts v. EPA, 549 U.S. 497, 517 (2007); *Baker*, 369 U.S. at 204.

77. Scalia, *supra* note 14, at 891; *see also* Siegel, *supra* note 36, at 88 (noting that, while it is obviously true that courts in a common law system rely on the adversarial presentation of issues to decide cases, no conclusions about the quality of advocacy can be drawn from this fact); *cf.* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 323 (2008) (contending that the argument for effective advocacy "loses force wben [sic] the stakes of a suit are so low that the return is unlikely to exceed the investment" and concluding that "[a] litigant investing in such a suit is driven by principle, and the desire to vindicate that principle is likely to provide adequate motivation to litigate effectively"). As I discuss below, the requirement that organizations proffer members with standing has arguably resulted in individual plaintiffs who serve largely as window dressing: so long as the organization finds a member who satisfies the standing doctrine to give a

Finally, as Professor Hessick has recently argued, the standing doctrine in the concrete-adversity guise has actually been used to *narrow* the traditional sphere of judicial action in inappropriate ways.[79] A doctrine that evolved to control access to the courts for new "public rights" cases—cases that took the courts beyond their traditional role—is now used to prevent access to the courts even for those who bring traditional "private rights" suits: "[A]lthough the Court has claimed that its standing requirements are necessary to preserve the traditional limits on the judiciary, those requirements have precluded claims that courts historically would have permitted."[80]

In sum, while there is a plausible connection between standing doctrine and the concrete-adversity function, any benefits the doctrine provides in this respect are limited and indeed may be outweighed by its drawbacks.

B. *The Pro-democracy Function*

The Court has described standing as a doctrine that helps assure the "proper—and properly limited—role of the courts in a democratic society."[81] Here standing plays a role different from the concrete-adversity function: the question is not simply whether a case is susceptible to judicial resolution, but whether, given "the role assigned to the judiciary in a tripartite allocation of power,"[82] a plaintiff is bringing an issue to the court that, even if susceptible to judicial resolution, is more properly answered elsewhere. Thus, the question is not what Article III alone requires, but what separation-of-powers limits (mentioned nowhere in the Constitution but inherent in its structure) require of the courts.[83]

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legitimate "front" to the lawsuit, the organization is typically then free to proceed with its advocacy in a manner that is likely no different than if it had been allowed to sue without the member present. *See infra* Part II.

78. It is not my mission here to criticize the Court's injury requirement, although I agree with Judge Fletcher and Professor Sunstein that the test as it is currently framed has caused more trouble than it is worth. *See, e.g.*, Fletcher, *supra* note 25, at 223; Sunstein, *supra* note 32, at 1451-61. *But see* Leonard & Brant, *supra* note 20, at 91-133 (arguing that "[b]y and large the injury-in-fact rule has done a good job of policing the boundaries of Article III").

79. Hessick, *supra* note 77, at 310.

80. *Id.* at 277.

81. Warth v. Seldin, 422 U.S. 490, 498 (1975). Despite the apparent import of this quote (and its wide use in later cases to support the pro-democracy view of standing), the *Warth* Court does not explicitly invoke a separation-of-powers theory in justifying its standing analysis and indeed seems more focused on the concrete adversity concept discussed in Part I.A, *supra*.

82. Flast v. Cohen, 392 U.S. 83, 95 (1968).

83. 13 WRIGHT ET AL., *supra* note 6, § 3531.3. While normally posed as a constitutional issue, this concern for what courts *should* do need not be of constitutional magnitude. As I discuss below, Justice Harlan found that few standing limits were imposed by Article III. *See infra* notes 95-96 and accompanying text. Nevertheless, he found strong reasons for the federal courts to abstain on nonconstitutional grounds from certain actions:

In some cases that fall in this category, standing has been distorted to permit courts to avoid cases that they do not want to hear,[84] and especially to avoid issues that are sufficiently controversial that they threaten the courts' position in the constitutional structure.[85] This distortion of standing is rightly criticized.[86] Here, however, I focus instead on the Court's ongoing use of

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"The powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government." *Flast*, 392 U.S. at 131 (Harlan, J., dissenting). See discussion *infra* Part III.

84. *See* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 66 (1976) ("The Court's treatment of injury in fact . . . threatens that it shall 'become a catchall for an unarticulated discretion on the part of this Court' to insist that the federal courts 'decline to adjudicate' claims that it prefers they not hear." (quoting Poe v. Ullman, 367 U.S. 497, 530 (1961) (Harlan, J., dissenting))); *see also* Tushnet, *supra* note 34, at 664 (arguing that standing permits the Court to "refus[e] to confront hard cases honestly"). *See generally* Pierce, *supra* note 30 (demonstrating that the political views of judges better predict outcomes in standing cases than any analysis of the doctrine).

85. For example, in *Allen v. Wright*, the Court rejected on standing grounds a claim that the IRS had failed to enforce nondiscrimination regulations against purportedly tax-exempt schools, holding that it was "entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." 468 U.S. 737, 758 (1984). As Justice Stevens noted in dissent, however, such an analysis flies in the face of economics generally, and of tax policy in particular: if you make it more expensive for people to do things, they tend to choose less-expensive alternatives. *Id.* at 785-88 (Stevens, J., dissenting); *see also* Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 640 n.27 (1985) ("[T]he causation and redressability reasoning in . . . *Allen* . . . was directly at odds with Congress's theory in granting tax exemptions: the five Supreme Court Justices joining the majority opinion[] . . . seem to believe that private parties do not change their behavior to reduce their taxes."). If segregated schools did *not* so choose, it presumably reflected the racism that they were not, as purportedly tax-exempt entities, legally permitted to implement through admissions policies.

The political facts behind *Allen* suggest that the Court may have been seeking to avoid a battle with the other branches. The IRS had proposed new, more restrictive requirements for tax-exempt status, *see Allen*, 468 U.S. at 747, yet Congress repeatedly blocked those efforts, using appropriation bills to prohibit spending on the measures, *see id.* at 747-48 n.16. The IRS ultimately abandoned the proposals. *See id.* at 769 (Brennan, J., dissenting). By the time the case arrived at the Court, an uneasy peace between the legislative and executive branches had been reached, and the Court could have been wary of intervening.

Professor Fallon has noted this issue in the realm of remedy: if a court fears its remedy may cost too much or intrude too much on legislative spending prerogatives, it may resort to arguments of justiciability to avoid the case. *See generally* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).

86. There are vast numbers of cases involving controversial questions that the Court cannot possibly reject on standing grounds. Cases involving issues such as the criminalization of homosexual conduct, *see* Lawrence v. Texas, 539 U.S. 558 (2003), assisted suicide, *see* Gonzales v. Oregon, 546 U.S. 243 (2006), and medical marijuana, *see* Gonzales v. Raich, 545 U.S. 1 (2005), ordinarily have plaintiffs who satisfy the tripartite standing test and yet ask the Court to involve itself in the most controversial issues of our time. *See also* Siegel, *supra* note 36, at 96 ("[T]he justiciability doctrines, even if stringently enforced, still leave individuals empowered to litigate lawsuits . . . that affect all of

standing as a democracy-promoting mechanism. Thus, plaintiffs who assert only "generalized grievances" must be diverted into the political system, not only to save courts from being overrun, but also to preserve such general questions for the attention of Congress and the President. Similarly, in some cases the parties arguably satisfy the injury-in-fact requirement, but courts have found standing lacking because those injuries were so widely shared among many people that they should be addressed politically, not judicially.

In all these categories, the Court is focused not on the judiciary's capacities—what courts *can* do—but on the judiciary's obligations to its coequal constitutional entities—what courts *should* do with cases that tread upon the province of the political branches.[87] In trying to craft rules that funnel cases into one category or the other, however, the Court has created a puzzle. In denying standing to those who claim "generalized grievances"—when the plaintiff cannot distinguish himself in any meaningful way from other citizens—the Court has suggested that mere numerosity creates a standing problem. But injuries that are widely shared yet particularized for each plaintiff satisfy any ordinary interpretation of the injury-in-fact test. The doctrine and the function are mismatched.

1. *The standing doctrine is said to divert from the courts those cases better heard in the political branches*

In cases involving widely shared injuries, the Court invokes our "common understanding of what activities are appropriate to legislatures, to executives, and to courts."[88] The concern is still for the "proper—and properly limited—role of courts in a democratic society,"[89] but the inquiry focuses on the proper

society."). Thus, the standing doctrine does not usefully sort cases into "controversial" and "uncontroversial" categories—a point which the Court has, in the past, recognized: "The fundamental aspect of standing is that it *focuses on the party* seeking to get his complaint before a federal court and *not on the issues* he wishes to have adjudicated." *Flast*, 392 U.S. at 99 (emphasis added). Other doctrines exist to sort issues suitable for judicial resolution: "[A] party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question." *Id.* at 100.

87. Professors Leonard and Brant contend that the trajectory of standing doctrine—which they correctly describe as having followed a trend that "has transformed injury-in-fact from a tool of inclusion to an exclusionary device"—reveals "a firm philosophy that federal courts generally avoid political matters assigned by the Constitution to the legislative and executive branches." Leonard & Brant, *supra* note 20, at 4, 8. As I explain in this Part and in Part I.C, however, to describe the Court's approach as revealing a "firm" philosophy is misleading. Instead, the cases reveal deep rifts within the Court over what it means for courts to take their place beside the democratic branches in the constitutional structure.

88. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

89. Warth v. Seldin, 422 U.S. 490, 498 (1975); *see also Allen*, 468 U.S. at 750 ("The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government.").

audience of each branch and thus on the breadth of the class of persons seeking action. The Article III judicial power exists, the *Warth* Court emphasizes,

> only to redress or otherwise to protect against injury to the complaining party . . . . Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.[90]

Standing, which focuses on the "separate and distinct constitutional role of the Third Branch," is thus "one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches."[91] And if a plaintiff suffers an injury that is "'undifferentiated and common to all members of the public,' the plaintiff has a 'generalized grievance' that must be pursued by political, rather than judicial, means."[92] As the second Justice Harlan put it in his *Flast* dissent, "[t]he interests [such plaintiffs] represent, and the rights they espouse, are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population, taxpayers and nontaxpayers alike."[93]

The Court has often made it seem as though keeping such would-be plaintiffs out of court is constitutionally required to maintain the proper role of the judiciary:

> Were the federal courts merely publicly funded forums for the ventilation of public grievances . . . the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums. . . .
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> . . . Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.[94]

There has not been monolithic agreement on that point, however. The second Justice Harlan, for example, concluded that "it is, nonetheless, clear that non-Hohfeldian plaintiffs as such are not *constitutionally* excluded from the

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90. *Warth*, 422 U.S. at 499-500.

91. *Lujan*, 504 U.S. at 576; *see also Allen*, 468 U.S. at 750 (emphasizing the role of justiciability doctrines in maintaining "the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government" (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring))).

92. FEC v. Akins, 524 U.S. 11, 35 (1998) (Scalia, J., dissenting) (quoting United States v. Richardson, 418 U.S. 166, 177 (1974)).

93. Flast v. Cohen, 392 U.S. 83, 119-20 (1968) (Harlan, J., dissenting).

94. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 473-74 (1982).

federal courts. The problem ultimately presented . . . is . . . to determine in what circumstances, consonant with the character and proper functioning of the federal courts, such suits should be permitted."[95] Moreover, Justice Harlan believed that the limitations the Court had attempted to impose through the standing doctrine were "wholly untenable."[96] While limitations were needed—if a plaintiff can sue when there is nothing distinctive about him in relation to the lawsuit, then there is literally no limit on the cases that the federal courts could be asked to hear[97]—they could be found in a prudential doctrine of abstention.[98]

The Court took another path, concluding that the standing doctrine was constitutionally required to prevent access to the courts by those raising such generalized grievances. Thus, the Court has generally tightened the requirements of the doctrine in service of this goal.

Some of these restrictions are straightforward. The Court has rejected a general federal concept of a pure "private attorney general," who pursues lawbreakers through the courts solely from an interest in seeing the law obeyed.[99] Such a person is indistinguishable from any of thousands or millions

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95. *Flast*, 392 U.S. at 120 (Harlan, J., dissenting). "Hohfeldian" is a term coined by Professor Jaffe to refer to the plaintiff who "seek[s] a determination that he has a right, a privilege, an immunity or a power." Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033 (1968) (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913)). A non-Hohfeldian plaintiff, therefore, is a plaintiff with no personal stake in the litigation, who sues to vindicate the public interest. *See id.* at 1037.

96. *Flast*, 392 U.S. at 131 (Harlan, J., dissenting).

97. While each such suit could conceivably be described as a "case" or "controversy" under Article III, the structural constitutional implications of hearing all these suits are unacceptable: permitting such unrestrained power in an unelected, unrepresentative branch would undermine our democracy. *See Flast*, 392 U.S. at 130 (Harlan, J., dissenting).

98. *See infra* Part III.A.

99. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 737 (1972) (emphasizing that a plaintiff must satisfy standing limitations in order to sue, even if, after surviving that test, the plaintiff may then act as a "private attorney general" and "argue the public interest in support of his claim"). To promote citizen suits by private attorneys general, Congress has in many statutes authorized the recovery of attorney's fees. *See, e.g.*, Newman v. Piggie Park Enters., 390 U.S. 400 (1968) (per curiam) (interpreting attorney's fees provision of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 244 (codified at 42 U.S.C. § 2000a-3(b) (2000))). In *Newman*, the Court states:

> A Title II suit is . . . private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.

390 U.S. at 401-02 (footnote omitted). Such fees cannot confer standing, however. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself.").

of other people who wish to see the law obeyed; rather than sue, those people should band together and ensure that their democratically elected representatives see that the law is enforced.[100] Similarly, the Court has rejected "taxpayer" standing, reasoning that to permit one taxpayer to challenge the uses to which her tax payments have been put would be to open the courts to endless challenges by any and all taxpayers irked by government expenditures.[101] Each of us could presumably identify a government expenditure of which we disapprove, but in that we are all alike. Moreover, widespread concern among taxpayers should permit concerted pressure on the political branches.[102]

But the pro-democracy analysis has moved well beyond taxpayer or private-attorney-general suits. The plaintiffs in *Allen v. Wright*, for example, contended that they were harmed because the IRS's failure to enforce nondiscrimination regulations against segregated private schools deprived them of access to integrated schools (an argument the Court rejected on causation

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At least one state had long permitted private attorneys general. Prior to its amendment by ballot initiative in 2004, the California Business and Professions Code section 17204 permitted suit by "any person acting for the interests of itself, its members or the general public" to enforce the provisions of California's Unfair Competition Law, and it provided for attorneys' fees for victorious plaintiffs. CAL. BUS. & PROF. CODE § 17204 (2003) (amended 2004). The 2004 amendment replaced the private attorney general provision with language restricting suit to "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." CAL. BUS. & PROF. CODE § 17204 (2004); *see also* Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1007-08 n.24 (2001) (identifying Connecticut, Florida, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, and South Dakota as states that have environmental statutes that can be enforced by citizens without a threshold showing of personal injury).

100. *See* Massachusetts v. EPA, 549 U.S. 497, 535 (2007) ("[R]edress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts." (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992))).

101. *See* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2553, 2563 (2007) (rejecting, on standing grounds, suit by taxpayers challenging use of federal funds to promote "faith-based initiatives" because, "[a]s a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing"); *see also, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (holding that taxpayers lacked standing to challenge, under the Establishment Clause, a donation of land by the federal government to a religious organization); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (holding that taxpayers lacked standing to challenge, under the Incompatibility Clause, commissions held in the Armed Forces Reserve by members of Congress); United States v. Richardson, 418 U.S. 166 (1974) (holding that taxpayers lacked standing under the Accounts Clause to challenge a statute that permitted the CIA to refrain from accounting for its expenditures); Frothingham v. Mellon, 262 U.S. 447, 486-87 (1923) (holding that taxpayers lacked standing under the Tenth Amendment to challenge federal funding of health programs for mothers and children).

102. *See, e.g.*, *Richardson*, 418 U.S. at 189 (Powell, J., concurring) ("Indeed, taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government.").

grounds),[103] and because the IRS's failure to act itself constituted a direct injury to the plaintiffs' dignity: the IRS was not taking racial discrimination seriously, and the plaintiffs were injured by that cavalier approach. They were not complaining as taxpayers or bringing the suit as pure private attorneys general; they were bringing suit for what they saw as highly specific and concrete injuries. The Court concluded, without much analysis, that the claimed dignitary injury was nevertheless either a generalized grievance—"an asserted right to have the Government act in accordance with law"[104]—or an "abstract stigmatic injury."[105] To accept such an injury as sufficient to create a case or controversy, the Court said, "would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'"[106] With a wave of the doctrinal wand, parents of children deprived of integrated education were turned into "concerned bystanders."

The Court has also rejected concerns, raised by lower courts, that if standing is denied "then as a practical matter no one can [sue]." Instead, the Court has emphasized that "[o]ur system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[107]

If the pro-democracy function truly means that large groups of plaintiffs should go to the political branches rather than the courts, however, the Court has not consistently enforced that limitation, for reasons inherent in the standing test. The standing doctrine requires injury in fact, causation, and redressability; it does not require the Court to ask whether the injury claimed by the plaintiff is shared by many others. So, for example, the Court made clear in *FEC v. Akins* that an injury held in common with all voters could nonetheless give rise to standing because the plaintiff suffered that injury concretely and in a way particular to her.[108]

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103. *See* Allen v. Wright, 468 U.S. 737 (1984); *see also* discussion *supra* note 85.

104. *Allen*, 468 U.S. at 754.

105. *Id.* at 755.

106. *Id.* at 756 (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973)).

107. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) (internal quotation marks omitted).

108. [T]he fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an "injury in fact." This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law.

FEC v. Akins, 524 U.S. 11, 24 (1998). For an in-depth discussion of the import of *Akins*, see Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 616 (1999). Professor Brown argues that the traditional notion of a "concrete stake" better explains standing in such cases than does injury in fact. *See* Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 Md. L. Rev. 221, 265-66 (2008).

Likewise, in *Massachusetts v. EPA*, the global warming case decided in April 2007,[109] the majority concluded that Massachusetts had shown the requisite injury: it was losing shoreline thanks to rising sea levels caused by global warming. "Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner. . . . Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars."[110] This kind of economic harm is, of course, at the core of injury in fact.[111] The majority thus concluded, I think uncontroversially, that standing existed because Massachusetts suffered particularized harm; that is so even though global warming arguably affects every person on the planet.[112] Just as in *FEC v. Akins*, the number of people

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One could also argue, as Professor Jaffe has, that the Court is more generous with standing in contexts that affect the functioning of the democracy itself. *See* Jaffe, *Public Actions*, *supra* note 19, at 1298. Therefore, standing exists in *Akins* and in the voting cases, *see, e.g.*, Shaw v. Hunt, 517 U.S. 899 (1996), because one whose vote is rendered inefficacious should not have to resort to the very political branches (supposedly controlled by voting) to solve that problem. *See infra* Part I.B.3.

109. Massachusetts v. EPA, 549 U.S. 497 (2007).

110. *Id.* at 523 (citation, footnote, and internal quotation marks omitted).

111. *See, e.g.*, Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 291 (3d Cir. 2005) ("While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms.").

112. Justice Stevens's standing analysis has an elaborate doctrinal prelude invoking the quasi-sovereign status of Massachusetts as key to the standing inquiry and further noting that procedural injuries receive a deferential causation and redressability analysis. *See* Massachusetts v. EPA, 549 U.S. at 516-21 1453-55. While the latter point is undoubtedly correct as a matter of doctrine, *see, e.g.*, *Akins*, 524 U.S. at 25, neither the procedural injury nor the state-sovereignty elements played any obvious role in the subsequent analysis of Massachusetts's injury—a point also noticed by Chief Justice Roberts in dissent, *see* Massachusetts v. EPA, 549 U.S. at 540 (Roberts, C.J., dissenting) ("It is not at all clear how the Court's 'special solicitude' for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms."). The loss of property—Massachusetts's loss of shoreline thanks to rising sea levels—is a straightforward injury in fact, and the Court had no reason to resort to the state-sovereignty or procedural-injury excuses.

In any event, the "procedural injury" argument seems to involve bootstrapping. Procedural injuries are typically failures *by the agency itself* to follow required procedures. For example, an agency might fail to prepare an environmental impact statement (EIS) regarding a proposed dam; a plaintiff opposing construction of the dam need not demonstrate that, had the agency prepared the EIS, the dam would not have been built. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.7 (1992). Instead, so long as the plaintiff would be harmed by the dam if it were built, he has standing to challenge any procedural failings in the process leading to the dam. The causation and redressability standards are lessened, for otherwise almost no procedural challenge could satisfy the standing test—only in the most egregious cases could a plaintiff prove that correct procedures would result in a different outcome.

In *Massachusetts v. EPA*, however, the procedural injury arises under 42 U.S.C. § 7607(b), which is a *judicial review* provision; in other words, that provision guarantees no particular agency procedures but instead provides for review of certain agency decisions in federal court. One can gain access to the federal courts only if one satisfies Article III

sharing the injury is irrelevant as long as the plaintiff himself satisfies the injury standard.

The Court split dramatically (as had the D.C. Circuit below)[113] because of this pro-democracy problem: Chief Justice Roberts and Justices Scalia, Thomas, and Alito would have dismissed the case for lack of standing, because the injury Massachusetts faces from global warming was the same injury everyone on the planet faces.[114] "This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts."[115]

2. *The doctrine does not reliably identify such cases and may even reject the very cases most appropriate for the courts to resolve*

If standing is meant to divert into the political branches problems better solved there, then its proper application should result in the dismissal of cases where large numbers of plaintiffs share the same injury. The problem is that this use of standing does not make sense in the doctrine's own terms: the tripartite test asks whether a plaintiff has suffered injury in fact. If the plaintiff is, in fact, injured, it is irrelevant under that analysis whether many others share that same injury.[116] It is one thing to resist a plaintiff's attempt to vindicate an

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standards. If one lacks standing and thus cannot obtain judicial review, that is not the denial of the right to have an agency follow a particular procedure, that is a failure to meet the constitutional threshold for access to the courts. Massachusetts v. EPA, 549 U.S. at 516-18. One cannot claim procedural injury from being denied standing, just as one cannot "bring[] suit for the costs of bringing suit." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).

113. *See* Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) (producing widely divergent opinions from Judges Randolph, Sentelle, and Tatel).

114. Massachusetts v. EPA, 549 U.S. at 541 (Roberts, C.J., dissenting). The dissenters contended that the Court's standing analysis was flawed in other ways. For example, the time frame of Massachusetts's alleged injury was on the scale of hundreds of years; the dissenters complained that "accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless." *Id.* at 542. The majority, however, found that Massachusetts had *already* lost coastline to sea-level rise caused by global warming. *Id.* at 522-23 (majority opinion). The majority did go on to note that "[t]he severity of that injury will only increase over the course of the next century," *id.*, but that statement was inessential to the holding that Massachusetts had standing.

The dissent also lambasted the majority for its weak causation and redressability analysis, contending that the EPA action the plaintiffs sought to compel would have made almost no difference in the progress of global warming. *Id.* at 542-47 (Roberts, C.J., dissenting). In response, the majority noted that problems need not be solved *in toto* for a problem-solving method to satisfy Article III's redressability requirements; an incremental approach is perfectly acceptable, and it was unquestionable that action from the EPA on global warming would at least slow the process of global warming. *Id.* at 523-25 (majority opinion).

115. *Id.* at 535 (Roberts, C.J., dissenting).

116. As Justice Kennedy stated in *Lujan*, "it does not matter how many persons have

"undifferentiated interest" in seeing the law enforced,[117] and quite another to resist a plaintiff who presents a particularized and concrete injury that happens also to be widespread.[118]

So, as Professor Chayes noted three decades ago, the nature of the new public rights statutes—which create in every citizen the right to clean water, clean air, safe consumer products, and the like[119]—necessarily mean that "persons are usually 'affected' by litigation in terms of an 'interest' that they share with many others similarly situated."[120] Everyone has a right to clean air, but each of us experiences dirty air in a particularized and concrete way.[121] Indeed, if one considers contemporary mass tort and class action cases, it becomes clear that federal courts must have jurisdiction over countless cases that involve widespread yet particularized harms.[122]

Thus, it might be correct as a matter of separation-of-powers policy to recommend that courts stay out of cases where truly huge numbers of people suffer the relevant injury. Certainly there is an argument that such issues are better addressed by legislators,[123] and a further argument that an injury widely

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been injured by the challenged action." 504 U.S. 555, 581 (Kennedy, J., concurring).

117. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.").

118. As Justice Ginsburg emphasized when she concurred in *DaimlerChrysler*, one can agree with the limits on taxpayer standing imposed by *Frothingham* and its progeny without agreeing with the further limits on standing imposed by the Court in cases like *Lujan*. DaimlerChrysler Corp. v. Cuno, 547 U.S. 322, 354-55 (2006) (Ginsburg, J., concurring).

119. *See* Consumer Product Safety Act, 15 U.S.C. §§ 2051-2085 (2006); Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006); Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000).

120. Chayes, *supra* note 52, at 1310.

121. As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a personal stake in the outcome or a particular, concrete injury or a direct injury; in short, something more than generalized grievances.

United States v. Richardson, 418 U.S. 166, 179-80 (1974) (citations and internal quotation marks omitted).

122. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997) ("The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies."); *see also* FEC v. Akins, 524 U.S. 11, 24 (1998) (noting that it is "particularly obvious" that widely shared injuries may satisfy Article III "where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law").

123. As Professor Chayes has noted, many modern lawsuits are characterized not by the bipolar resolution of private rights by the award of retroactive relief based on historical

shared should give rise to the political will to solve the problem.[124] But the standing doctrine cannot consistently help identify those cases: the doctrine requires only that injury be "concrete and particular," and not "abstract or hypothetical"; it does not impose any numerosity limitation.

Standing in environmental cases, including *Massachusetts v. EPA*, highlights this. Many environmental issues are exactly the kind of issues that, on the Court's pro-democracy view, should be left to the legislative and executive branches. If global warming affects everyone, those seeking action on global warming should be able to get a groundswell of support for action.[125] At the same time, however, most environmental harm is not the kind of undifferentiated interest in the vindication of the rule of law forbidden by the "generalized grievance" cases. Even if environmental harm is widely shared, each individual suffers a harm concrete and particularized to herself.[126] Thus

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facts seen in the traditional model, but by a "sprawling and amorphous" group of parties seeking to resolve "a grievance about the operation of public policy" by making a "predictive and legislative" inquiry into the facts, resulting in "ad hoc . . . flexible and broadly remedial" relief. *See* Chayes, *supra* note 52, at 1302. This distinction echoes that made between administrative action suitable for adjudication, *see* Londoner v. City of Denver, 210 U.S. 373 (1908), and administrative action suitable for legislation, *see* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915), and suggests that courts these days engage in activities *Bi-Metallic* would characterize as legislative.

124. Because my mission here is not to undertake a full critique of the Court's view of separation of powers but to see how separation-of-powers issues play out in the context of standing doctrine, I bracket a number of concerns that could be raised from the perspective of social scientists—for example, that certain kinds of injuries shared by large numbers of people are unlikely to give rise to political solutions because of collective action problems such as free riding or the tragedy of the commons, *see* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965), or that government actors may not respond to the pressure of even large numbers of people because the government actors are captured by special interests, *see* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971), or that voting is irrational, even when voters have problems that could be addressed through the political process, because the effect of any single vote on the outcome is virtually nil and thus not worth the trouble, *see* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 265 (1957) ("[S]ince the returns from voting are often minuscule, even low voting costs may cause many partisan citizens to abstain."). *See generally* Siegel, *supra* note 36, at 101-02 (invoking social science literature to similar effect).

125. I note that global warming is precisely the kind of problem that generates the collective action problems noted above, *see* OLSON, *supra* note 124. Solving the global warming problem is a public good characterized by jointness of supply (it takes many people working together to produce the benefit) and nonexcludability (once the benefit is produced, everyone enjoys it, regardless of their contribution to its production); any solution to global warming will benefit virtually everyone on the planet, whether or not everyone contributes to the solution. *Cf., e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE II, 9-15 (rev. ed. 1989) (explaining "public goods"). Thus each individual has a rational incentive to let others take the steps necessary to solve the problem (and thus to free ride), because if the problem is solved, he gets the benefit at no cost. *Id.* Of course, if everyone makes this perfectly rational decision, no solution to global warming is reached, and we all end up much worse off than if we had all contributed to solving the problem.

126. Standing to sue to vindicate environmental interests raises a separate problem—which harm is relevant to the standing inquiry: harm to the environment or harm to the

an environmental plaintiff may easily satisfy the *doctrine*, while undermining the *policy* the Court intends the doctrine to serve. The fit between the doctrine and the function is extremely poor.

Then-Judge Scalia emphasized standing's capacity to keep would-be plaintiffs from "remov[ing a] matter from the political process and plac[ing] it in the courts."[127] The problem on this view is not that the plaintiff presents a nonjusticiable controversy, but that she presents a controversy that for structural reasons we think is better resolved in the political branches. That function has no necessary or sufficient connection to the injury-in-fact test actually used.[128]

As a means of pursuing the general pro-democracy goal, then, standing proves a poor tool. It may well be worthwhile to dismiss cases involving generalized grievances, because plaintiffs in those cases have no common-sense stake beyond that any of us has and thus might properly be channeled away from the courts and into the political process.[129] The problem is that the

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plaintiff? The Court in *Laidlaw* made it quite clear:

> The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits . . . .

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., (TOC) Inc. 528 U.S. 167, 181 (2000). That last sentence raises a serious problem for standing analysis, because it may well be possible that Congress at times attempts to expand the class of plaintiffs beyond that permitted by Article III. *See supra* text accompanying note 94, and *infra* text accompanying note 150.

127. Scalia, *supra* note 14, at 894.

128. Indeed, the pro-democracy content here echoes Professor Choper's suggestion that the political question doctrine should be used to avoid questions involving "constitutional injuries that are general and widely shared." Choper, *supra* note 8, at 1463.

129. Though, as just discussed, *see supra* note 124, those political processes are likely less responsive than is typically assumed.

Professor Kontorovich has used a transaction-costs analysis to explain the value of keeping such lawsuits out of the courts. *See* Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663 (2007). He notes an individual may waive her constitutional rights if she feels that suing over a violation is not worth the trouble. In certain situations, however, a large group of individuals suffers a rights violation. Some (or even most) of the group may believe the benefits of the rights violation outweigh its costs, but a single member of the group may nevertheless sue to enjoin the unlawful action. If she wins, others have lost the benefits they saw in the action, and social utility declines. Moreover, because the transaction costs of bargaining with the lone litigant to prevent her suit are extremely high, the majority cannot prevent this outcome. Standing, on Professor Kontorovich's view, thus serves a useful function in limiting the category of those who may sue and thus preventing some subset of lawsuits that reduce social utility.

It is not clear how many lawsuits would be excluded on this argument; Professor Kontorovich describes only one concrete situation. *See id.* at 1687-88. It may be that his argument provides a justification for why we exclude generalized grievances from the courts and thus provides a useful analysis of a standing rule that otherwise operates somewhat intuitively. However, if his argument is meant to apply more broadly to cases with numerous potential litigants, many situations falling within this category will not be excluded by the standing doctrine if the plaintiff can show specific harm under *FEC v. Akins* and

benefit of the doctrine here is nugatory: "[I]t is never hard to find an adequately Hohfeldian[130] plaintiff to raise the issues."[131] Thus standing may find the few true negatives—cases where standing does not exist—but it will also allow many false positives—cases where standing exists, yet under the pro-democracy tenet should be resolved by the political branches, not the courts.

3. *The Court's approach to these cases may actually undermine democratic values*

The Court has said repeatedly that standing should be used to keep in the political arena those issues that should be decided there.[132] But what if the Court is using standing to distort democratic politics? Any such use would be illegitimate.

A good case can be made that standing doctrine produces this very result. As *Allen v. Wright* demonstrates, the Court sometimes uses standing to evade what it has elsewhere asserted as its proper role.[133] In *Carolene Products*'s famous footnote four, the Court emphasized its role in assuring that those who are marginalized are not trampled on by the majority, and suggested that

> legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . .
>
> . . . [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[134]

The Allen plaintiffs—African Americans seeking integrated schools in the South—were precisely the kind of plaintiffs who, as a discrete and insular minority, could not seek political redress and whom Carolene Products said the Court must protect.[135] Justice Brennan suggests as much in his Allen dissent:

> By relying on generalities concerning our tripartite system of government, the Court is able to conclude that the respondents lack standing . . . without

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Massachusetts v. EPA.

130. As mentioned above, "Hohfeldian" is a term coined by Professor Jaffe to refer to the plaintiff who "seek[s] a determination that he has a right, a privilege, an immunity or a power." Jaffe, *supra* note 95.

131. *See* Chayes, *supra* note 52, at 1305.

132. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-77 (1992).

133. *See supra* text accompanying note 80.

134. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

135. Remember that Congress had repeatedly forbidden the IRS to implement new regulations that would have permitted the agency more effectively to identify discriminating schools and deny them tax-exempt status. *See supra* note 85. The *Allen* plaintiffs had no ready audience there or with the President. *See, e.g.*, Stuart Taylor Jr., *Reagan—Not the Law—Shifted on Bias and Taxes*, N.Y. TIMES, Jan. 17, 1982, at E4 (noting "outraged accusations of political pandering to segregationists" in response to Reagan administration policy of granting tax exemptions to private segregated schools).

> acknowledging the precise nature of the injuries they have alleged. In so doing, the Court displays a startling insensitivity to the historical role played by the federal courts in eradicating race discrimination from our Nation's schools.[136]

Allen is not an isolated instance. Professor Nichol has convincingly argued that standing doctrine "systematically favors the powerful over the powerless."[137] This bias means that "the power to trigger judicial review is afforded most readily to those who have traditionally enjoyed the greatest access to the processes of democratic government."[138] Nichol thus contends that standing has been applied more leniently to whites than blacks in the race discrimination (and particularly the voting) context, to men rather than women in the sex discrimination context, and generally to the privileged rather than the underprivileged.[139]

But if the doctrine tends to admit those who already have access to the political system, and reject those who lack such access, the doctrine provides court access precisely when the Court would say it is unnecessary—admitting those who are best able to seek political remedies—and denies it precisely where it should be granted—shutting out those who lack access to the "traditional levers of democratic decision-making."[140] Precisely because the courts are less democratic than the executive and legislative branches, they should make sure not to *worsen* the antidemocratic aspects of the political branches.[141]

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136. Allen v. Wright, 468 U.S. 737, 767 (1984) (Brennan, J., dissenting).

137. Nichol, *Standing for Privilege*, *supra* note 37, at 304; *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1168 (1993) ("Justice Scalia's view of separation of powers threatens to constitutionalize an unbalanced scheme of regulatory review. . . . The courts can protect the interests of regulated entities, but the interests of 'regulatory beneficiaries' are left to the political process." (footnote omitted)).

138. Nichol, *Standing for Privilege*, *supra* note 37, at 333.

139. *See id.* at 322-29. Justice Douglas raised a similar concern when he dissented in *Schlesinger v. Reservists Comm. to Stop the War*. 418 U.S. 208, 229 (1974) (Douglas, J., dissenting). In preventing citizens from challenging certain actions under the Incompatibility Clause, Justice Douglas argued that standing doctrine

> protects the status quo by reducing the challenges that may be made to it and to its institutions. It greatly restricts the classes of persons who may challenge administrative action. Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens.

Id.

140. Nichol, *Standing for Privilege*, *supra* note 37, at 305.

141. *Cf.* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 777 (1991). Justice Douglas stated something like this view when he concurred in *Flast*:

> There has long been a school of thought here that the less the judiciary does, the better. It is often said that judicial intrusion should be infrequent, since it is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors; that the effect of a participation by the judiciary in these processes is to dwarf the political capacity of

Indeed, the Court's approach is misguided not merely under *Carolene Products*, but also under the tenets of political theory. The Court's position here was well stated by then-Judge Scalia in his oft-cited article: (1) majorities do not need the courts, because they can engage the engines of democracy; courts exist to protect minorities from the oppression of the majority; (2) therefore, if the political branches ignore a problem, it is because the majority wants them to ignore it; and (3) therefore laws that go unenforced are unenforced because they are no longer desired by the majority.[142]

The problem, of course, is that our government is not designed to put the majority's will into operation at every turn. The United States is not a democracy; it is a republic.[143] As such, it is designed to be held captive by minority veto: constitutional devices such as the veto and the filibuster permit minorities to obstruct legislation that has the support of a majority of the House and Senate.[144] As Professor Chayes put it, "to retreat to the notion that the legislature itself—Congress!—is in some mystical way adequately representative of all the interests at stake . . . is to impose democratic theory by brute force on observed institutional behavior."[145]

Contra the Scalia argument, then, one might say that a law enacted despite these significant hurdles is particularly valuable and deserving of the Court's solicitude, particularly when it is also subject to an effective minority veto in the executive branch when the President decides, e.g., to direct enforcement officers not to enforce the law or to encourage agencies to promulgate rules that do not fulfill the spirit of the law,[146] or when agencies become too solicitous of

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> the people, and to deaden its sense of moral responsibility.
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> . . . .
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> . . . The Constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches. He faces a formidable opponent in government, even when he is endowed with funds and with courage. The individual is almost certain to be plowed under, unless he has a well-organized active political group to speak for him. The church is one. The press is another. The union is a third. But if a powerful sponsor is lacking, individual liberty withers—in spite of glowing opinions and resounding constitutional phrases.

Flast v. Cohen, 392 U.S. 83, 110-11 (1968) (Douglas, J., concurring) (internal quotation marks omitted).

142. *See* Scalia, *supra* note 14, at 895-97.

143. What, then, are the distinctive characters of the republican form?

> . . . [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.

THE FEDERALIST NO. 39 (James Madison).

144. For a public-choice analysis of the way our constitutional structure imposes high transaction costs on those who would seek legislative action, see Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

145. Chayes, *supra* note 52, at 1311.

146. President George W. Bush has repeatedly used signing statements to reject or modify bills as they are presented for his signature under Article I § 7 of the Constitution.

their regulatory constituencies.[147] Lawsuits, on this view, provide accountability: if an agency knows it can be sued, it has an incentive not to violate the law. The lawsuit is a brake on runaway agencies and thus serves separation-of-powers functions (especially important functions, given the uneasy situation of agencies within the federal structure[148]). Professors Sunstein and Pierce have suggested precisely this.[149]

Thus, as some of the Court's members have suggested, the Court should pay attention not only to *separation* of powers but also to the constitutional *balance* of powers: "Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures."[150]

See Elisabeth Bumiller, *White House Letter: For President, Final Say on a Bill Sometimes Comes After the Signing*, N.Y. TIMES, Jan. 16, 2006, at A11; Robert Pear, *Legal Group Says Bush Undermines Law by Ignoring Select Part of Bills*, N.Y. TIMES, July 24, 2006, at A12; Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1. The use of signing statements is not new. *See* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 201-06 (2002). But the scope and number of the Bush administration's signing statements is both striking and troubling. *See* AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 5 (2006).

147. *See* Sierra Club v. Morton, 405 U.S. 727, 745-46 (1972) (Douglas, J., dissenting) ("The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.").

148. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Peter L. Strauss, *The Place of Agencies in the Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

149. *See, e.g.*, Richard J. Pierce, Jr., Comment, Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170-71 (1993); Sunstein, *What's Standing*, *supra* note 35, at 165 (1992); *see also* Hessick, *supra* note 77, at 327 (noting value of lawsuits in deterring undesirable private conduct).

150. Lujan v. Defenders of Wildlife, 504 U.S. 555, 604 (1992) (Blackmun, J., dissenting); *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) ("Congress has found that civil penalties . . . deter future violations. This congressional determination warrants judicial attention and respect."); Touby v. United States, 500 U.S. 160, 165 (1991) ("We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches.").

Professor Hessick argues that current standing doctrine compromises separation of powers in yet another way—by depriving the courts of some of their core business. *See* Hessick, *supra* note 77, at 318-19 (demonstrating that courts have used standing analysis to find nonjusticiable cases involving private—rather than public—rights, even though such cases are at the core of the Judicial Branch's constitutional powers, and concluding that "while the Court may (or may not) be correct that separation of powers restricts the judiciary to deciding cases involving private rights, separation of powers is certainly not a basis for precluding the judiciary from resolving claims of private rights, regardless of injury").

A "pro-democracy" purpose does not point solely toward narrowing the courts' power.

Furthermore, as students of democracy have long noted, the mere fact of widespread harm does not lead to political mobilization: "The real problem . . . is the inevitable incompleteness of the interest representation. What about those who do not volunteer—most often the weak, the poor, the unorganized?"[151] Thus, dismissing a case because an injury is widely shared, on the assumption that the group will mobilize to obtain redress through the political branches, does not take into account the political reality that some groups have more access than others.[152]

Finally, the Court's standing jurisprudence reinforces this distorted pursuit of democratic goals by making it easiest for economic entities to get standing. Such interests are usually suing as regulated entities, opposing the exercise of government regulation. The Court has emphasized that the standing of a regulated entity is typically self-evident: when "the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."[153] But such entities are often the least deserving of democratic solicitude from the courts, for they arguably have the most access to the corridors of power.[154] The Court has repeatedly applied this asymmetric view of standing—making it easy for regulated entities to get standing, and hard for everyone else—and that approach, again, actually

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151. Chayes, *supra* note 52, at 1311.

152. *See, e.g.*, JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980).

153. *Lujan*, 504 U.S. at 561-62. Interestingly, this position was nearly codified by the D.C. Circuit when, in 2005, it proposed a Circuit Rule requiring parties to address standing issues in their briefing. (Because the D.C. Circuit directly reviews agency action, it faces cases where the proceedings below were not governed by Article III and in which the decision-makers had no need to inquire into standing.) The proposed Circuit Rule would have required standing arguments and supporting materials only from "a petitioner or appellant *who is not directly regulated by the agency action under review*," Int'l Bhd. of Teamsters v. Transp. Sec. Admin., 429 F.3d 1130, 1134 n.2 (D.C. Cir. 2005) (emphasis added), thus basing the procedural rule on the distinction between standing for regulated entities and standing for others, including regulatory beneficiaries. The court apparently altered the rule based on public comment, although the public comments have not been made available by the court. *See* E-mail from Steve Young, Research Librarian, Columbus Sch. of Law, Catholic Univ. of Am., to Heather Elliott, Assistant Professor of Law, Columbus Sch. of Law, Catholic Univ. of Am. (Oct. 23, 2006, 14:59 EST) (on file with author). The rule now requires that the docketing statement and the brief of petitioner "set forth the basis for the claim of standing." D.C. Cir. R. 28(a)(7) (citing Sierra Club v. EPA, 292 F.3d 895, 900-01 (2002)); *see also* D.C. Cir. R. 15(c)(2). The *Sierra Club* case cited requires standing arguments from any entity whose "standing is not self-evident." 292 F.3d at 900.

154. Of course, the term "regulated entities" embraces small businesses and others who are not powerful. My point is simply that a rule giving greater access to regulated entities than to others is not a rule that crisply enforces democratic values.

has the effect of exacerbating existing inequalities in the democratic system.[155, 156]

The standing cases thus may represent a serious distortion of politics, rather than a help to it. Far from ensuring that the courts stay out of democratic politics, the doctrine of standing instead works to worsen political inequalities, in contravention of *Carolene Products.*

C. *The Anticonscription Function*

Recent opinions by the Court and certain Justices, notably Justice Scalia, have suggested that standing serves a third separation-of-powers purpose—that of protecting the executive branch against an unholy alliance between Congress

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155. Because, the argument might go, there are many reasons to distrust government regulation (governments are inefficient, incompetent, and interfere with the proper functioning of markets), it should be easy to challenge government regulations and hard to take action to compel more regulation. A recent D.C. Circuit decision suggests that this antigovernment bias is in fact at work: the court closely scrutinized the standing of regulated entities (who are usually thought to have self-evident standing, *see* Lujan, 504 U.S. at 561-62) because they sought *more* regulation from the agency, rather than less. *See* Am. Chem. Council v. Dep't of Transp., 468 F.3d 810, 815 (D.C. Cir. 2006).

156. For this reason, Professor Stearns's meticulous argument on social choice and standing also has troubling implications. *See* Stearns, *Justiciability*, *supra* note 3 (presenting social choice analysis of standing); Stearns, *Historical Evidence*, *supra* note 3 (providing historical support for analysis presented in Stearns, *Justiciability*, *supra* note 3); *see also* Maxwell L. Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321 (2001) [hereinafter Stearns, *From* Lujan *to* Laidlaw] (applying prior analysis to cases involving environmental issues). Professor Stearns notes that, because of stare decisis, the development of doctrine at the Supreme Court is at least in part dependent on the order in which issues are taken up by the Court. *See* Stearns, *Justiciability*, *supra* note 3, at 1309. Moreover, because of paradoxes inherent in collective decision making (technically, the intransitivity in preferences known as the Condorcet Paradox, *see id.* at 1329), the Court may reach different results in sequential cases depending solely on the order in which the cases are decided. Interest groups thus have incentives to try to affect the sequence in which cases arise at the Court. *See id.* at 1310. Standing has thus emerged as a means for the Court to limit the ability of interest groups to manipulate the timing of cases. Because the tripartite test demands that litigants make a factual showing "that is largely beyond the litigants' control," it limits the ability of litigants to control the timing of cases. *Id.* at 1361-62. Thus "standing serves the critical function of encouraging the order in which cases are presented to be based upon fortuity rather than litigant path manipulation." *Id.* at 1359.

Of course, as Professor Siegel has discussed, the factual bases of standing are more within the litigants' control than Professor Stearns acknowledges. *See* Siegel, *supra* note 36, at 115 (stating that "[i]deologically interested parties are permitted to place themselves in harm's way in order to suffer an injury that can serve as the basis for standing" and thus have "considerable, if not unlimited" control over the timing of cases). My concern is more with the biases that Stearns's position necessarily embraces: because the courts grant standing much more readily to regulated entities, especially when a strict version of standing doctrine is applied, those entities benefit from stare decisis at the expense of regulatory beneficiaries. As discussed above, that result may exacerbate existing inequalities.

and the courts. From *Lujan*[157] to the recent opinions from the Supreme Court and the D.C. Circuit in *Massachusetts v. EPA*,[158] this concern for executive power emerges again and again.

1. *Standing doctrine is used to beat back congressional efforts to use the courts against the executive branch*

As Justice Scalia wrote for the Court in *Lujan*, a strong doctrine of standing limits Congress's ability to turn the courts into "'virtually continuing monitors of the wisdom and soundness of Executive action.'"[159] Congress frequently empowers a broad category of citizens to sue to enforce certain provisions of a federal statute; it sometimes empowers "any person" to sue.[160] But if literally *any* person can invoke the power of the courts to oversee the actions of the executive branch, there would be no limit on the courts' ability to intrude on executive functions. Any rulemaking priorities, decisions whether to prosecute, and other core activities of the Executive could be completely upset by citizen intervention using the courts. Standing doctrine, on this view, serves as a brake on Congress's efforts to conscript the courts to oversee executive action.[161] Without that brake, courts could, "with the permission of Congress, . . . assume a position of authority over the governmental acts of another and co-equal department."[162] Congress may take *actual* injuries that were previously without legal remedy and turn them into *legal* injuries actionable at law, but it

157. 504 U.S. 555 (1992).

158. Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007).

159. *Lujan*, 504 U.S. at 577 (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

This view of executive power is part of a larger "strong executive" theory of separation of powers. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 546 (1994). As discussed above, *see supra* text accompanying notes 146-49, it can be persuasively argued that this emphasis on executive power improperly derogates Congress's power to enact legislation. *See, e.g.*, Chayes, *supra* note 52, at 1314 ("For cases brought under an Act of Congress rather than the Constitution . . . [t]he courts can be said to be engaged in carrying out the legislative will, and the legitimacy of judicial action can be understood to rest on a delegation from the people's representatives.").

160. *See, e.g.*, Federal Election Campaign Act of 1971 § 309, 2 U.S.C. § 437g(a)(8)(A) (2006); Toxic Substances Control Act § 20, 15 U.S.C. § 2619(a)(1) (2006); Endangered Species Act of 1973 § 11, 16 U.S.C. § 1540(g)(1) (2006); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270(a) (2006); Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365(a) (2006); Safe Drinking Water Act of 1974 § 1449, 42 U.S.C. § 300j-8(a) (2000); Resource Conservation and Recovery Act of 1976 § 7002, 42 U.S.C. § 6972(a) (2000); Clean Air Act § 304, 42 U.S.C. § 7604(a) (2000).

161. On this analysis, the Court was surely wrong in *Flast v. Cohen* when it stated:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.

392 U.S. 83, 100-01 (1968).

162. *Lujan*, 504 U.S. at 577 (internal quotation marks and citation omitted).

cannot "abandon[] the requirement that the party seeking review must himself have suffered an injury."[163]

Justice Scalia, dissenting in *Laidlaw*, took a similar approach to citizen suits, warning that the Court's opinion permitting a suit to proceed had "grave implications for democratic governance."[164] There, the plaintiffs brought a citizen suit against an alleged violator under the Clean Water Act. The Court held that the plaintiffs had standing because they had alleged sufficient concrete injury due to their use of the river into which the defendant's pollutants had been emitted; the plaintiffs' injury was redressable, despite the lack of a damages remedy, because if the defendant were required to pay civil penalties to the United States under the Clean Water Act, it would be deterred from committing future violations. Justice Scalia dissented vigorously, contending that, by "marry[ing] private wrong [harm caused to plaintiffs by pollution] with public remedy [civil penalties],"[165] the Court "come[s] close to mak[ing] the redressability requirement vanish,"[166] "turns over to private citizens the function of enforcing the law,"[167] and "place[s] the immense power of suing to enforce the public laws in private hands."[168]

This may seem like an Article II problem: that Congress has improperly delegated the Article II executive power to private individuals. And, indeed, various Justices have noted such problems.[169] Justice Scalia has repeatedly

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163. *Id.* at 578 ("'Individual rights' . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public.").

Justice Kennedy concurred in *Lujan* to make clear his view that Congress should be given some latitude in creating injuries:

> As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Id. at 580 (Kennedy, J., concurring) (citations omitted).

164. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 202 (2000) (Scalia, J., dissenting).

165. *Id.* at 198. The Court should instead, Justice Scalia argued, require that Congress provide "relief specifically tailored to the plaintiff's injury." *Id.* at 204. The problems with Justice Scalia's argument are discussed below. *See infra* text accompanying notes 172-73.

166. *Laidlaw*, 528 U.S. at 215 (Scalia, J., dissenting) (internal quotation marks omitted).

167. *Id.* at 209.

168. *Id.* at 215. Justice Scalia also rejected the Court's standing analysis on its own terms: "Even if it were appropriate, moreover, to allow Article III's remediation requirement to be satisfied by the indirect private consequences of a public penalty, those consequences are entirely too speculative in the present case." *Id.* at 202.

169. Justice Kennedy, for example, concurred in *Laidlaw*:

> Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II . . . . In my view these matters are best reserved for a later case.

made clear, however, that this is not *solely* an Article II problem: "Article III, no less than Article II, has consequences for the structure of our government . . . ."[170]

But Justice Scalia's concern here is not with standing, per se: it would have been easy enough for the environmental group to find a plaintiff who more clearly satisfied the injury-in-fact requirement, and, as discussed below,[171] it is sensible to say, under well-established standing doctrine, that deterrence is sufficient redress. Justice Scalia's concern is really with Congress's effort to enroll the courts in its turf battles with the executive branch.[172]

It is thus perplexing that Justice Scalia wrote for the Court in approving standing for *qui tam* relators in the *Vermont Agency* case.[173] There, the Court upheld the False Claims Act's relator provisions, which empower private citizens to sue on behalf of the United States to recover for fraud against the government.[174] Those relators suffer no direct harm themselves, and thus paradigmatically lack standing. The Court nevertheless affirmed the practice: relators stand in the shoes of the United States, which has been harmed by the fraud; courts have long acknowledged the power of a party to assign its cause of action to another; because the statute promises the relator a bounty, the relator stands to benefit from the suit in a way that gives the relator Article III standing.

How is this not conscription? To be sure, *qui tam* relators sue private individuals to recover funds taken fraudulently from the government, and there may be little intrusion on executive power there. But choosing whom to prosecute for defrauding the government seems as much or more at the heart of the executive function as any decision about which polluter to enforce against,[175] or which government program transgresses the bounds of the Endangered Species Act,[176] or which segregated private school has violated the antidiscrimination regulations of the IRS.[177]

Moreover, if the logic of *Vermont Agency* is correct, Congress could presumably cure the redressability problem by empowering citizen suitors to collect a bounty for the enforcement actions they undertake.[178] In comparing

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Id. at 197 (Kennedy, J., concurring). Similarly, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Court stated that "[i]n . . . concluding [that a *qui tam* relator has Article III standing], we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3." 529 U.S. 765, 788 n.8 (2000).

170. *Laidlaw*, 528 U.S. at 209 (Scalia, J., dissenting).

171. *See infra* note 189 and accompanying text.

172. *See Laidlaw*, 528 U.S. at 209-10 (Scalia, J., dissenting).

173. *See* Vt. Agency of Nat'l Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765 (2000).

174. 31 U.S.C. § 3730 (2006).

175. *See Laidlaw*, 528 U.S. 167.

176. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

177. *See* Allen v. Wright, 468 U.S. 737 (1984).

178. *See, e.g.*, Sunstein, *What's Standing*, *supra* note 35, at 232-34.

qui tam suits to other citizen suits, there is no relevant distinction between the harms at stake—monetary harm to the United States from fraud and environmental harm to the United States from permit violations are both harms that the government could prosecute itself, and could thus (if delegation is permissible) delegate to others. If citizen suitors are given a bounty, they would receive the same kind of redress as do *qui tam* relators. But none of this removes the anticonscription concerns that animate Justice Scalia's vigorous dissent in *Laidlaw*.[179]

Unsurprisingly,[180] sharp disagreement exists over what separation of powers requires: Justice Scalia's view of who should win in the battle between Congress and the executive branch is hotly contested. While he won the day in cases like *Lujan* and *Steel Company*, the Court in *Laidlaw* shows intense concern for a profoundly different conception of separation of powers: that the Court cannot transform standing into a backdoor way to limit Congress's legislative power.[181] Instead, the choice of remedy is Congress's, and if Congress wishes to ensure that its laws are enforced by creating citizen suits, it is free to do so. For the Court to use standing to defeat that congressional purpose would be to exceed the bounds of the judicial power.[182] Justice Blackmun had the same concerns in his dissent in *Lujan*: "the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates."[183]

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179. *See* 528 U.S. at 198-216 (Scalia, J., dissenting). The answer undoubtedly lies in the venerable age of *qui tam* suits, which have been employed since at least "the time of Blackstone." *See* Vt. Agency of Nat'l Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000). But history is replete with many other legal actions that would not survive analysis under the Court's current standing doctrine. *See, e.g.*, Woolhandler & Nelson, *supra* note 20, at 698-99. Why *qui tam* suits are different—if indeed they are—is not immediately apparent.

180. Similar disagreements exist for the concrete adversity function, *see supra* Part I.A.1, and for the pro-democracy function, *see supra* Parts I.B.1, I.B.3.

181. *See Laidlaw* 528 U.S. at 187 (deferring to congressional determination of what remedies would achieve congressional goals by deterring undesirable behavior and noting that choice of remedy "'is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis'" (quoting Tigner v. Texas, 310 U.S. 141, 148 (1940))); *see also* Pierce, *supra* note 149, at 1195-1201 (arguing that *Lujan* is aimed at "the evisceration of the principle of legislative supremacy").

182. *See* Siegel, *supra* note 36, at 103-04 (noting that Congress is perfectly capable of denying a private right of action to enforce a statutory scheme and concluding that "Justice Scalia's argument that courts should respect the majority's law-enforcement decisions [by using standing to limit enforcement through the courts] seems somewhat ironic, inasmuch as he really desires to deny the majority the right to control the very choice he describes").

183. Lujan v. Defenders of Wildlife, 504 U.S. 555, 602 (1992) (Blackmun, J., dissenting); *see also* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 64 (1976) (Brennan, J., concurring) ("Of course, the most disturbing aspect of today's opinion is the Court's insistence on resting its decision regarding standing squarely on the irreducible Art. III minimum of injury in fact, thereby effectively placing its holding beyond congressional power to rectify."); *id.* at 65 ("In our modern-day society, dominated by complex legislative

2. *The doctrine fails reliably to identify and exclude cases of congressional conscription*

As the foregoing discussion has already made clear, standing is completely unhelpful in serving the anticonscription function. As the Court noted in *Flast*, "[t]he question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government."[184] The question whether a particular plaintiff has standing is essentially unrelated to the question whether Congress violates the Constitution by enlisting the courts to fight its battles with the executive branch.

The poorness of fit is particularly notable in Justice Scalia's dissent in *Laidlaw*, where he laments the link of a private injury (the plaintiffs' claim of harm based on the polluter's activities) and a public remedy (civil penalties payable to the U.S. Treasury and not to the plaintiffs): "The principle that 'in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another' applies no less to prosecution for civil penalties payable to the State than to prosecution for criminal penalties owing to the State."[185] Justice Scalia's concern is that, in empowering private litigants to bring this citizen suit, Congress has gone far past "the traditional business of Anglo-American courts [in awarding] relief specifically tailored to the plaintiff's injury, and not *any* sort of relief that has some incidental benefit to the plaintiff"[186]:

> In seeking to overturn that tradition by giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an "undifferentiated public interest" into an "individual right" vindicable in the courts. . . . A claim of particularized future injury has today been made the vehicle for pursuing generalized penalties for past violations, and a threshold showing of injury in fact has become a lever that will move the world.[187]

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programs and large-scale governmental involvement in the everyday lives of all of us, judicial review of administrative action is essential both for protection of individuals illegally harmed by that action and to ensure that the attainment of congressionally mandated goals is not frustrated by illegal action." (citations omitted)); Flast v. Cohen, 392 U.S. 83, 131-32 (1968) (Harlan, J., dissenting) (discussing the constitutionality of public actions and stating that "[a]ny hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President" (citations and footnote omitted)).

184. *Flast*, 392 U.S. at 100.

185. *Laidlaw*, 528 U.S. at 204 (Scalia, J., dissenting).

186. *Id.* at 204.

187. *Id.* at 204-05 (citations omitted). Justice Scalia also analogizes civil penalties to generalized grievances:

> Just as a "generalized grievance" that affects the entire citizenry cannot satisfy the injury-in-fact requirement even though it aggrieves the plaintiff along with everyone else, so also a generalized remedy that deters all future unlawful activity against all persons cannot satisfy

But there is no clear reason why standing doctrine should take such a formalistic view of the link between injury and remedy, where the focus is on whether something is labeled "private" or "public." The standing doctrine, to the contrary, has been noted—and heavily criticized—for its focus on the real-world nature of injury and redress.[188] As the *Laidlaw* majority reasonably asserts, civil penalties will in actual fact deter the undesirable conduct, thus redressing the plaintiffs' injuries.[189] Such a practical link is all that the doctrine has usually been asked to provide, regardless of the consequences for separation of powers.

> the remediation requirement, even though it deters (among other things) repetition of this particular unlawful activity against these particular plaintiffs.

Id. at 204 (citation omitted). This argument, however, assumes a specificity of remedy that the Court has never required. While it is true that the standing doctrine has long required the *injury* claimed by the plaintiff to be particularized, *see Lujan*, 504 U.S. at 560 (injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical" (internal quotation marks omitted)), redress requires only that the remedy, whatever its character, offset the plaintiff's claimed injury. Indeed, requiring more would vitiate standing for many procedural challenges to agency action, given that such procedures are frequently for the general benefit of the public (open government, etc.), rather than specifically intended to protect individual rights.

188. It is commonly stated that, when the Court made the move to emphasize injury in fact over legal injury in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), it rejected any notion of an essential link between the injury the plaintiff claims and the legal arguments she raises to obtain redress for that remedy. *See, e.g.*, PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW 1133-34 (10th ed. 2003). So, for example, in *Duke Power*, the Court explicitly rejected a "subject-matter nexus between the right asserted and the injury alleged." Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 79 (1978). There, plaintiffs who alleged harm from a nuclear plant's thermal pollution to a lake they used for recreation had standing to challenge the constitutionality of the Price-Anderson Act, which indemnified nuclear power plants in the case of a nuclear accident. *Id.* at 80-81. The Price-Anderson Act, of course, had nothing to do with thermal pollution, but because a favorable decision on their claim would result in the closure of the nuclear power plant (which could not afford to operate without the indemnification provided by the Act), the plaintiffs could obtain redress and thus had standing. *Id.* at 74-78.

This approach is subject to extensive criticism because it removes from the analysis the question of *legal* injury (does a statute denominate this as an injury?), and inserts instead the question of *factual* injury (is the claimed injury real?). Judges are presumably much better at answering the first question than the second:

> The essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty? This question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked. . . .
>
> . . . .
>
> . . . [The Court's] "injury in fact" requirement [in contrast] cannot be applied in a non-normative way. There cannot be a merely factual determination whether a plaintiff has been injured except in the relatively trivial sense of determining whether plaintiff is telling the truth about her sense of injury.

Fletcher, *supra* note 25, at 229-31.

189. *Laidlaw*, 528 U.S. at 185-86. Because the plaintiffs had alleged the threat of future injury if the defendant recommenced its allegedly illegal discharges, a remedy that deterred such action by the defendant provided redress. *Id.*

Given the poor fit between standing doctrine and the anticonscription function, the only way this function might serve Justice Scalia's goal is by precluding suit on some random subset of cases.[190] If the only goal is to reduce the cases the courts hear, then standing doctrine might be effective. But a doctrine should not *randomly* choose who can or cannot sue. "Standing doctrine should turn on real distinctions, not on gestures designed to propitiate the gods of justiciability."[191]

None of this is to question the very real concern that Congress might be taking advantage of a liberal standing doctrine to shunt into the courts problems that it does not wish to resolve in full political view. Congress could certainly spell out a general directive for agencies in a statute, and then rely on private plaintiffs to push the agency one way or the other, letting the courts decide whether the agency's implementation worked. And Congress has every reason to act this way—as numerous political scientists have demonstrated, the main imperative of any member of Congress is to be reelected,[192] and avoiding controversy (by, for example, shunting a tricky decision into the court) is a prime way to support one's reelection hopes.[193, 194] But many citizen suits do not involve such shunting,[195] and such suits can be seen, not as a mechanism

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190. *Cf.* Chayes, *supra* note 52, at 1307 (concluding, based on our "cultural commitment to judicial oversight," that "[o]ne may further question whether even a conscious effort to limit judicial review of executive and administrative action can be effective except at the margin").

191. Siegel, *supra* note 36, at 107.

192. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

193. "[I]n recent decades, Congress has . . . effectively delegated difficult questions of regulatory enforcement to the federal judiciary through the liberalization of standing." Stearns, *From* Lujan *to* Laidlaw, *supra* note 156, at 344. Indeed, the sponsor of a bill has reason to use standing provisions to enlist the courts' help, because such provisions may fly under the radar of other legislators and thus are "a relatively more obfuscatory" method for the sponsor to achieve her goals. *Id.* at 350. Judicial limits on standing, however, "have the beneficial effect of encouraging the resolution of divisive issues in Congress." *Id.* at 339.

194. The shunting problem thus seems to me more a nondelegation problem than a conscription problem. When Congress avoids a controversial question by creating vague legislation and then leaving it to litigation to work out the details, the result is something akin to standardless delegation of legislative authority to agencies. *Cf., e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 183-84 (1993).

195. It is hard to argue, for example, that the "maximum achievable control technology" hammer provision added to the Clean Air Act by the 1990 amendments, *see* 42 U.S.C. § 7412(g), (j) (2000), which was made enforceable by judicial review, *see* 42 U.S.C. § 7607(b)(1) (2000), represents Congress's effort to shunt responsibility for tough decisions onto an agency. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified in scattered sections of 42 U.S.C.). Instead, those amendments are widely seen as Congress's effort to bring to heel an agency that was not proceeding along the path Congress desired. *See, e.g.*, David P. Novello, *The Air Toxics Program at the Crossroads: From MACT to Residual Risk*, 18 NAT'L RES. & ENV'T, Winter 2004, at 57, 57 ("EPA consistently lagged behind the stringent statutory schedule for promulgation set out in [the prior version of the Act]. . . . To try to force EPA to remain on schedule, Congress wrote into the statute CAA § 112(j), a provision commonly referred to as the 'MACT hammer.'").

for congressional avoidance of tricky political questions, but as a way for Congress to overcome the problem of agency capture[196]: citizen suits allow citizens to ensure that agencies are not captive to regulated entities.[197] If citizen suits are a remedy for capture, they may serve a separation-of-powers interest arguably as valid as the anticonscription function.

It is simply not the case that Congress issues purely substantive rules and waits for the Executive to enforce them; Congress regularly specifies procedures for agencies to follow, adopts statutes that impose action-forcing deadlines on agencies, and constrains executive power in innumerable other ways.[198] If Congress can set up such procedures, there is no clear reason to forbid courts to enforce those procedures at Congress's direction.[199] As the Court has long made clear, Congress may enlist help from coordinate branches in doing its job.[200] The illogic of the anticonscription function suggests that it is motivated by what Justice Blackmun contended was an "unseemly solicitude for an expansion of power of the Executive Branch."[201]

* * *

I began this Article by quoting the Court: standing "is built on a single basic idea—the idea of separation of powers."[202] But as I have demonstrated above, there is no single "idea of separation of powers," but instead at least three—the concrete-adversity function, the pro-democracy function, and the anticonscription function—and each of these is contested. Arguably because of these submerged disagreements, standing performs these functions poorly. Standing is not particularly good at ensuring concrete adversity, gives incoherent and sometimes antidemocratic guidance on promoting democracy, and utterly fails at preventing Congress from conscripting the courts to ensure that the executive branch does its job.

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196. *See* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 83-84, 107-11 (2002) (noting "regulatory agencies' tendency to be seduced or 'captured' by regulated interests").

197. *See, e.g.*, *id.* at 84; *see also* Chayes, *supra* note 52, at 1313 ("After all, the growth of judicial power has been, in large part, a function of the failure of other agencies to respond to groups that have been able to mobilize considerable political resources and energy.").

198. *See, e.g.*, Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 820; *see also* Brown, *supra* note 108, at 274-75 (arguing that the effort to use standing doctrine to restrict Congress's power to control the Executive cannot be justified under the Constitution).

199. Justice Scalia would presumably respond that it is one thing to delegate power to a coordinate branch accountable to the people of the United States, and quite another thing to delegate such power to the far-from-democratic federal courts.

200. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("We also have recognized . . . [that] the non-delegation doctrine in particular, do[es] not prevent Congress from obtaining the assistance of its coordinate Branches.").

201. Lujan v. Defenders of Wildlife, 504 U.S. 555, 605 (1992) (Blackmun, J., dissenting).

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

One might nevertheless conclude that an imperfect tool is better than none in pursuing goals the Court has repeatedly emphasized are central to maintaining the structure established by the Constitution. This conclusion is incorrect for two reasons. First, standing's imperfections cause the Court, and the federal courts more generally, serious problems of illegitimacy and incoherence. Second, better tools are available to perform the functions for which the Court currently uses standing. The problems are the subject of Part II; the solutions, of Part III.

II. THE PATHOLOGIES OF STANDING

As I have already noted,[203] the incoherence of the standing doctrine has led to repeated accusations that the Court is lawless, illogical, and dishonest. The persistence of such criticism is, in itself, a separation-of-powers concern: repeated accusations of manipulation and illegitimacy only weaken the Court's efficacy, and cause harm to the Court's position in the constitutional structure.

Perhaps more to the separation-of-powers point, however, are the problems caused for the lower courts. No jurist can produce predictable results from a set of rules that arises from incoherence. Certain members of the Court have repeatedly predicted such problems.[204] And, indeed, case after case results in splintered decisions;[205] other cases ricochet back and forth between "standing"

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203. *See supra* notes 31-38 and accompanying text.

204. *See, e.g.*, *Lujan*, 504 U.S. at 593 (Blackmun, J., dissenting) ("I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm."); *id.* at 602 ("I have the greatest of sympathy for the courts across the country that will struggle to understand the Court's standardless exposition . . . ."); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 66 n.13 (1976) (Brennan, J., concurring) ("After today's decision the lower courts will understandably continue to lament the intellectual confusion created by this Court under the rubric of the law of standing. 'The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court has itself characterized its law of standing as a complicated specialty of federal jurisdiction. . . . One cannot help asking why this should be true.'" (quoting Scanwell Labs. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970) (citation and internal quotation marks omitted))).

205. The D.C. Circuit's decision in *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), for example, could not have resulted in three more divergent opinions. Judge Randolph decided that the standing question was so enmeshed with the merits question (whether EPA should have regulated carbon dioxide under the Clean Air Act) that he proceeded to the merits inquiry without resolving the plaintiffs' standing. *See id.* at 56.

Judge Sentelle, explicitly invoking the pro-democracy arguments for standing, thought it obvious from the Supreme Court's precedents that the harm plaintiffs claimed from global warming were

> neither more nor less than the sort of general harm eschewed as insufficient to make out an Article III controversy by the Supreme Court and lower courts. . . . .

and "no standing" decisions depending on the timing of the latest Supreme Court decision.[206]

Moreover, as Professor Pierce has demonstrated, the incoherence of the doctrine gives scope for "the strong tendency of judges to engage in ideologically driven doctrinal manipulation in standing cases."[207] Standing doctrine as it currently exists cannot help but create confusion in the lower courts:

> . . . Because plaintiffs' claimed injury is common to all members of the public, the decision whether or not to regulate is a policy call requiring a weighing of costs against the likelihood of success, best made by the democratic branches taking into account the interests of the public at large. There are two other branches of government. It is to those other branches that the petitioners should repair.

Id. at 60 (Sentelle, J., dissenting in part and concurring in the judgment).

And Judge Tatel thought it equally obvious under Supreme Court precedent that at least one plaintiff, Massachusetts, had suffered a concrete and particularized injury in fact:

> The Commonwealth of Massachusetts claims an injury—namely, loss of land within its sovereign boundaries—that affects [it] in a personal and individual way. This loss (along with increased flood damage to the Massachusetts coast) undeniably harms the Commonwealth in a way that it harms no other state. Other states may face their own particular problems stemming from the same global warming—Maine may suffer from loss of Maine coastal land and New Mexico may suffer from reduced water supply—but these problems are different from the injuries Massachusetts faces. Massachusetts's harm is thus a far cry from the kind of generalized harm that the Supreme Court has found inadequate to support Article III standing, i.e., harm to [its] and every citizen's interest in proper application of the Constitution and laws, or put another way[,] relief that no more directly and tangibly benefits [it] than it does the public at large.

Id. at 65 (Tatel, J., dissenting) (citation and internal quotation marks omitted); *see also id.* at 65-66 (concluding that the plaintiffs had made a sufficient showing of causation and redressability).

Several recent cases demonstrate a similar divergence of views. *See* Barnes-Wallace v. City of San Diego, 530 F.3d 776 (9th Cir. 2008) (superseding on rehearing an earlier opinion granting standing, embracing a different theory of standing than the district court in the prior opinion, and producing a majority, a concurrence, and a dissent); Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494 (5th Cir. 2007) (en banc) (on rehearing, producing a majority, a special concurrence, and two dissents on standing of plaintiffs); ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007) (denying standing to plaintiffs with an opinion and an opinion concurring in the judgment by Judge Gibbons, over a dissent).

206. For example, the Fourth Circuit had held that an environmental group lacked standing to sue, in part because showing "a mere exceedance of a permit limit" imposed by the Clean Water Act was not sufficient to satisfy the Article III standards articulated by the Court. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 179 F.3d 107, 115 (4th Cir. 1999) (internal quotation marks omitted). The Supreme Court then decided *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), purporting to apply its usual standing principles. The Fourth Circuit then reheard *Gaston Copper* en banc and found standing because "[d]ismissing the action . . . encroaches on congressional authority by erecting barriers to standing so high as to frustrate citizen enforcement of the Clean Water Act." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 151 (4th Cir. 2000) (en banc). Now, of course, it is perfectly appropriate for a lower court to respond to a decision of the Supreme Court; I note the case merely to demonstrate how the lack of predictability in the Court's doctrine causes more work for the lower courts.

207. Pierce, *supra* note 30, at 1760.

> Any judge can write a reasonably well-crafted opinion granting or denying standing in a high proportion of cases. The Supreme Court has issued so many opinions on standing with so many versions of injury, causation, [and] redressability . . . that any competent judge can find ample precedent to support broad or narrow versions of each of the doctrinal elements that together comprise the law of standing.[208]

And Professor Pierce demonstrates empirically, using a statistical analysis of circuit court decisions regarding the standing of environmental plaintiffs, that the doctrine's incoherence does, in fact, allow politically driven results: during the sixty-six-month period studied, "a Republican judge was almost four times as likely as a Democratic judge to vote to deny an environmental plaintiff standing."[209] Pierce concludes: "Access to the courts should be governed by the rule of law and not by the political preferences of individual judges and Justices."[210]

Professor Staudt argues that judges act less on their political beliefs than Pierce and others have suggested, in part because earlier studies did not select appropriate samples—in particular, leaving out cases where "courts *assume* standing and move straight to the merits."[211] She nevertheless finds, in a statistical study constructed to remedy such problems,[212] that the more scope judges have for engaging in politically motivated standing decisions, the more likely such decisions are.[213]

There thus appear to be some constraints on politicized decision making, in Professor Staudt's view. It is nevertheless plain that standing doctrine lacks sufficient clarity to prevent manipulation in many circumstances. Such malleability teaches people to take advantage of vague and inconsistent precedents to reach the results they seek, to manipulate doctrine beyond all recognition, and ultimately to distrust the courts.

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208. *Id.* at 1762.

209. *Id.* at 1760.

210. *Id.* at 1775.

211. Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 615-16 (2004). For example, as Professor Pierce explains in his article, he searched for cases that explicitly addressed standing. *See* Pierce, *supra* note 30, at 1759 n.12.

212. "This Article undertakes that exploration and overcomes the problems found in the legal and social science literatures by including in the analysis the entire population of published judicial opinions in an area of law where a single line of precedent governs the plaintiffs' right to be in court." Straudt, *supra* note 211, at 616.

213. Professor Staudt finds that if precedent is vague, or if a decision is likely to receive little scrutiny from a higher court, judges indulge their political preferences:

> [D]istrict courts are subject to a high level of oversight and monitoring, and this works as a powerful deterrent to political decisionmaking. . . . In situations in which the appellate judges are reasonably sure the Supreme Court will not review their decisions, they will pursue their own political preferences irrespective of the existing legal precedent. . . . [T]he Supreme Court Justices, with little oversight or institutional constraints to inhibit them, make decisions that reflect their sincere policy preferences in certain contexts but engage in more strategic decisionmaking in others—all in an effort to ensure they get their favored outcome.

Id. at 669.

Even absent accusations of manipulation, the doctrine's lax fit with the purposes it purportedly serves has led some courts to reach results that privilege an empty formalism over any proper policy outcome. As I noted above,[214] the focus on concrete adversity in the organizational context has resulted in what amounts to window dressing: the individual member brought in to satisfy the standing test provides the necessary constitutional front for the lawsuit, but typically has no real involvement in the lawsuit.[215] This places the formal requirements of standing above any common-sense notion of why the standing test is applied in the first place, and yet it is a perfectly logical result of the Court's standing jurisprudence. Form has replaced function.

This empty formalism reached its zenith in the case *Natural Resources Defense Council v. EPA*, which challenged the EPA's authorization of the ozone-depleting chemical methyl bromide in certain "critical use" circumstances.[216] Under long-standing principles of associational standing,[217] NRDC was required to show that "at least one of its members ha[d] standing to sue in his own right," that pursuing the suit was "germane to [NRDC's] purpose," and that no need existed for individual members to participate directly in the litigation.[218] NRDC satisfied this standard, not by offering up an identifiable individual member who was harmed by the methyl bromide rule, but by introducing statistical evidence that the methyl bromide rule would lead to an increased lifetime risk of death of 1 in 200,000.[219] Because NRDC had "nearly half a million members," "two to four" of those members would "develop cancer as a result of the rule."[220] NRDC thus had associational standing to pursue the lawsuit, the court held, even though it was and is impossible to identify *which* of its members would die from increased methyl bromide levels, or even if any member would be so affected.[221] There was *no*

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214. *See supra* note 77.

215. *See, e.g.*, DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL § 15.03[3][f] (Law Journal Press 2008) (1997) (stating that "[t]he organizational plaintiff should be ready to identify live representatives who meet the standing criteria," implying that such representatives are not always already closely involved in the litigation).

216. Natural Res. Def. Council v. EPA, 464 F.3d 1, 3 (D.C. Cir. 2006).

217. *Hunt v. Washington State Apple Advertising Commission* has long forbidden associations to sue regarding issues that might affect their members without identifying members actually affected. 432 U.S. 333, 343 (1977) ("[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

218. *Natural Res. Def. Council*, 464 F.3d at 5-6 (citing Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002)).

219. *Id.* at 7.

220. *Id.*

221. An individual risk of death of 1 in 200,000 does not actually translate into certainty that one person in a particular group of 200,000 people will die; the larger the group gets, the more likely that it contains someone who will eventually suffer the event

identifiable member to support the association's standing—only the statistical likelihood that some small number of NRDC's members would be adversely affected by the regulation.[222]

The Eleventh Circuit recently used identical reasoning in deciding a challenge to a Florida voter registration statute: "When the alleged harm is prospective, we have not required that the organizational plaintiffs name names because every member faces a probability of harm in the near and definite future."[223] Instead, the court stated, "all that plaintiffs need to establish is that at least one member faces a realistic danger of having his or her" voter registration application rejected.[224] The court thus had to engage in some unusual statistical calculations[225] to conclude, not that a member of the NAACP would certainly be harmed by the law, but that it was "highly unlikely . . . that not a single member will have his or her application rejected."[226] In other words, there was again no identifiable member to give the organization standing; instead, it was highly likely (but not certain) that the organizations had members who would be harmed. The court then said that "[h]uman fallibility being what it is, someone is certain to get injured in the end."[227]

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subject to the risk analysis, but the question is always one of *probability*, not one of *certainty*. *See, e.g.*, John Cairns, Jr., Editorial, *Absence of Certainty Is Not Synonymous with Absence of Risk*, 107 ENVTL. HEALTH PERSP. A56, A56-57 (1999).

222. As I have discussed elsewhere, this statistical standing doctrine has several curious aspects. *See* Heather Elliott, Collisions in Standing Doctrine 2-3 (Oct. 28, 2007) (unpublished manuscript, on file with the author). To note just one, it seems unlikely that the D.C. Circuit, in the *NRDC* case, would have reached the same conclusion had the case been brought by a much smaller organization. For example, an environmental group with 10,000 members could show only that it had one-twentieth of a member who would likely die from the methyl bromide rule, arguably insufficient for standing. But there is no reason that an association's ability to sue should be contingent on its size. Conversely, were America's environmental organizations to band together to produce an umbrella organization whose membership numbered in the millions or tens of millions, they would be able to show standing under the statistical theory for virtually any risk, running counter to the pro-democracy argument and even the general ban on private attorneys general.

223. Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1160 (2008).

224. *Id.* at 1163.

225. The statistical-standing analysis here was more complicated than in *NRDC*; while all the NRDC's members were exposed to the atmosphere and thus to the risk of death, here the NAACP's members were not all at risk—most of them were already registered voters. The court hypothesized, apparently conservatively, that there might be "200 individuals among the 20,000 Florida NAACP and [other plaintiff associations] who are first time registrants." *Id.* at 1163 n.13. The court then noted that the Florida Department of State had rejected about 1% of voter registrations overall since the statute became effective, and had rejected 2% of Latino and African-American registrations in the same period. *Id.* Applying the 1% rejection rate, the court concluded that there was only a 13% chance that none of those new registrants would be rejected under the statute and, applying the 2% rejection rate, only a 2% chance that none would be rejected. *Id.* Thus it was between 87% and 98% certain that a member of one of the plaintiff organizations would be harmed by the law.

226. *Id.* at 1163.

227. *Id.* at 1164.

None of this is to say that finding standing in these cases is *wrong*. There are many reasons to suspect, for example, that environmental injury is best addressed by associations precisely because certain types of environmental risk are spread across populations,[228] that challenges to voting problems should be heard early and often because after the election those challenges are moot,[229] and that it adds nothing to these cases to have the organizations name a specific member.[230] And the pro-Congress view of separation of powers counsels that courts are needed to help enforce the rules as Congress (or the Constitution, in the voting rights case) has established them. But if one emphasizes the anticonscription or pro-democracy view, this kind of standing makes scant sense. In particular, *Hunt*'s requirement that organizations work with actual people might be described as promoting "small-d" democratic values. If that is a good idea, the move in *NRDC* to permit statistical standing is somewhat troubling.[231]

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228. *See, e.g.*, Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495, 498-99 (1986) ("[B]y all accounts exposures to benzene in the workplace, low level radiation in the atmosphere, ordinary air pollution, and asbestos-like fibers in drinking water pose small risks to any single individual. Yet the size of the exposed population or the lifetime exposure of single individuals makes 'statistical deaths' or 'statistical carcinomas' virtually certain." (footnotes omitted)).

229. *See NAACP v. Browning*, 522 F.3d at 1164 ("[If] we require [would-be voters] to wait until after their applications have been rejected . . . , there may not be enough time to reach a decision on the merits.").

230. This is probably the best response to the *NAACP* case, because it seems fairly straightforward for the organization to find a member who is a first-time registrant and thus to satisfy the *Hunt* requirements without resorting to statistical standing; but why bother? What does it add to know that there is *definitely* an NAACP member who is registering to vote and may be negatively affected by the statute?

231. At least in the *NRDC* and *NAACP* cases, there are valid reasons to permit the statistical-standing analysis; not so in a recent district court decision. In a suit over certain mailings to Medicare recipients, the organization identified no member who had standing to sue, and, citing *NRDC*, said they need not "if that member's existence and injury can be reasonably inferred from the available statistics." Action Alliance of Senior Citizens v. Leavitt, 456 F. Supp. 2d 11 (D.D.C. 2006), *vacated on other grounds*, 483 F.3d 852 (D.C. Cir. 2007). The court then conducted a statistical analysis to conclude that the organization had members who must have received the mailing. *Id.* at 15-16 ("Assuming that at least seventy percent (or 14,000) of the Gray Panthers are enrolled in Part D, and that they are affected in approximately the same proportion as all Medicare beneficiaries (one percent), then at least 140 members of the Gray Panthers alone were likely affected . . . . Thus, Plaintiffs have sufficiently alleged that at least one of their members would have standing to bring this case." (citation omitted)).

But the harm caused here is not a probabilistic injury: a senior citizen either received the letter from the Department of Health and Human Services, and was allegedly harmed thereby, or she received no such letter, and thus suffered no harm. Unlike the NRDC, which had no way to identify which of its 500,000 members would ultimately become sick and die from exposure to methyl bromide, or the NAACP, who had no way to know a priori which of its members would suffer under the voter-registration statute, it was certainly possible to identify members who had received the challenged letters. This is empty formalism extended to nonsense—and it was unnecessary to boot: the organization could simply state in its complaint that, on information and belief, it had members who suffered the relevant injury

In a move that might be called heightened, rather than empty, formalism, the D.C. Circuit recently denied standing to a regulated entity even though there is "ordinarily little question" about such an entity's standing.[232] In *American Chemistry Council v. Dep't of Transp.*, the D.C. Circuit suggested that a regulated entity might not have standing to challenge Department of Transportation regulations because it could solve the problem *through voluntary self-regulation.*[233] It has never been an element of standing doctrine that the plaintiff show that her sole refuge is the courts.[234] And such a rule would frequently be impossible to satisfy—there are numerous alternatives to litigation in most cases. The court could not make its motivations more clear: its decision arose because of the "atypical request by industry associations to require an agency to regulate their industry *more* pervasively."[235] In other words, government regulation is to be minimized, and thus anyone *objecting* to the constraints of government regulation should be able to challenge that action—and anyone else will be viewed with suspicion.

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That endless critics have lambasted standing doctrine, that the lower courts find the doctrine difficult to apply, that some judges manipulate the doctrine's indeterminacy to reach politicized outcomes, and that courts are increasingly resorting to an empty formalism results in large part, I contend, from its recruitment to perform separation-of-powers tasks for which it is ill-suited. Standing doctrine produces erratic results depending in part on the function which it is asked to serve: it is sometimes rationally related to ensuring concrete adversity, while it performs abysmally at sorting cases along pro-democratic or anticonscription lines. This analysis suggests that radical change is in order.

III. NARROWING THE FUNCTIONS OF STANDING

As I have demonstrated above, standing doctrine is not actually an essential element of the separation of powers, and it is not built on a single idea of

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and would amend to name such members as soon as practicable. Indeed, the complaint was later so amended. *See* Action Alliance of Senior Citizens v. Leavitt, 483 F.3d 852, 855 (D.C. Cir. 2007).

232. Am. Chemistry Council v. Dep't of Transp., 468 F.3d 810 (D.C. Cir. 2006); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992); Sierra Club v. EPA, 292 F.3d 895, 900 (D.C. Cir. 2002) (concluding that if complainant is the object of regulatory action, standing is normally self-evident). Indeed, in the D.C. Circuit's recent rulemaking to require briefing of standing issues in cases emerging from agencies, the court initially proposed to require such briefing only from parties who were *not* regulated entities. *See supra* text accompanying note 153.

233. *Am. Chemistry Council*, 468 F.3d at 820.

234. *See, e.g.*, *Lujan*, 504 U.S. at 555.

235. *Am. Chemistry Council*, 468 F.3d at 815 (emphasis added) (internal quotation marks omitted).

separation of powers. Instead, it is used to pursue many such ideas, none of which it serves particularly well, and some of which it disserves. Using standing doctrine in pursuit of these goals has been harmful, inviting harsh criticism and burdening the lower courts. The doctrine in its current form should be discarded.

What to do? Abandoning this sort of threshold inquiry altogether seems unwise; while the current doctrine is faulty, the separation-of-powers functions it serves should not be abandoned. While it is not the purpose of this Article to take sides in the separation-of-powers debate, the Court's persistent and deep disagreements about how best to view the role of the judiciary in the constitutional structure demonstrate that these issues cannot simply be ignored.[236]

The question then becomes what such a threshold inquiry might look like. As might be expected, those who accuse standing doctrine of being "incoherent,"[237] "manipulable" and permeated with "doctrinal confusion,"[238] a decision on the merits in the guise of a threshold jurisdictional inquiry,[239] akin to substantive due process,[240] and a "pointless constraint on courts,"[241] have suggested a number of ways to fix the doctrine. One dominant suggestion is to abandon standing altogether and return to the question of whether the plaintiff states a claim. As Professor (now Judge) Fletcher puts it in his oft-cited article, *The Structure of Standing*, "we should ask, as a question of law on the merits, whether the plaintiff has the right to enforce the particular legal duty in question."[242] Standing would then depend on the law governing the merits:

> If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it. If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it. Congress should have some, but not unlimited, power to grant standing to enforce constitutional rights. The nature and extent of that power should vary depending on the duty and constitutional clause in question.[243]

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236. *See supra* Part I.

237. Fletcher, *supra* note 25, at 221 ("The structure of standing law in the federal courts has long been criticized as incoherent.").

238. Sunstein, *supra* note 32, at 1458.

239. *See, e.g.*, Tushnet, *supra* note 34, at 663.

240. *See, e.g.*, Sunstein, *supra* note 32, at 1480 (noting parallel between strict standing and the economic conservatism of the *Lochner* era); *see also* Fletcher, *supra* note 25, at 233 ("[O]ne may even say that the 'injury in fact' test is a form of substantive due process.").

241. Siegel, *supra* note 36, at 75.

242. Fletcher, *supra* note 25, at 290-91.

243. *Id.* at 243-44.

Professors Sunstein,[244] Nichol,[245] and Pierce[246] make arguments along the same lines.

This view echoes the concern expressed by the Court in *Laidlaw* that standing should not trample on Congress's legislative prerogatives.[247] But, as discussed above, strong deference to Congress might itself invite legislation that raises separation-of-powers problems, because it acquiesces in Congress's ability to shunt difficult legislative questions to the courts.[248] When Congress does this by delegating power to agencies, we have accepted it at least in part on the logic that agencies are politically accountable to some extent.[249] And, of course, courts cannot perform their judicial role without interpreting law and filling gaps.[250] But there is nevertheless something to the idea that, if courts have no way to decline to exercise their authority when they suspect Congress is engaged in such shunting, our constitutional balance will be upset.[251]

Some critics have also suggested retaining the essence of the standing doctrine (and, apparently, its constitutional grounding) while making the doctrine more coherent. Professor Pierce, for example, while suggesting greater deference to Congress and the executive branch,[252] contends that "[t]he Court should simplify the applicable doctrines, objectify the doctrines, [and] increase the consistency with which it describes and applies the doctrines."[253] I doubt, however, that the courts can provide sufficient clarity within the structure of the current doctrine to eliminate the recurrence of the problems I have outlined above.

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244. Sunstein, *What's Standing*, *supra* note 35, at 235 ("Congress can create standing as it chooses and, in general, can deny standing when it likes."); Sunstein, *supra* note 32, at 1481 ("For the most part, the question of standing is for legislative resolution.").

245. *See* Nichol, *Standing for Privilege*, *supra* note 37, at 336-37.

246. *See* Pierce, *supra* note 30, at 1776 (arguing that the courts "should at least be reluctant to refuse to resolve a dispute when the plaintiff has an explicit statutory cause of action").

247. *See supra* Part I.C.1.

248. As discussed above, this appears to be a different problem than the anticonscription problem Justice Scalia worries about. *See supra* note 169 and accompanying text; *supra* note 194.

249. *See, e.g.*, Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 407-08 (1987). Of course, some have argued that our "fourth branch" is utterly unconstitutional. *See generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

250. *See, e.g.*, Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 444 (2003) ("fill[ing] the gap in the statutory text" left by Congress's failure to define a term).

251. As I have already made clear, I do not think that standing doctrine is a legitimate way for courts to avoid such cases. *See supra* notes 84-86 and accompanying text. Thus even if Professor Stearns is right that standing is currently used this way, *see* Stearns, *From* Lujan *to* Laidlaw, *supra* note 156, at 344 (arguing that Congress tries to divert contentious questions regarding enforcement to the courts and that standing doctrine gives the courts a way to resist such diversion), I believe standing is the wrong tool.

252. *See supra* note 246.

253. *See* Pierce, *supra* note 30, at 1776.

A more promising avenue is one that permits the federal courts to explicitly raise the separation-of-powers concerns described in this Article but as a matter of prudence rather than constitutional mandate.[254] I am not the first to suggest this—Professor Jaffe decades ago recommended that a prudential abstention doctrine would be preferable to the standing doctrine;[255] this approach has been echoed by Professors Tushnet[256] and Siegel.[257] As my analysis above suggests, however, any such abstention doctrine should be informed by specific factors that have not been sufficiently recognized.

A. *A Return to Prudential Consideration of Factors Giving Rise to a "Judicial Case" Would Better Serve the Concrete-Adversity Function*

As I discussed in Part I.A, standing emerged as a doctrine to help the courts ensure that they were doing what it is that courts do. To do their jobs, courts need concrete, factual contexts in which to apply the law, and they need the adversarial presentation of argument. Thus any abstention doctrine would continue the Court's historically venerable inquiry into whether a traditional judicial case is present; the Court has long forbidden collusive cases, for example.[258] This function could even be pursued by a prudential version of the existing standing doctrine. As I demonstrated above, standing plausibly ensures that the parties who bring a suit actually have a concrete interest in that suit suitable to make the case "concretely adverse" and thus susceptible of judicial

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254. Calling upon the Court to abandon many of its standing decisions does implicate stare decisis, but as the Court has made clear in numerous cases, stare decisis does not require slavish devotion to precedent that fails. *See, e.g.*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288-89 (1977). Professor Pierce points out that, while stare decisis may forbid abandoning the standing doctrine altogether, *see* Pierce, *supra* note 30, at 1775-76 ("It is . . . probably too late in the day to adopt that course of action."), the unpredictability of the doctrine itself suggests that stare decisis has little force, *see id.* at 1767 ("[I]t is hard to make a case that stare decisis compels the Court to adhere to any particular version of modern standing law in future cases.").

255. *See* Jaffe, *Public Actions*, *supra* note 19, at 1302-06 (suggesting an abstention doctrine to limit the justiciability of suits brought to vindicate the public interest). Professor Murphy suggests reviving a different aspect of Dean Jaffe's standing analysis, that of deference to the political branches. *See* Richard W. Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. (forthcoming 2008).

256. *See* Tushnet, *supra* note 34, at 700 (suggesting a "candid assessment of the plaintiff's ability to present the case adequately and a pragmatic evaluation of the factual concreteness that could be expected," "a reluctance to find standing where plaintiffs more directly affected by the claimed illegality might realistically be expected to come forward," and "a revitalized political question doctrine, which would allow the court to confront directly the separation-of-powers concerns" that arise under the guise of standing decisions).

257. *See* Siegel, *supra* note 36, at 129-38 (recommending a variety of discretionary rules of justiciability).

258. One might place the prohibition on advisory opinions here as well, though Professor Siegel has made a persuasive argument that prohibition is inadvisable and that, instead, courts should have "discretion over cases calling for purely advisory opinions." *Id.* at 133.

resolution. To pull back the standing doctrine to its state in *Baker v. Carr*—returning to the function of eliminating cases not sufficiently adversary to be susceptible of judicial resolution[259]—would be acceptable.

Even so, the doctrine in its current form is needlessly complex. It seems unnecessary to conduct an extensive inquiry into injury in fact, causation, and redressability simply to determine whether the parties before the court possess the necessary concrete adversity to permit the court to do its job. Arguably, therefore, a prudential standing doctrine that is intended to perform only the concrete-adversity function could be stripped down considerably.[260] Moreover, as Professor Hessick has argued, if a case raises a traditional private-rights claim, it should be justiciable: in such cases, there is no reason to conduct an analysis to determine if the plaintiff has a requisite stake, because—so long as the case is not collusive—an invasion of private rights has always been at the core of the judicial power.[261]

At the same time, however, the courts should abandon much of the injury requirement in determining concrete adversity, in particular when the inquiry is for the purpose of promoting vigorous argument and hence better judicial decision making.[262] For example, there is no reason to force associations to name a member with standing to satisfy the *Hunt* hurdle; associations, as long as they are suing over issues within their purview, would seem to satisfy the concrete-adversity requirement by their very nature. The lower courts have arguably recognized this in the statistical standing cases described above.[263] If

259. Baker v. Carr, 369 U.S. 186, 204 (1962).

260. It is possible that this function of standing could just as well be served by a 12(b)(6) motion to dismiss for failure to state a claim, particularly because this removes the analysis from the constitutional realm. *See* Fletcher, *supra* note 25, at 239 ("[T]he important point to notice is that the question of whether plaintiff 'stands' in a position to enforce defendant's duty is part of the merits of plaintiff's claim. It is the sort of claim that can be tested in federal district courts under a rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted . . . ."); *see also* Hessick, *supra* note 77, at 325 (arguing that, at least for a plaintiff claiming an invasion of a private right, "the only standing inquiry should be whether the facts alleged by the plaintiff establish a violation of that right"; if not, the plaintiff has failed to state a claim and his case should be dismissed under Rule 12(b)(6)). The substantive inquiry would be very similar to the concrete adversity inquiry under Article III, but it would be nonconstitutional, and for good reason. As the Court has repeatedly noted, in the standing context and others, courts should avoid constitutional questions if possible. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345-48 (1936); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 112 (1998) (Stevens, J., concurring) (citing *Ashwander* in contending that the Court should have avoided resolving the standing issue presented in *Steel Company*, when resolving the statutory question achieved the same result).

261. *See* Hessick, *supra* note 77, at 324. As I discuss below, however, I think the courts should be able, using this prudential abstention doctrine, to avoid cases involving "private rights" if facts are present that show some other threat to separation of powers (e.g., when Congress is shunting controversial cases to the courts, *see infra* note 287 and accompanying text).

262. *See supra* Part I.A.2.

263. *See supra* Part II.

the concern is for excellence of argument and the adversarial presentation of issues, the NRDC is a manifestly suitable plaintiff for environmental cases, and the NAACP for civil rights cases.

B. *Explicit Consideration of the Political Issues Involved in Each Case Would Better Serve the Pro-democracy Function*

An abstention doctrine should also permit courts to consider the extent to which the case involves a question that is better resolved in the political branches. This is more than a simple numerosity issue; as discussed above,[264] it is simply not the case that an issue affecting huge numbers of people will necessarily be addressed by the political branches, even if people would want it to be.[265]

Take, for example, *Massachusetts v. EPA*, where plaintiffs sued to challenge the EPA's failure to regulate carbon dioxide (a global-warming contributor) as a pollutant under the Clean Air Act.[266] The majority and dissent disagreed over whether court action was suitable, given the political context. But they argued in terms of the plaintiffs' standing—a fruitless exercise under current doctrine, as I have shown above.[267] A debate over whether the Court should have *abstained* from deciding the case, conducted in terms of the separation-of-powers issues involved, would have been much more fruitful and, I believe, much more believable. Given that the global warming issue is fraught with free-rider problems, making resort to the political branches problematic,[268] and given that the plaintiffs had a strong argument under the Clean Air Act that the Administrator of the EPA had failed in his legal duty, I think the Court properly invoked its Article III power in addressing the merits question.

Similarly, the prudential abstention doctrine should permit courts to explicitly consider whether a *Carolene Products* footnote four issue might be present.[269] As discussed above, there is good reason to suspect that the standing doctrine has been used to exacerbate existing injustices.[270] When invoking separation-of-powers concerns to deny justiciability, courts should be careful to maintain access for those who cannot expect a fair hearing from the political branches. After all, the ultimate purpose of our Constitution's separation of powers is to restrain arbitrary government action; it would be

264. *See supra* Parts I.B.2-3.

265. *See supra* note 124 and accompanying text; *see also* Siegel, *supra* note 36, at 101-02.

266. 549 U.S. 497 (2007).

267. *See supra* notes 109-15 and accompanying text.

268. *See supra* note 125.

269. *See supra* notes 134-36 and accompanying text.

270. *See supra* Part I.B.3.

oxymoronic to deny standing to a plaintiff who cannot gain access to the political branches of government to redress arbitrary government action.

If, on the other hand, the issue involves the kind of abstract interest traditionally described as a "generalized grievance," the courts should continue to have the discretion to spurn such suits.[271] The Court has long forbidden taxpayer suits, for example, on what were originally prudential grounds,[272] and there are common-sense reasons—including docket control—to continue to refrain from hearing such suits.

Finally, the abstention doctrine should permit consideration of the extent to which the case involves a statute in which Congress has expressly authorized standing. As stated by the Court in *Laidlaw*, and echoed by numerous critics of standing doctrine, standing should not trample on Congress's legislative prerogatives.[273]

Indeed, under a prudential abstention doctrine, the Court might even accede to cases brought under a pure private-attorney-general statute.[274] In discussing "public actions" or those where the plaintiff has no personal injury and instead sues on behalf of the public, the second Justice Harlan emphasized that "[a]ny hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President."[275] The mere fact of a statute would not necessarily mean that the federal courts would be *required* to hear such cases, because of prudential limitations on the courts' jurisdiction.[276]

The prudential abstention doctrine I am outlining here would be another such restriction. Particularly in situations where the Court had reason to suspect that Congress was shunting controversy into the courts merely to make its own members' reelection more possible,[277] an explicit discussion of the effect the

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271. *See supra* note 129 and accompanying text.

272. *See supra* note 65.

273. *See supra* notes 242-46 and accompanying text.

274. *See supra* note 99.

275. Flast v. Cohen, 392 U.S. 83, 131-32 (1968) (Harlan, J., dissenting). Indeed, Justice Harlan made clear that he thought such actions were unwise *unless* authorized by statute:

> I appreciate that this Court does not ordinarily await the mandate of other branches of the Government, but it seems to me that the extraordinary character of public actions, and of the mischievous, if not dangerous, consequences they involve for the proper functioning of our constitutional system, and in particular of the federal courts, makes such judicial forbearance the part of wisdom. It must be emphasized that the implications of these questions of judicial policy are of fundamental significance for the other branches of the Federal Government.

Id. at 132-33.

276. *Id.* at 131 n.21 ("This Court has recognized a panoply of restrictions upon the actions that may properly be brought in federal courts, or reviewed by this Court after decision in state courts. It is enough now to emphasize that I would not abrogate these restrictions in situations in which Congress has authorized a suit.").

277. *See supra* notes 193-94 and accompanying text.

controversy would have on the courts' place in the constitutional structure and the elements of the statute that evinced Congress's improper purpose would permit a court to abstain. Such an approach is clearly imperfect—there certainly are risks that a more explicit discussion could itself raise problems for the courts' place in the constitutional structure[278]—but I believe it would be preferable to a world where courts are forced to apply a misconceived doctrine in an attempt to solve problems that the doctrine simply cannot solve.

C. *The Court Should Address the Anticonscription Problem Under Article II, Not Article III*

Standing does an abysmal job of promoting the "anticonscription" function: There is simply no logical relationship between the injury in fact *vel non* of a particular plaintiff and the extent to which Congress might (or might not) have trampled on executive power in empowering that plaintiff to sue. The concerns that motivate Justice Scalia are Article II concerns.[279] His true problem is with the transfer of executive power to private citizens.[280] Rather than using standing doctrine to address this question, the Court needs to confront the Article II issue directly.

What answer the Court would reach under this analysis is unclear, particularly given recent changes to the composition of the Court.[281] It is the very controversy involved in resolving the issue that shows why standing doctrine is *not* the correct avenue for resolving it. Moreover, because this question is really an Article II problem,[282] rather than an issue of judicial self-

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278. *See, e.g.*, Pierce, *supra* note 30, at 1785-86 (discussing, in the context of the prudential zone-of-interests standing test, the difficulties courts have in determining legislative intent, and invoking Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998)).

279. As Professor Sunstein has noted, the emphasis on the Take Care Clause derogates the authority of Congress:

> The "take Care" clause . . . is a duty, not a license. The clause requires the President to carry out the law as enacted by Congress. . . . [T]he President's discretion, and the "take Care" clause in general, do not authorize the executive branch to violate the law through insufficient action any more than they authorize it to do so through overzealous enforcement.
>
> If administrative action is legally inadequate or if the agency has violated the law by failing to act at all, there is no usurpation of executive prerogatives in a judicial decision to that effect. Such a decision is necessary in order to vindicate congressional directives, as part of the judicial function "to say what the law is."

Sunstein, *supra* note 32, at 1471 (footnotes omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

280. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-77 (1992).

281. The Court has avoided this question thus far. *See, e.g.*, Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000).

282. *Pace* Justice Scalia's statement that "Article III, no less than Article II, has consequences for the structure of our government," Friends of the Earth v. Laidlaw Envtl. Services TOC, 528 U.S. 167, 209 (2000) (Scalia, J., dissenting), the discussion in Part I.C demonstrates that recent efforts to resolve this difficulty using Article III analysis fail

policing, I think it would be problematic for the Court to stave off this question using abstention. The Court may nevertheless continue to decline the question through refusal to grant certiorari. But, assuming the Court grants a petition that directly raises this heavily disputed question, the Court should answer the question in clear terms, not bury the debate within the workings of a doctrine wholly unsuited to resolving such questions.

D. *An Abstention Doctrine Bests Current Standing Doctrine*

Several reasons support abandoning current standing doctrine and shifting instead to a prudential abstention doctrine. First, as already explained above, the tripartite standing test (injury in fact, causation, and redressability) has little logical relationship to the purposes the test is supposed to serve—analyzing the three standing prongs has led courts into useless cul-de-sacs. The factors considered in this abstention doctrine, in contrast, are premised explicitly on the separation-of-powers concerns the Court has emphasized, as well as other concerns they should acknowledge. Indeed, the Court is familiar with such analyses in the prudential standing context.[283]

Second, as many commentators have noted,[284] the standing doctrine is especially problematic because the Court has rooted it immovably in the text of Article III. While the tripartite test is arguably a permissible interpretation of Article III,[285] it certainly is not a mandatory one. As the above discussion demonstrates, the separation-of-powers concerns that animate the standing doctrine are varied and disputed. It is not unreasonable to believe that the other branches deserve not only the solicitude of the courts in separation-of-powers

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miserably.

283. The Court famously dismissed the controversial case challenging the phrase "under God" in the Pledge of Allegiance under a prudential standing analysis, holding that the plaintiff (father of the child required to say the Pledge) was not clearly an appropriate representative of his daughter under state law. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). In resolving the case on this prudential ground, the Court avoided addressing a divisive Free Exercise Clause question:

> The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake. Even in cases concededly within our jurisdiction under Article III, we abide by a series of rules under which we have avoided passing upon a large part of all the constitutional questions pressed upon us for decision . . . .
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> . . . Without such [prudential] limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

Id. at 11-12 (citations and internal quotations marks omitted).

284. *See, e.g.*, Fletcher, *supra* note 25, at 223-24; Jaffe, *Private Actions*, *supra* note 19, at 304-05; Jaffe, *Public Actions*, *supra* note 19, at 1300.

285. *See* Leonard & Brant, *supra* note 20, at 5-6 (demonstrating that the Founders would support a requirement that individuals show injury in fact to obtain access to the federal courts, but stopping short of contending that Article III *compels* such a test).

analyses, but that Congress and the President might well have something to say on the matter themselves. A prudential abstention doctrine would permit the courts to adjust to the expressed views of the other branches on the appropriate balance of separation of powers (especially in cases that would currently fail under existing standing doctrine), while still giving the courts the power to decline to hear cases should the abstention factors counsel such a result.

Finally, standing doctrine has been used to the worst effect in attempting to pursue the pro-democracy goal. As explained above, the Court may well have produced an *anti*democratic result by using the ill-fitting standing doctrine to pursue pro-democracy goals.[286] Particularly because of the potentially disastrous consequences of turning away the politically powerless in the name of democracy, the abstention doctrine includes a factor requiring the courts to ensure that cases are not dismissed for "democratic" reasons when the democratic branches are, in fact, unavailable to the plaintiff.[287]

By taking these steps, the Court could address the many problems caused by the current state of the doctrine. First, streamlining the functions that standing is used for—and most particularly halting the use of standing for purposes to which it is profoundly unsuited—can cut short accusations that standing is merely a devious method to hidden ends. For the more the Court uses a doctrine patently unsuited to its task, the more likely it will be accused of actually trying to achieve something quite different from its professed goals.

Moreover, a streamlined (or moribund) standing doctrine, and concomitantly expanded doctrines that more precisely address the other separation-of-powers functions, will permit the lower courts to act consistently. Finally, the approach I suggest would permit the Court to pursue these separation-of-powers functions in ways that are more intelligible and thus more defensible.

If, in pursuing these goals in crisper, cleaner ways, the Court is confronted with problems in the separation-of-powers functions themselves—if those functions are untenable when their mechanisms are more clearly revealed—then those functions need to be rethought. That inquiry is not the project of this Article.

CONCLUSION

For the past several decades, the Court has used the doctrine of standing to promote several separation-of-powers functions: restricting courts to cases possessing the requisite concrete adversity for judicial resolution, avoiding

286. *Supra* Part I.B.3.

287. As noted above, *see supra* notes 84-86, the Court has frequently been accused of using standing doctrine to duck controversial questions. The abstention doctrine described above might permit the Court to delineate the requirements for abstaining from controversial questions.

questions better answered by the political branches, and resisting Congress's effort to conscript the courts in its battles with the executive branch. As I have demonstrated above, however, standing doctrine does not effectively serve these goals. The Court should dramatically reduce its use of standing as a tool for separation-of-powers functions so that it may explicitly confront the separation-of-powers issues it now addresses implicitly (and confusingly) through standing analysis. The end result should be that the Court uses doctrines more suitable to achieving the separation-of-powers interests it considers so fundamental to our republic, while at the same time defusing criticism that standing doctrine is at bottom dishonest and offering clearer rules to the lower courts.