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The Separation-of-Powers Theory of Standing

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THE SEPARATION-OF-POWERS THEORY OF STANDING*

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Under current law, a party must establish Article III standing to bring suit in federal court. According to the Supreme Court, this standing requirement is necessary to protect the separation of powers. It does so by limiting the judiciary to its historical role, preventing the judiciary from resolving disputes better suited to the other branches, protecting the legitimacy of the courts, and restraining Congress from empowering the judiciary to usurp the role of the Executive. This Article argues that these separation-of-powers rationales do not apply to all types of disputes. In particular, they do not apply to suits by private individuals asserting the violation of private rights, nor do they apply to suits seeking to force state officials to act or seeking to exercise a power held by state officials. Dispensing with standing in those cases would remove an unwarranted obstacle to relief for similarly situated plaintiffs, make standing more conceptually coherent, and invigorate standing doctrine in cases that do present salient threats to the other branches.

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INTRODUCTION

Article III of the Constitution limits the federal courts to deciding only "cases" and "controversies."[1] The Supreme Court has developed a number of doctrines implementing this provision of Article III. "[P]erhaps the most important of these doctrines" is standing.[2] To establish standing, a plaintiff must show that he has suffered or will suffer an injury in fact, that the injury is fairly traceable to the defendant, and that the injury will be "redressable by a favorable ruling."[3]

According to the Court, the "single basic idea" underlying Article III standing is "separation of powers."[4] The Court has identified several ways in which standing protects the separation of powers. First, it preserves the balance of power envisioned by the founders by confining the federal courts to the historical role of the courts.[5] Second, standing ensures that the federal judiciary does not

1. U.S CONST. art. III, § 2, cl. 1.

2. *See* Allen v. Wright, 468 U.S. 737, 750 (1984).

3. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010)).

4. Raines v. Byrd, 521 U.S. 811, 820 (1997) (quoting *Allen*, 468 U.S. at 752); *see also, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) ("The law of Article III standing . . . is built on separation-of-powers principles . . . ." (quoting *Clapper*, 133 S. Ct. at 1146)).

5. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992)).

resolve matters more appropriately addressed by the elected branches of the federal government.[6] Third, standing protects the legitimacy of the federal courts by allowing them to act only when necessary to protect rights.[7] Fourth, standing prevents Congress from enacting laws enabling individuals to assume the President's power of "tak[ing] Care that the laws [are] faithfully executed."[8]

But if Article III standing exists only to protect these principles of separation of powers, standing law is overbroad. Although standing must be established in every case brought in federal court,[9] not all cases present equal threats to the separation of powers. The risk to separation of powers varies from suit to suit, depending on the identity of the parties, the rights asserted, and the remedies sought. Some suits do raise separation of powers concerns that may support the application of standing law. This group includes suits brought by private individuals seeking to force the President or Congress to exercise its powers—such as a suit against Congress trying to force it to enact a particular law. It also includes suits seeking to enforce a law whose enforcement is entrusted to another branch of the federal government—such as suit by an individual seeking to enforce a federal criminal law.[10]

But other suits do not threaten the separation of powers in ways that justify the application of standing law. For example, a suit by a private individual seeking to vindicate a private right does not threaten the power of Congress or of the President; instead, it falls squarely within the core power of the courts "to decide on the rights

6. *Clapper*, 133 S. Ct. at 1146–47 ("The law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches." (citations omitted)); Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009) ("[Standing] is founded in concern about the proper—and properly limited—role of the courts in a democratic society." (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))).

7. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) (stating that standing helps to maintain the "public confidence essential to" the judiciary (quoting United States v. Richardson, 418 U.S. 166, 188 (1974))).

8. Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–77 (1992) (quoting U.S. CONST. art. II, § 3).

9. *See* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 75 (2014) (explaining how courts have imposed the same standing requirements in all types of "cases" or "controversies" under Article III); *see also* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 448 (1994).

10. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

of individuals."[11] Nor are separation-of-powers concerns present when an individual seeks to force a *state* official to act or to enforce a state law whose enforcement is entrusted to a state official—such as a state criminal law. Whether an individual may seek to enforce a state power entrusted to a state official raises questions about the appropriate allocation of power within the state. It also raises potential questions about the allocation of power between the federal and state governments. But it does not threaten the powers of the President or Congress.[12]

Scholars have challenged whether separation of power is—or should be—the basis for standing doctrine.[13] They have also extensively criticized the Court's vision of separation of powers in developing standing.[14] But none has examined whether the theories of separation of power given by the Court to justify standing support applying standing doctrine to all cases.[15] This question is of central importance. The legitimacy of a doctrine, and the decisions it produces, depends in large part on the doctrine being the product of a process of "reasoned elaboration."[16]

11. *Lujan*, 504 U.S. at 576 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

12. *See* Heather Elliott, *Federalism Standing*, 65 ALA. L. REV. 435, 454–55 (2013) (citing Hollingsworth v. Perry, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting)) (arguing that federalism principles, instead of separation of powers, should have guided the Supreme Court's standing analysis in *Hollingsworth*, in which proponents of a ballot initiative banning same-sex marriage in California were denied standing to challenge a district court ruling that declared the referendum unconstitutional); *cf.* Hessick, *supra* note 9, at 91–95 (arguing that federal standing doctrine should not apply in state law diversity cases because they do not threaten the separation of powers).

13. *See, e.g.*, F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 91–101 (2012); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 649 (1985).

14. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 284–85 (1990); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1310 (1976); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1940–41 (1986); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 436–49 (1996); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 95–108 (2007) (criticizing the Court's view of separation of powers as unjustifiably restrictive of judicial power); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1363–73 (1988).

15. For an argument that standing is not effective at implementing the Court's vision of separation of powers, see generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008).

16. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143–52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1465–66 (1995).

This Article assesses the justifications for Article III standing and establishes the extent to which that doctrine should apply. It argues that if separation of powers provides the only foundation for standing law, a plaintiff should be required to establish standing only in those suits that pose a threat to the separation of powers. These suits comprise actions by individuals seeking to force another branch of the federal government to exercise its powers, and suits seeking to enforce a law whose enforcement is entrusted to another branch of government.

But in other suits, establishing standing is unnecessary to protect the separation of powers,[17] and in those suits, courts should dispense with the standing inquiry altogether.[18] These suits include actions by individuals to enforce their private rights—that is, individual rights such as the common-law right to be free from trespass and the Fourth Amendment right to be free from unreasonable government searches and seizures.[19] Establishing standing should likewise be unnecessary in actions seeking to vindicate state interests. These include suits by individuals seeking to force the state government to comply with the law or to exercise one of its powers, as well as individual suits seeking to exercise powers of the state governments (such as enforcing a state criminal law). Neither private actions nor state-interest actions threaten the separation of powers because they do not implicate the powers of the President or Congress. Accordingly, if Article III standing rests on separation of powers, establishing standing is unnecessary in those cases.

Eliminating standing from these categories of suits would not fundamentally alter the role of the federal judiciary. Historically, standing was not a requirement in federal courts. Courts created

17. Although this Article focuses only on standing, the argument could be extended to other justiciability doctrines, such as ripeness and mootness, because those doctrines also enforce the scope of the federal judiciary's power under Article III. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language . . . ." (citing Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003))).

18. The argument in this Article is limited to suits brought by individuals. It does not address suits brought by states. Although the arguments in this Article likely could be extended to challenge the application of Article III standing requirements to state suits, considerations about the extent to which the states should be allowed to assert the interests of their citizens, especially in suits against the United States, complicate the analysis. *See generally* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995) (discussing the considerations underlying state standing doctrines).

19. U.S. CONST. amend. IV.

standing as a separate requirement only in the twentieth century.[20] Before that time, whether a plaintiff could proceed with a suit depended on whether she had invoked the appropriate form of action and was entitled to relief under that action.[21] In order to maintain an action in federal court, plaintiffs must still satisfy this requirement, in addition to establishing standing, by demonstrating that they are entitled to relief.[22]

At the same time, dispensing with standing in private-rights and state-interest suits would have at least two important consequences. First, it would remove an unnecessary obstacle to obtaining judicial relief in those suits. Second, it would improve standing law. Many commentators have criticized standing as incoherent and confusing.[23] One reason for this incoherence is that the same standing test applies to all cases, but courts have applied that test differently depending on whether the case actually raises separation-of-powers concerns. Eliminating standing from cases that do not threaten the separation of powers would significantly reduce these inconsistencies. It would also likely strengthen standing's protection of separation of powers because there would be less dilution of the doctrine through decisions in cases that do not threaten the separation of powers.

This Article argues that, if we accept the Court's claim that separation of powers provides the sole rationale for standing, standing law should not apply in all cases, or even most cases. Instead, it should apply only to those suits that seek to enforce a federal public right or to vindicate a federal public interest. This Article proceeds in four parts. Part I provides an overview of standing's development and its current requirements. Part II describes the separation-of-powers justifications underlying standing doctrine. It identifies four different principles underlying standing doctrine. Part III explains how these separation-of-powers rationales underlying standing do not apply to cases seeking to enforce private rights or to cases seeking to enforce state interests. Accordingly, it argues, courts should not apply standing law to those suits. Instead, standing's application should be limited to suits in which an individual seeks to use the judiciary to

20. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224–28 (1988) (tracing the history of standing).

21. *See id.*

22. *See, e.g.*, FED. R. CIV. P. 12(b)(6) (authorizing dismissal of a complaint that fails to state a claim for relief).

23. Bandes, *supra* note 14, at 227–29; Fletcher, *supra* note 20, at 221–24 (1988); Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 315–16 (2001); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008).

exercise functions assigned to Congress or the President. Part IV discusses the implications of changing standing in this way, explaining how it would both remove the obstacle of standing in cases in which the standing inquiry is unnecessary and reduce the inconsistencies in standing law.

I. THE LAW OF STANDING

Standing is one of several doctrines that implements the "[c]ases" and "[c]ontroversies" provision in Article III.[24] Under current law, to establish standing, a plaintiff must demonstrate that he has suffered, or will imminently suffer, an "injury in fact."[25] That injury must be "concrete" and "particularized," and must be to a "judicially cognizable interest."[26] The plaintiff must also show that the injury is "fairly traceable" to the defendant and that it will "likely [] be redressed" by a favorable court decision.[27] If a plaintiff fails to meet these requirements, the federal court must dismiss the case for lack of jurisdiction.[28]

Although decisions ground standing doctrine in the "cases" or "controversies" provision of Article III, the Constitution does not define those terms. Nor does the Constitutional Convention yield any insights into their meaning.[29] Thus, instead of flowing naturally from the text of Article III, standing has developed over the years through

24. U.S. CONST. art. III, § 2, cl. 1. Article III standing is not the only standing doctrine. There are also judicially created prudential standing doctrines, which Congress may override, *see* Warth v. Seldin, 422 U.S. 490, 500–01 (1975), though the Court recently indicated that it could discard those doctrines, *see* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 & n.3 (2014) (abrogating zone-of-interest test and questioning other prudential standing doctrines). Although this Article focuses on Article III standing, its argument extends to prudential standing insofar as those prudential doctrines also protect the separation of powers by preventing courts from "decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) (quoting *Warth*, 422 U.S. at 500).

25. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citing Allen v. Wright, 468 U.S. 737, 756 (1984); *Warth*, 422 U.S. at 508; Sierra Club v. Morton, 405 U.S. 727, 740–41 n.16 (1972)).

26. Bennett v. Spear, 520 U.S. 154, 167 (1997) (citing *Lujan*, 504 U.S. at 560–61).

27. Allen v. Wright, 468 U.S. 737, 751 (1984) (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

28. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998).

29. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911) (stating that Article III limits courts to resolving disputes only of "a Judiciary Nature").

judicial opinions in a common-law-like process.[30] According to the Supreme Court, the "single basic idea" informing this doctrinal development is "the idea of separation of powers."[31] The role of standing is to ensure that the judiciary does not usurp the role of the legislative and executive branches by limiting the circumstances under which the judiciary can act.[32]

Standing has not always been viewed as essential to the separation of powers. Indeed, standing did not flourish as an independent doctrine limiting the jurisdiction of the federal courts until the early 1900s.[33] Over the years, the Supreme Court has justified standing through various instrumental and normative reasons in addition to separation of powers.[34] It has said, for example, that the injury necessary to support standing increases the quality of the decision-making process both by ensuring that the plaintiff has adequate incentive to litigate and by providing context that forces the court to be aware of the impact of its decision.[35] It has also suggested

30. *Allen*, 468 U.S. at 751 (acknowledging that Article III "concepts have gained considerable definition from developing case law"); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 401 (1980) ("[J]usticiability doctrine[s are] of uncertain and shifting contours." (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968))); Poe v. Ullman, 367 U.S. 497, 503–04 (1961) (plurality opinion) (explaining that the Court "evolved" the various justiciability doctrines); Hessick, *supra* note 9, at 62 ("[T]he Court has provided meaning[] to [Article III] on a case-by-case basis through a common-law-like process that focuses on the appropriate role of the judiciary in the federal system.").

31. Raines v. Byrd, 521 U.S. 811, 820 (1997) (quoting *Allen*, 468 U.S. at 752); *see also, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014).

32. *See Steel Co.*, 523 U.S. at 102.

33. Hessick, *supra* note 23, at 290. Scholars disagree about whether separation of powers was the original motivation for standing doctrine. Some scholars argue that it was, contending that standing developed to protect progressive legislation from judicial review. MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 218 (2000) ("Justice Louis Brandeis and then-professor Felix Frankfurter developed standing to shield progressive regulatory programs, culminating in the New Deal, from attack in the federal courts . . . ."); *see* Winter, *supra* note 14, at 1374. Others have argued that standing originated as a tool to manage caseloads. Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 638 (2010).

34. This is not to say that the Court deemed separation of powers irrelevant to standing. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472–73 (1982) (listing separation of powers and other reasons for standing); *see also* Ho & Ross, *supra* note 33, at 650 (stating that empirical studies suggest that by the 1940s separation of powers motivated standing). Though on occasion the Court has disclaimed separation of powers as the basis for standing. *See, e.g.*, *Geraghty*, 445 U.S. at 396 (1980) ("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 . . . ." (quoting Flast v. Cohen, 392 U.S. 83, 100–01 (1968))).

35. *See Valley Forge*, 454 U.S. at 472.

that standing protects the autonomy of those most likely to be affected by a judicial order because it restricts judicial access to those whose rights have been violated instead of third parties.[36] But since 1984, the Court has rejected these other bases for standing, stating that separation of powers is the "single" idea underlying standing.[37]

Moreover, the ways in which standing protects the separation of powers have changed over time. In the 1940s, courts understood standing as applying only in a suit "by a citizen against a government officer."[38] Since that time, standing has been expanded to provide broader protections of the separation of powers.

For example, the Court has limited the types of injuries that qualify for standing.[39] The Court has said standing cannot rest on an injury to an individual's interest in having the government comply with the law.[40] According to the Court, that injury is a "generalized grievance" that is "undifferentiated and 'common to all members of the public.' "[41] Thus, redressing that injury is not "the business of the courts" but is instead for "the political branches."[42] For a plaintiff to have standing, she must suffer a distinct, concrete harm beyond that experienced by the general public.[43] For the same reason, the Court has held that, except for in a limited class of suits based on the establishment clause,[44] a federal taxpayer's complaint about the

36. *See id.* at 473 ("[S]tanding also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order."); *see also* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306–15 (1979) (elaborating on the argument). Unlike with separation of powers, these considerations are not constitutionally compelled. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2687 (2013) (describing the adversarial requirement as "prudential").

37. Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."); *see also, e.g.*, Susan B. Anthony v. Driehaus, 134 S. Ct. 2334, 2341 (2014) ("The law of Article III standing . . . is built on separation-of-powers . . . ." (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013))); Raines v. Byrd, 521 U.S. 811, 820 (1997).

38. *See* Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 700 (2d Cir. 1943).

39. *See* Hessick, *supra* note 23, at 296 (describing standing restrictions as resulting from concerns about interfering with other branches of government).

40. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 575–76 (1992).

41. *E.g.*, *id.* at 575–76 (quoting United States v. Richardson, 418 U.S. 166, 176–77 (1974)); *Valley Forge*, 454 U.S. at 475 (stating that "generalized grievances" are "most appropriately addressed in the representative branches" (citing Warth v. Seldin, 422 U.S. 490, 499–500 (1975))); *see also* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.3 (2014) (confirming that restriction on generalized grievances is constitutional, not prudential).

42. *Lujan*, 504 U.S. at 576.

43. *Id.* at 575–76.

44. Flast v. Cohen, 392 U.S. 83, 103 (1968).

government's misuse of tax dollars does not constitute an "injury in fact."[45] According to the Court, the interest of the taxpayer is "the interests of the public at large."[46]

Likewise, the Court has imposed limits on standing to seek relief from future injuries.[47] The Court has said that future injuries support standing only if the threat of injury is "real."[48] Similar worries about interfering with the other branches of government have driven the creation and shape of the traceability and redressability requirements of standing.[49]

Because separation of powers underlies Article III standing, most recent Supreme Court decisions shaping standing have involved suits in which a private individual sues to force another branch of the federal government to act or to abstain from acting—the type of suit that most clearly raises separation-of-powers concerns.[50] But the application of standing is not limited to those types of cases. Standing applies in all suits brought in federal court, even suits that do not obviously affect the other branches of the federal government.[51]

Accordingly, federal courts have held that an individual must establish standing when he is suing for the violation of an individual right against another private actor, even though those suits do not implicate the elected branches of the federal government. For example, in *Silha v. ACT, Inc.*,[52] students who took college entrance exams administered by American College Testing, Inc. ("ACT") sued ACT, claiming that ACT deceived them and unjustly enriched itself by selling personal information about the test takers.[53] The Seventh

45. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599–600 (2007) (denying standing to taxpayers challenging use of federal funds to promote "faith-based initiatives"); Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 433–34 (1952) (dismissing taxpayer action as alleging generalized grievance).

46. *See Hein*, 551 U.S. at 600.

47. *See, e.g.*, *Lujan*, 504 U.S. at 560–61.

48. *E.g.*, O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (citations omitted).

49. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1066 (2015) (arguing that the traceability and redressability prongs developed during the 1970s).

50. *See id.* at 1105 ("The formative cases in the Supreme Court's development of its tripartite standing formula mostly involved private suits against the government and its officials.").

51. *See* Pushaw, *supra* note 9, at 448 (explaining how courts have imposed the same standing requirements in all types of "cases" or "controversies" under Article III).

52. 807 F.3d 169 (7th Cir. 2015).

53. *Id.* at 171–72.

Circuit denied standing, concluding that the plaintiffs had not alleged that they lost anything of value from ACT's misconduct.[54]

Courts have likewise concluded that an individual must establish standing when suing state actors for a violation of individual rights. For example, in *City of Los Angeles v. Lyons*,[55] Adolph Lyons sought an injunction barring Los Angeles police officers from using a potentially life-threatening chokehold, arguing that the chokehold constituted an unreasonable seizure under the Fourth Amendment.[56] Although the suit did not threaten the other branches of the federal government, the Court denied standing on the ground that it was mere "speculation" that Lyons would be subjected to a chokehold in the future.[57]

Similarly, federal courts have held that individuals lack standing to force state governments to comply with the law. For instance, in *Lance v. Coffman*,[58] four Colorado citizens filed a federal suit challenging a decision of the Colorado Supreme Court upholding a court-drawn redistricting plan.[59] They argued that the court-drawn plan violated the elections clause of the U.S. Constitution, which assigns the power to draw congressional districts to state legislatures.[60] The U.S. Supreme Court held that the plaintiffs lacked standing, concluding that they alleged only an "undifferentiated, generalized grievance" that the Colorado government had failed to follow the elections clause.[61]

So too, federal courts have required plaintiffs defending state laws to establish standing. In *Hollingsworth v. Perry*,[62] the official proponents of a California state referendum banning same-sex marriage sought to appeal a ruling of the district court declaring the

54. *Id.* at 174–75. For another example, see Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544–45 (2016) (requiring private plaintiff to establish Article III standing in suit against private individuals).

55. 461 U.S. 95 (1983).

56. *Id.* at 98.

57. *Id.* at 108.

58. 549 U.S. 437 (2007) (challenging People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (en banc)).

59. *Id.* at 438.

60. *Id.*

61. *Id.* at 442. For other examples, see Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2338 (2014) (applying federal standing doctrine to constitutional challenge to Ohio law); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 134 (2011) (denying standing to taxpayers who raised establishment clause challenge to an Arizona law granting a tax credit for donations to religious schools, explaining that standing generally cannot be based on taxpayer status).

62. 133 S. Ct. 2652 (2013).

referendum unconstitutional.[63] The Supreme Court of California had held that the official proponents were "authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal [the] judgment invalidating the measure."[64] But the U.S. Supreme Court held that the proponents lacked standing.[65] The Court explained that the proponents had alleged only a generalized grievance—that the district court wrongly struck down the referendum—and that the California court's declaration that the proponents could assert the state's interest did not change the analysis.[66]

II. THE SEPARATION-OF-POWERS RATIONALES OF STANDING

The Court's claim that standing is necessary to protect the separation of powers is deceptively simple. Separation of powers is an extremely abstract concept.[67] It generally refers to ensuring that the respective branches of government do not infringe on the other branches of government, but that sweeping concept does not say how the powers should be allocated. Therefore, as Professor Elliott has explained, the Court has not relied on the abstract concept of separation of powers in discussing standing; instead, it has identified several different principles of separation of powers in discussing standing.[68]

The Court has noted at least four ways that standing protects the separation of powers.[69] The first three focus on the power of the judiciary. First, standing doctrine maintains the balance of power envisioned by the founders because it confines the federal courts to

63. *Id.* at 2660.

64. Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

65. *Hollingsworth*, 133 S. Ct. at 2666.

66. *Id.* ("[T]he authority . . . 'to assert legal arguments in defense of the state's interest in the validity of the initiative measure' . . . . is by definition a generalized one . . . ." (quoting *Perry*, 265 P.3d at 1029)); *see also* Greenbaum v. Bailey, 781 F.3d 1240, 1241 (10th Cir. 2015) (dismissing appeal for lack of standing of private committee seeking to defend constitutionality of a provision of the Albuquerque charter).

67. Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 301 (1989) ("[S]eparation of powers frustrates analysis because of its abstract dimensions.").

68. *See* Elliott, *supra* note 15, at 467–68.

69. Professor Elliott identifies three strands of separation of powers that standing promotes: (1) ensuring that the dispute before the court is concrete and adverse, (2) preventing courts from making decisions better left to the political branches, and (3) preventing Congress from conscripting the courts to circumvent the Executive. *Id.* at 468. The four theories of separation of powers that this Article identifies differ in significant respects from Professor Elliott's categories.

the historical role of the courts.[70] Second, standing doctrine ensures that the federal judiciary does not decide matters more appropriately addressed to the other branches of government.[71] Third, standing protects the legitimacy of the federal courts by restricting their ability to act to when it is necessary to protect the rights of individuals.[72] The fourth way that standing preserves the separation of powers focuses on Congress: standing protects the President from the threat of Congress enacting laws that confer executive power on private individuals.[73] Although they often overlap, these four categories are distinct justifications for standing.

A. Limiting Courts to Their Historical Role

According to the Court, Article III confers on the federal courts the power to decide only those disputes "traditionally amenable to, and resolved by, the judicial process."[74] In the Court's view, courts traditionally resolved only "concrete, living contest[s] between adversaries,"[75] and standing enforces this limitation.[76] On this view,

70. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

71. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–47 (2013).

72. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982).

73. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992). Scholars have identified five goals served by separation of powers: (1) promoting efficiency by allocating specific tasks to institutions designed to complete those tasks; (2) promoting accountability for particular acts by specifying which institution has that task; (3) increasing the likelihood that law furthers the common good by having different constituencies participate in its development; (4) increasing the impartial administration of the law by preventing prosecutors from serving as judges in each case; and (5) preventing tyranny by accumulation of power. W. B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 127–28 (1965). The Court has not identified which of these goals standing promotes. It seems apparent that standing prevents accumulation of power. But whether it promotes other goals is less clear. For example, one may argue that standing increases the impartial administration of justice by discouraging the courts from exercising the functions of the other branches, but that is not obviously correct because restricting judicial involvement may undermine impartiality by leaving some disputes to executive resolution. And standing is contrary to some of these goals. For example, standing seems to not promote the common good, because it limits an avenue for contributing to the development of the law.

74. *Steel Co.*, 523 U.S. at 102 (citing Muskrat v. United States, 219 U.S. 346, 356–57 (1911)).

75. Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting) (citations omitted); *see* Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) ("Article III of the Constitution restricts [the judiciary] to the traditional role of Anglo-American courts [of] redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by . . . violation of law."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) (noting the historical basis for the personal stake requirement).

standing law protects the other branches from the courts by allowing federal courts to exercise only those powers that they had at the nation's founding.[77]

The Anglo-American legal system traditionally distinguished between public and private rights.[78] Private rights were rights held by individuals. Included among these rights were the rights to personal security, life, and property; the right to enforce contracts;[79] and whatever other private rights the legislature created for individuals.[80] The victim of a violation of a private right could seek a judicial remedy for that violation by bringing the appropriate legal or equitable form of action, such as a writ of trespass.[81] Those actions were meant to provide recourse for the violation of a right, but they

76. *Steel Co.*, 523 U.S. at 102–03.

77. *Summers*, 555 U.S. at 492–93 ("[L]imiting the judicial power . . . to the traditional role of Anglo–American courts, ... 'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.' " (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))). Despite the Court's claim, it is not true that standing confines courts to their historical role. Historically, individuals could invoke courts to vindicate their rights. *See infra* text accompanying notes 187–89. And for most of the twentieth century, whether a person had standing depended on whether he alleged the violation of a "legal right." *E.g.*, Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137–38 (1939). But since 1970, standing has turned on whether the plaintiff suffered a factual harm, not a violation of legal rights. *See*, *e.g.*, Ass'n of Data Processing Servs. Orgs., Inc. v. Camp, 397 U.S. 150, 151–52 (1970).

Moreover, the Court has generally rejected the argument that Article III confines the federal courts to the role of courts in 1789. For example, historically, courts could not enter declaratory judgments; they could enter judgments for coercive remedies like damages or an injunction. But in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937), the Court held that federal courts could issue declaratory judgments, explaining that Article III "did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy[.]" *Id.* at 240 (quoting Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 264 (1933)).

78. Hessick, *supra* note 23, at 279–86 (discussing the distinction in early English and American cases).

79. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *117–41 (discussing "absolute" private rights to life liberty, and property); *id.* at *119 (discussing "relative" private rights acquired by "members of society"); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (O.W. Holmes, Jr. ed., 12th ed., Little, Brown & Co. 1873) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.").

80. *See* Stephens v. McCargo, 22 U.S. 502, 512 (1824); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 694 (2004) ("[L]egislatures have considerable power to create new rights and to redefine existing rights in ways that affect whether they are public or private.").

81. *See* WILLIAM BLACKSTONE, TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 15 (3d ed. 1771) (discussing "[t]he remedial [part of law]; or method of recovering private rights, and redressing private wrongs").

were distinct from the rights they protected.[82] A person could suffer a violation of a private right yet not be able to obtain relief because of limitations on the action.[83] A successful plaintiff could obtain damages to compensate for the violation of his rights or an injunction to prevent the violation.

Enforcement of public rights was more complicated. Public rights were those held by the general community,[84] such as the right to be free from violations of the criminal laws and to navigate the public highways.[85] The violation of a public right was a public wrong. Accordingly, the remedies for violations of these rights, which included civil and criminal penalties, were primarily aimed at vindicating the public interest instead of offsetting the losses to individuals.[86]

Because actions brought to vindicate those public rights were in the name of the public, the representative of the people (such as the king) was a proper prosecutor to vindicate public rights.[87] But the sovereign could authorize other individuals to vindicate public rights on behalf of the public. Thus, for example, early state and federal laws authorized a private individual to seek redress for a public harm, even if he had not suffered any personal harm, through a qui tam action.[88] Under those actions, an individual would bring suit on behalf of the government for damages and would receive a portion of the penalty paid to the government as a bounty.[89] Similarly, in many U.S. states and in England, private individuals could bring criminal prosecutions.[90] Moreover, in several states, disinterested individuals

82. Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784–86 (2004).

83. *Id.* at 786 ("[I]f no form of action afforded judicial relief, there was no remedy regardless of whether it could be said that there was a right.").

84. *See* 4 BLACKSTONE, *supra* note 79, at *5 (referring to "the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity").

85. 3 BLACKSTONE, *supra* note 79, at *2; Woolhandler & Nelson, *supra* note 80, at 693, 695.

86. Woolhandler & Nelson, *supra* note 80, at 693 ("[L]ike public law more generally, penal law focuses on vindicating the claims of the public rather than on compensating individuals.").

87. *See* 4 BLACKSTONE, *supra* note 79, at *2.

88. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775–76 (2000) (detailing history); Woolhandler & Nelson, *supra* note 80, at 694.

89. Woolhandler & Nelson, *supra* note 80, at 694.

90. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515–16 (1994) (discussing historical development of the private prosecutor).

could seek a writ of mandamus to enforce the public right to the performance by government officials of their duties.[91]

With the exception of qui tam actions, private enforcement of public rights was not as broad in the federal system. Unlike in the states and England, the federal system did not authorize private prosecutions. After the Judiciary Act of 1789 established federal district attorneys to prosecute criminal violations, private individuals had no power to prosecute under federal criminal laws.[92] Although the federal courts did not resolve whether an uninjured individual could seek a writ of mandamus to compel officers to obey the law,[93] in other contexts, the Court limited private actions to enforce a public right. For example, an individual could not bring suit for a public nuisance;[94] that action belonged to the government alone. If an individual suffered a "special" harm from that nuisance, she could bring a private action to vindicate her right against a private nuisance; but she could not bring suit to vindicate the public right.[95]

If the purpose of standing is to confine federal courts to their historical role, this historical backdrop suggests that an individual should lack standing to enforce a federal public right—such as ensuring federal government compliance with the law—unless Congress has authorized the action (as with a qui tam action) or the individual has suffered a distinctive harm that actually converts the

91. *See, e.g.*, People *ex rel.* Case v. Collins, 19 Wend. 56, 65–67 (N.Y. Sup. Ct. 1837). *See* Woolhandler & Nelson, *supra* note 80, at 708–09 (identifying states authorizing the practice). Scholars have disagreed about whether England allowed disinterested parties to seek writs of mandamus. *Compare* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 822–25 (1969) (arguing that under early English practices third-party strangers could seek mandamus), *and* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 171–72 (1992) (same), *with* Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1043–47 (1997) (arguing that "mandamus was not available to 'disinterested strangers' ").

92. An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 92–93 (1789); United States v. Murphy, 41 U.S. (16 Pet.) 203, 209 (1842).

93. *See* Woolhandler & Nelson, *supra* note 80, at 710 (noting that federal courts did not resolve the issue).

94. *Id.* at 703.

95. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 564–66, 626 (1851). Notably, some cases suggest that injuries that would suffice for standing today would not have supported a private nuisance action. For example, to support standing, an injury may be a mere "trifle," United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)), but to support a private challenge to a nuisance, the injury must be a "substantial, and not merely a technical, or inconsequential, injury," Bigelow v. Hartford Bridge Co., 14 Conn. 565, 580 (1842).

action to an effort to vindicate a private right (as with private nuisance). Some decisions limiting Article III standing for individuals seeking to enforce federal public rights roughly hew to this line. For example, in *United States v. Richardson*,[96] a taxpayer brought suit to force Congress to publish an accounting of its receipts and expenditures, as required by Article I.[97] In denying standing, the Court made clear that it viewed the accounting clause as imposing a structural requirement on Congress, not as conferring an individual right to an accounting.[98] The denial of standing thus comfortably fits with the view that historically individuals could not enforce public rights without sovereign authorization, because neither Congress nor the Constitution authorized individual suits to enforce the accounting clause. Moreover, the *Richardson* Court suggested that the taxpayer would have standing if he had suffered a distinctive harm.[99] That conclusion is consistent with the historical practice of recognizing that an individual who suffers a distinctive harm may have suffered the violation of a private right that mirrors a public right.

But other decisions less comfortably follow the historical rule. In *Lujan v. Defenders of Wildlife*,[100] for example, the Court denied standing for concerned citizens who brought suit under the Endangered Species Act, which authorizes "any person" to sue to force government officials to comply with the Act.[101] Although legislatures historically could authorize private enforcement of public rights, the Court reasoned that the right to government compliance is a public right and that Congress cannot authorize individuals to enforce public rights in the courts.[102] This is not to say that the decision in *Lujan* was incorrect. Some other separation-of-powers argument may justify the decision in *Lujan*. But the historical argument does not justify *Lujan*'s conclusion.

B. Protecting the Democratically Accountable Branches

A separate function of standing is to ensure that the federal judiciary stays within the "proper—and properly limited—role of the

96. 418 U.S. 166 (1974).

97. U.S. CONST. art. I, § 9, cl. 7.

98. *Richardson*, 418 U.S. at 176–77.

99. *Id.* at 180 (stating that a "particular, concrete injury" would support standing (quoting Sierra Club v. Morton, 405 U.S. 727, 740–41 n.16 (1972))).

100. 504 U.S. 555 (1992).

101. Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1)(A) (2012); *Lujan*, 504 U.S. at 578.

102. *Lujan*, 504 U.S. at 576.

courts in a democratic society."[103] In this role, standing allows courts to operate in their appropriate sphere as courts, but prevents individuals from using the courts to address matters that should be left to the political branches.[104]

There is disagreement on the appropriate role of the courts in a democracy. Some have argued that the function of the federal courts is only to provide remedies for violations of rights.[105] Under this "dispute resolution" model,[106] the role of the federal courts is not to expound on constitutional or other legal questions or to police the other branches of government.[107] Courts may engage in these functions, but only in the course of resolving a dispute arising from the violation of rights.[108] Others have rejected that model as too narrow in favor of the broader "special functions" model.[109] Under this model, the role of federal courts is not only to remedy violations of rights, but also to articulate constitutional values and ensure government compliance with the law.[110]

For its part, the Court has adopted the narrower dispute resolution model in fashioning standing.[111] This understanding of the

103. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

104. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–47 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." (citing Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009))); Elliott, *supra* note 15, at 475 ("Here standing [asks] whether . . . a plaintiff is bringing an issue to the court that, even if susceptible to judicial resolution, is more properly answered elsewhere.").

105. Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) ("Article III of the Constitution restricts [the judiciary] to the traditional role of Anglo-American courts . . . [of] redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by . . . violation of law.").

106. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73 (6th ed. 2009).

107. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365 (1973).

108. *See Summers*, 555 U.S. at 492 ("Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action." (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992))); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) ("Federal courts . . . pass on constitutional questions because . . . they must decide a litigated issue that is otherwise within their jurisdiction . . . .").

109. *See* FALLON ET AL., *supra* note 106, at 73; Bandes, *supra* note 14, at 284; Monaghan, *supra* note 107, at 1368–71.

110. *See, e.g.*, FALLON ET AL., *supra* note 106, at 73.

111. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (limiting standing to plaintiffs who seek redress for their injuries). Although the dispute resolution model underlies standing, several other justiciability doctrines rest on the special functions model. *See* Hessick, *supra* note 9, at 64–65 (providing examples).

role of the judiciary provides a core foundation for the current concrete-injury requirement of standing. According to the Court, restricting standing in suits by private individuals to only those individuals who suffer a concrete individualized injury ensures that the judiciary stays within its "province . . . to decide on the rights of individuals"[112] and does not address "abstract questions of wide public significance" that are more appropriately addressed to the political branches.[113] Accordingly, individuals lack standing to seek judicial relief for "generalized grievance[s]" that are "undifferentiated and 'common to all members of the public.' "[114] Based on this reasoning, the Court has denied standing for individuals claiming to have been injured by the failure of the government to obey the law, stating that a person's interest in seeing the government obey the law is a "public interest" shared by all citizens.[115] Similar reasoning undergirds the denial of taxpayer standing to challenge the legality of government spending.[116]

Under the Court's view of the appropriate role of the courts, the restriction on suits alleging generalized grievances makes some sense. Generalized grievances involve injuries shared collectively by the public. In a democracy, the people as a whole should address collective harms.[117] They may do so through the election of representatives tasked to handle general societal problems. Allowing individuals to sue whenever they disagree with the outcomes of this process would circumvent that democratic process by allowing one person to dictate how the people should govern themselves.

On this view, a person should not have standing to sue to force Congress to enact or repeal a law simply because she thinks it would result in a better society. Nor, as the Court has held, should an individual have standing to sue the Executive based simply on a

112. *Lujan*, 504 U.S. at 576 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

113. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc. 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin 422 U.S. 490, 500 (1975)); *see also Lujan*, 504 U.S. at 576 (stating that "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive").

114. United States v. Richardson, 418 U.S. 166, 176–77 (1974) (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam)) (citation omitted).

115. *Lujan*, 504 U.S. at 576.

116. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599–600 (2007) (denying taxpayer standing because the interest of the taxpayer is the "the interests of the public at large"); Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 433–34 (1952) (dismissing taxpayer action as alleging generalized grievance).

117. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 893, 896–97 (1983).

desire that the Executive enforce a particular law.[118] The Executive cannot enforce all the laws all the time because of finite resources. One consideration in casting a vote for a presidential candidate is which laws he will enforce against whom. Allowing a private suit to challenge those decisions would undermine that election process and shift the power of allocating resources from the President to the courts.[119]

One might argue that claims of concrete harms are also better suited for the political branches if many people have suffered the same type of harm. Justice Scalia once espoused this view.[120] He argued that when a majority of people share an injury, that group may resort to the majoritarian political process for relief.[121] Judicial relief is appropriate only to protect individuals who suffer particular injuries that distinguish them from the majority because those individuals cannot depend on the political process.[122] On this view, even if a person alleges a concrete, individualized injury, she should be denied standing if a substantial number of others suffered similar injuries. For example, if an individual faced a substantial risk of getting cancer from the emission of toxic waste, he would not have standing to seek to enjoin the emission if every other person in the country faced a comparable risk. Instead, he would have to seek a political remedy.

Even if the political process is equipped to handle widespread injuries,[123] it is not a judicial usurpation of the powers of the political branches for the courts to hear those claims—at least not under the

118. *E.g.*, Diamond v. Charles, 476 U.S. 54, 64 (1986) (denying standing to an individual seeking to force the State to enforce criminal laws).

119. *See* Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 41 (1984).

120. Scalia, *supra* note 117, at 895–97.

121. *Id.*

122. *Id.*

123. It is hardly clear that the political process is well suited to remedy widespread injuries because of collective action problems. A rational person who suffers even a significant widespread harm may choose not to spend his time and money securing a political remedy because others who were also injured may seek to obtain that political redress. *See* Siegel, *supra* note 14, at 101. The problems are worse when the injury to each person is relatively minor so that the cost to each person of obtaining redress exceeds the benefits. The court system has the class action to deal with similar problems, but no equivalent exists for political remedies. Brian J. Shea, Note, *Better Go It Alone: An Extension of Fiduciary Duties for Investment Fund Managers in Securities Class Action Opt-Outs*, 6 WM. & MARY BUS. L. REV. 255, 261 (2015). Further hampering a political remedy for widespread harm is that, if the challenged act conferred substantial benefits on a small group, that group is likely to have strong incentives to seek political support to maintain the benefit. Siegel, *supra* note 14, at 101–02.

Court's view of the appropriate role of the judiciary in a democracy. That is because, even though many people suffered similar injuries, each individual suffered an individualized injury, and the core function of the judiciary, in the Court's view, is to provide remedies for concrete, individualized injuries.[124] A person who suffers a burn in a fire thus should have standing even if the fire burned many others.[125] Moreover, in suits invoking statutory and constitutional rights, vindicating those rights does not result in the courts displacing the political branches because the political process created the law that provides the basis for relief.[126]

It is therefore unsurprising that the Court has not denied standing based solely on the widespread nature of an injury. To the contrary, it has consistently concluded that the number of people harmed has no bearing on standing.[127] Indeed, allowing judicial recovery for widespread harm is the basis for class actions.[128] To be sure, there have been several decisions in which one might argue the Court did deny standing based on widespread, concrete harm. For example, in *Allen v. Wright*,[129] the Court held that the stigma black plaintiffs suffered from the IRS's failure to prevent discrimination against other blacks was not a basis for standing to sue the IRS.[130] Although that stigma seems to be a concrete and personal injury, the Court did not deny standing on the ground that the stigma was too widespread of an injury. Instead, it concluded that the injury was "abstract" and that recognizing standing would transform the courts

124. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

125. FEC v. Akins, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting).

126. *See* Chayes, *supra* note 14, at 1314 ("For cases brought under an Act of Congress . . . . [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."); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1473 (1988).

127. *See, e.g.*, *Akins*, 524 U.S. at 24 (majority opinion) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.' " (citing Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449–50 (1989))); *accord id*. at 36 (Scalia, J., dissenting); Sierra Club v. Morton, 405 U.S. 727, 734 (1972) ("[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.").

128. FED. R. CIV. P. 23(a). *See generally* 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1753.1 (3d ed. 2005) (providing an overview of the purpose of class actions).

129. 468 U.S. 737 (1984).

130. *Id.* at 755–56.

into "a vehicle for the vindication of the value interests of concerned bystanders."[131]

In short, standing protects the other elected branches by barring individuals from bringing suit simply to challenge the way that the other branches of government have exercised their power. But it does not prohibit individuals from bringing suit, even suits that seek to force the other branches to act, when they seek relief for personal, distinctive harms that they have suffered.

C. Protecting Legitimacy

The Court has suggested a third way that standing doctrine protects the separation of powers: it prevents the judiciary from *weakening* by protecting its legitimacy. The Court has intimated that the legitimacy of the federal judiciary depends on establishing for the public that courts act out of necessity to protect individual interests instead of out of the judges' desire to achieve particular policy goals.[132] Requiring plaintiffs to establish standing helps achieve that goal.[133] As Justice Stevens explained, limiting judicial action to when a plaintiff has demonstrated standing ensures the courts do not simply "engage in the business of giving legal advice," which would "chip away a part of the foundation of [the judiciary's] independence and . . . strength."[134]

This argument is not that standing doctrine is compelled by Article III and therefore it would be illegitimate for courts not to

131. *Id.* at 756 (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973)). Similarly, in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, the Court held that the psychological distress caused by the government's illegal conduct is not an adequate injury to support standing. 454 U.S. 464, 486 (1982); *see also* Massachusetts v. E.P.A., 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting) (arguing that global warming was not a "particularized" injury because it "is a 'phenomenon harmful to humanity at large' " (quoting Massachusetts v. E.P.A., 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in judgment))).

132. *E.g.*, *Valley Forge*, 454 U.S. at 474 (suggesting that the "public confidence" in the courts depends on the courts "refrain[ing] from passing upon the constitutionality of an act [of the representative branches] unless . . . the question is raised by a party whose interests entitle him to raise it" (quoting Blair v. United States, 250 U.S. 273, 279 (1919))).

133. *Id.* (stating that standing helps to maintain the "public confidence essential to" the judiciary (quoting United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell J., concurring))).

134. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 103 (1978) (Stevens, J., concurring in the judgment); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (stating that standing helps to ensure that the judiciary is "held to account" by revealing "what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied").

require plaintiffs to establish standing. Rather, the argument is that the legitimacy of the judiciary depends on the acceptance of its actions by the public,[135] and acting only when a plaintiff has standing increases the likelihood of public acceptance of judicial decisions.[136]

It is doubtful that federal standing law is essential to maintaining judicial legitimacy. To start, it is unlikely that the public has a clear, consistent opinion about when the judiciary should act. Further, as Paul Bator has written, "[t]he judicial power is neither a Platonic essence nor a pre-existing empirical classification."[137] Many states, which are not bound by Article III,[138] have adopted models in which a personal stake is not a prerequisite to invoking the judicial power.[139] In Utah, for example, plaintiffs may have standing when there is no other person better situated to bring suit.[140] And many states waive standing requirements in cases raising important public interests.[141] Nothing suggests that these state doctrines strip the courts of those

135. *See Valley Forge*, 454 U.S. at 474 (stating that standing helps to maintain the "public confidence essential to" the judiciary).

136. Public acceptance of government action is one well-recognized means of securing legitimacy. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) [hereinafter Fallon, *Legitimacy*] (stating governmental institution has legitimacy when "the relevant public regards it as justified, appropriate, or otherwise deserving of support"); *see also* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 589 (2001) [hereinafter Fallon, *Stare Decisis*] (arguing that norms can acquire legitimacy through social acceptance).

137. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 265 (1990); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1911–13 (2001) (arguing that there is no single concept of the judicial power).

138. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts . . . .").

139. *See* Hessick, *supra* note 9, at 66–68 (gathering different standing tests from different states).

140. Gregory v. Shurtleff, 299 P.3d 1098, 1104 (Utah 2013) (explaining that a party proves its appropriateness "by demonstrating that it has the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions and that the issues are unlikely to be raised if the party is denied standing" (quoting Utah Chapter of Sierra Club v. Utah Air Quality Bd., 148 P.3d 960, 972 (Utah 2006))).

141. *See, e.g.*, Vill. Rd. Coal. v. Teton Cty. Hous. Auth., 298 P.3d 163, 168 (Wyo. 2013) (relaxing standing in cases of "great public interest" (quoting Maxfield v. State, 294 P.3d 895, 900 (Wyo. 2013))); Fernandez v. Takata Seat Belts, Inc., 108 P.3d 917, 919 (Ariz. 2005) (en banc) (same); Nebraskans Against Expanded Gambling, Inc. v. Neb. Horsemen's Benevolent & Protective Ass'n, 605 N.W.2d 803, 807 (Neb. 2000) (noting "great public concern" exception for standing (citing Cunningham v. Exon, 276 N.W.2d 213, 215 (Neb. 1979))).

states of their legitimacy.[142] To the contrary, broad judicial access may improve public regard for state courts insofar as it allows broader access to justice, provides private individuals with an avenue for participating in public decision making, reduces the political power of interest groups, and provides a means for combatting governmental inaction because of political realities.[143]

Indeed, federal justiciability doctrines themselves do not subscribe to a single vision of the appropriate role of the courts. Although the dispute resolution model underlies standing and most other justiciability doctrines, other justiciability doctrines rest on the broader special functions model.[144] For example, under the "capable of repetition, yet evading review" exception to the mootness doctrine, a court will not dismiss a claim that is otherwise moot if there is a reasonable probability that the defendant will again engage in the complained-of conduct.[145] In that situation, the plaintiff no longer has a real stake in the case—an order favorable to the plaintiff will not provide him with tangible relief—yet courts have nevertheless concluded that they may resolve the dispute.[146] More generally, the justiciability doctrines do not limit the scope of issues that federal courts address. Federal courts regularly write dicta about important issues unnecessary to resolving the disputes before them.[147] There is no indication that these practices have undermined the legitimacy of the courts. Indeed, to the extent one hears complaints about the legitimacy of federal courts in the context of standing, they tend to be that the *denial* of standing illegitimately insulates wrongdoers from answering for their actions in court and results in the withholding of judicial remedies,[148] and that standing doctrine discriminates by

142. *See, e.g.*, Ben Winslow, *Utah Court System Has 93% Approval Rating, Chief Justice Boasts*, FOX 13: SALT LAKE CITY (Jan. 27, 2014, 3:55 PM), http://fox13now.com/2014/01/27/utah-court-system-has-93-approval-rating-chief-justice-boasts/ [https://perma.cc/L7MN-WXSY] (reporting that Utah courts have a ninety-three percent approval rating).

143. Hershkoff, *supra* note 137, at 1917–19, 1922, 1927.

144. *See supra* notes 109–10 and accompanying text.

145. *See* Spencer v. Kemna, 523 U.S. 1, 17 (1998). Although the Court has often described the exception as applying when the particular plaintiff might reasonably again experience the threatened conduct, *see id.*, in several cases the Court has applied the exception without regard to whether the issue would arise again between the same parties. *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 187 (1973); Roe v. Wade, 410 U.S. 113, 125 (1973).

146. Similarly, although federal courts forbid "feigned" suits today, in the past those suits were allowed to proceed. *See, e.g.*, Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 33–34 (1804) (resolving dispute involving only "a feigned issue").

147. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1269–71 (2006) (noting the widespread practice of issuing dicta).

148. *See, e.g.*, Lynn D. Lu, *Standing in the Shadow of Tax Exceptionalism: Expanding Access to Judicial Review of Federal Agency Rules*, 66 ADMIN. L. REV. 73, 78 (2014)

systematically favoring regulated entities over regulatory beneficiaries.[149]

More importantly, judicial legitimacy likely depends more on the substantive issues before the court and the way that the court decides those issues than on whether the plaintiff has standing. People tend to be most interested in cases that touch on divisive social issues or challenge the actions of law enforcement officers and other government officials, and they are quickest to condemn the decisions in those cases with which they disagree.[150] *Korematsu v. United States*,[151] *Dred Scott v. Sandford*,[152] and the 1930s decisions striking down New Deal legislation[153] are obvious examples.

To be sure, some decisions that generate cries of illegitimacy present serious questions of justiciability. *Bush v. Gore*,[154] in which the Court stopped a recount of ballots submitted in Florida for the presidential election, resulting in the election of George W. Bush as President, provides an example.[155] There is a serious question whether the dispute involved a non-justiciable political question.[156] But most criticisms of the decision have focused on the equal protection analysis instead of the justiciability of the case.[157]

(claiming that "standing doctrine illegitimately insulates the IRS—and, by extension, other federal agencies—from accountability for the harmful consequences of their rulemaking decisions").

149. *See* Elliott, *supra* note 15, at 488–89; *see also* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304, 324–28 (2002) (arguing that standing "systematically favors the powerful over the powerless").

150. *See* Siegel, *supra* note 14, at 96 (arguing people complain about "cases in which the Court has been at its most adventurist in discovering constitutional constraints that are not textually obvious, in striking down the work of political actors, in reforming long-standing social practices").

151. 323 U.S. 214 (1944).

152. 60 U.S. (19 How.) 393 (1857).

153. *E.g.*, United States v. Butler, 297 U.S. 1, 3 (1936) (invalidating the Agricultural Adjustment Act); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 495 (1935) (invalidating the National Industrial Recovery Act); *see* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: CONSTITUTIONAL REVOLUTION IN THE TIME OF ROOSEVELT 161–62 (1995) (discussing discontent flowing from these decisions).

154. 531 U.S. 98 (2000) (per curiam).

155. *Id.* at 111.

156. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 275–77 (2002) (arguing that the case presented a political question).

157. *See, e.g.*, ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 174 (2001); Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 589 (2001). *See generally* Fallon, *Legitimacy*, *supra* note 136, at 1816 (noting this focus of criticism). *But see* Barkow, *supra* note 156, at 275–77 (criticizing the decision on political

By the same token, people are likely to approve of decisions with which they agree, even if there are serious doubts about whether the court had the power to render the decision. For example, Republican approval of the Supreme Court went up twenty points after the Court's decision in *Bush v. Gore*.[158]

The claim that standing is essential to protect legitimacy is further undermined by the fact that public interest, and thus the possibility that the public will care enough to reject a decision, tends to increase as a case progresses up the appellate hierarchy and the precedential effect of the decision increases.[159] Accordingly, if standing is aimed at protecting legitimacy, its requirements should vary depending on the court hearing the claim. But they do not do so; the same standing test applies in district courts, circuit courts, and the Supreme Court.[160]

None of this is to say that standing *never* helps to protect judicial legitimacy. There could well be serious claims of illegitimacy because of judicial overstepping if courts allowed private individuals to exercise government functions, such as initiating prosecutions or dictating the content of federal legislation. Allowing an individual to choose who should be prosecuted could result in arbitrary and vindictive prosecutions;[161] likewise, empowering an individual to set

question grounds). *Roe v. Wade*, 410 U.S. 113 (1973), provides another example. The decision in that case expanded "the capable of repetition, yet evading review" exception to mootness, *see id.* at 125; Hessick, *supra* note 23, at 327 n.316, but the criticisms of the decision generally focus on the substantive decision that there is a fundamental right to abortion, not the exercise of judicial power, *see, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 922 (1973) (listing substantive criticisms).

158. *See* KARLYN H. BOWMAN & ANDREW RUGG, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, AEI PUBLIC OPINION STUDIES: PUBLIC OPINION ON THE SUPREME COURT 9–10 (2012), http://www.aei.org/wp-content/uploads/2012/06/-possupreme-courtjune-20122_162919650849.pdf [https://perma.cc/AC5F-PQN9].

159. *See* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1020 (2007) (noting greater sociological legitimacy concerns in Supreme Court opinions than in decisions of lower courts); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 118, 198 (2d ed. 1986) (focusing his "passive virtues" argument on the Supreme Court because "the lower courts can act in constitutional matters as stop-gap or relatively ministerial decisionmakers only"); Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 7 (2006) ("[A]lthough concerns about government by judiciary need not be restricted to or focused on the Supreme Court, in practice the Court is the most frequent object of worries about judicial activism . . . .").

160. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 615–16 (1989) (applying the injury-in-fact test for standing to proceed in Supreme Court).

161. Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 816–17 (2009).

federal legislation could result in the promulgation of self-interested laws that lack majority support.[162] But outside these contexts, standing plays little role in protecting judicial legitimacy, and in any event, these legitimacy concerns are not the ones identified by the Court.

Of course, standing could be refashioned to protect the public attitude toward the judiciary. Alexander Bickel argued that the Supreme Court should use standing and other jurisdictional doctrines to avoid deciding controversial questions to preserve its legitimacy.[163] But the standing doctrine envisioned by Bickel is not a constitutional one commanded by the separation of powers; instead, it is a discretionary one that the Court may invoke when it deems it prudent to do so.[164]

D. Constraining the Power of Congress

The Court has asserted that, aside from its role in constraining the courts, standing prevents Congress from impairing the executive power through the creation of private actions. Article II of the Constitution vests the executive power in the President,[165] and it imposes on the President the obligation to "take Care that the Laws be faithfully executed."[166] Relying on these provisions, the Court asserted in *Lujan* that the Executive alone has the power to decide how public law should be enforced and that Article III standing protects this executive function.[167] At issue in *Lujan* was the citizen-suit provision of the Endangered Species Act authorizing private suits to force the government to comply with the Act. Although the provision authorizes "any person" to sue,[168] the Court held that only a person who has suffered an injury conferring standing could bring suit under the law.[169] The Court explained that allowing anyone to sue to

162. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (prohibiting delegation of legislative power to private entity); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1362 (1995) ("[S]tanding forces . . . non-Condorcet minorities to seek codification of their preferences into law in the legislature.").

163. BICKEL, *supra* note 159, at 122–23.

164. *See id.*

165. U.S. CONST. art. II, § 1.

166. *Id.* art. II, § 3.

167. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992). The Court has expressly stated, however, that Article II is not the basis for standing. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 n.4 (1998) ("[O]ur standing jurisprudence[,] though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II.").

168. 16 U.S.C. § 1540(g)(1) (2012).

169. *Lujan*, 504 U.S. at 578.

ensure executive officers' compliance with the law would effectively transfer from the President to the courts the power to execute the laws, thereby converting the courts into "virtually continuing monitors of the wisdom and soundness of Executive action."[170]

If one accepts the position that the Executive has the exclusive power to vindicate the public interest,[171] the Court's worries in *Lujan* are legitimate. For every executive action—be it a prosecutorial decision, a rulemaking, or a proclamation of a national holiday—there are individuals whom the action has upset. If Congress could authorize any person to use the courts to oversee executive actions, the Executive would become effectively subservient to the courts. Standing protects against this threat by limiting the class of people that Congress can authorize to challenge executive action.

That said, more recent decisions suggest that a majority of the Court is no longer fully committed to the view that only the Executive can vindicate the public interest. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[172] the Court held that private individuals had standing by statute to seek civil penalties paid to the United States against a factory that violated the Clean Water Act.[173] As several dissenting Justices noted, allowing private individuals to seek public remedies arguably impairs the power of the President to enforce the law.[174] Moreover, in *Vermont Agency of National Resources v. United States ex rel. Stevens*,[175] the Court upheld the standing of private individuals suing as qui tam relators on behalf of the United States for fraud against the government.[176] Although relators do not suffer harm themselves, the Court reasoned that they have standing based on an assignment from the United States of its

170. *Id.* at 577.

171. Commentators have challenged this theory. *See* Elliott *supra* note 15, at 500 (arguing that standing does not reliably protect the President from Congress); Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1337 (2015) (arguing that the take care clause does not confer exclusive authority on the President to vindicate the public interest); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142–43 (1993) ("The decision is difficult to square with the language and history of Article III, with the injury requirement itself, with more modest visions of judicial power, and with time-honored notions of public law litigation.").

172. 528 U.S. 167 (2000).

173. *Id.* at 186–88.

174. *Id.* at 198 (Scalia, J., dissenting) (complaining that the majority approach "marr[ies] private wrong with public remedy in a union that violates traditional principles of federal standing—thereby permitting law enforcement to be placed in the hands of private individuals").

175. 592 U.S. 765 (2000).

176. *Id.* at 787.

injury from the fraud.[177] But under that reasoning, the relator is suing to enforce a right traditionally enforced by the government.

These decisions suggest that, in some circumstances, the Executive does not have the exclusive power to vindicate public interests. But the effect of these decisions should not be overstated. Nothing in these decisions suggests that the Executive does not have exclusive power to vindicate other public interests, such as how to enforce the criminal law. But they do establish that, for at least some public interests, executive enforcement need not be exclusive and therefore that standing does not serve the function of protecting the Executive from Congress.

III. TAILORING STANDING

The various considerations of separation of powers undergirding standing may justify imposing standing requirements in suits by private individuals seeking to exercise the powers of other branches of the federal government or to force those other branches to use those powers. But, as this Part explains, those separation-of-powers concerns do not extend to suits between private individuals seeking to enforce private rights, nor do they apply to suits that seek to enforce state public rights or to exercise the powers of state institutions. Federal standing doctrine accordingly should not apply in those suits.

A. Private Suits Asserting Private Rights

The distinction between public and private rights still exists.[178] Like their historical counterparts, private rights are those held by individuals. These rights may derive from the common law, as with the right to be free from trespass by others on one's land. They also may be created by Congress, as with the right not to be subject to racial discrimination by motels.[179] The Constitution also confers various private rights. Although most constitutional provisions are structural in that they dictate the scope of federal power or prescribe the procedures for federal action, some provisions, such as the Fourth Amendment restriction on unreasonable government searches and seizures,[180] confer rights on individuals.

177. *Id.* at 773.

178. *See* Hessick, *supra* note 23, at 286.

179. Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(a), 78 Stat. 241, 243 (1964) (codified as amended at 42 U.S.C. § 2000a (2012)) ("All persons shall be entitled to the full and equal enjoyment of the . . . accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race . . . .").

180. U.S. CONST. amend. IV.

Causes of action provide the means for vindicating private rights. But those actions are distinct from the rights they protect.[181] Rights entitle individuals to be treated a particular way; a cause of action is the mechanism to vindicate a right.[182] Not all private causes of actions enforce private rights. For example, the Administrative Procedure Act ("APA") requires agencies to follow particular procedures when promulgating rules.[183] The Act does not confer on individuals the "right" to have agencies follow these procedures,[184] but it does authorize "aggrieved" individuals to file suit if the agency has not followed them.[185] In other words, the APA creates a private cause of action under which individuals may vindicate a public interest.

Under current doctrine, for all suits, both those seeking to vindicate private rights and those seeking to vindicate public rights, an individual must establish standing by demonstrating an injury in fact.[186] Individual actions seeking to vindicate public rights may raise the separation-of-powers concerns discussed above. But none of those concerns apply to suits by private individuals seeking to vindicate private rights. Accordingly, courts should not require plaintiffs seeking to vindicate private rights to establish standing.

1. History

As previously explained, establishing standing was not historically a prerequisite to obtaining judicial relief for the violation of a private right. An individual could maintain an action to enforce her private rights simply by invoking the appropriate form of action and establishing that she was entitled to relief under that action. A plaintiff's failure to invoke a cause of action resulted in the dismissal of his suit, as did the plaintiff's failure to prove that he was entitled to relief under that action.[187]

181. *See* Gomez-Perez v. Potter, 553 U.S. 474, 483 (2008) (stating that rights are distinct from actions).

182. John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849, 850 (2016) ("A right is a claim to receive certain treatment, and the cause of action is a tool for enforcing that claim in court.").

183. 5 U.S.C. § 553 (2012).

184. *Cf.* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942) (stating that the Communications Act creates a cause of action to force agencies to follow procedures but does not "create new private rights" to those procedures).

185. 5 U.S.C. § 702 (2012).

186. *See supra* notes 25, 51 and accompanying text.

187. Garland v. Davis, 45 U.S. 131, 145 (1846) (allegations are subject to demur if "wrong in form").

These dismissals were not for lack of jurisdiction, as is the case today for dismissals for lack of standing;[188] instead, they were decisions on the merits.[189] If a plaintiff failed to show that he was entitled to relief under his action, the court would not dismiss on the ground that the court lacked the power to determine whether the plaintiff was entitled to relief. Rather, the dismissal was simply on the ground that the plaintiff had failed to establish that he was entitled to relief.

These deficiencies continue to be a basis for dismissal in federal court today. A plaintiff asserting her rights in federal court today still must establish that *her* rights have been violated and that a cause of action entitles her to relief for that violation.[190] The failure to do so results in dismissal for failure to establish a claim to relief.[191]

To be sure, the law provides private rights today that did not exist in the past. For example, individuals have a right against securities fraud that goes beyond the protections of the common law.[192] But these rights are still private rights in that they are held by individuals to protect personal interests,[193] and the failure to establish a personal violation of those rights is a basis for dismissal.[194]

Because plaintiffs in today's federal judicial system must still meet the historical requirements for maintaining suit, standing doctrine is not essential to confining the federal judiciary to its historical role in suits seeking to enforce private rights.

2. Protecting the Democratically Accountable Branches

The concern that the judiciary might usurp the power of the political branches also does not support imposing standing in private suits seeking to enforce private rights. By definition, claims that allege violations of individual rights fall squarely within the Court's view of the judiciary's "province" of "decid[ing] on the rights of

188. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109–10 (1998) (stating that when a plaintiff "lacks standing" the courts "lack jurisdiction").

189. *Compare* 3 BLACKSTONE, *supra* note 79, at *301 (pleas for lack of jurisdiction), *with id.* at *293–300 (pleas challenging sufficiency of the action).

190. U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 721 n.** (1990) (explaining that a person may recover only for violation one's of own rights, not those of a third party).

191. *See, e.g.*, FED. R. CIV. P. 12(b)(6).

192. *See, e.g.*, Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 343 (2005) ("Judicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions." (citations omitted)).

193. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (recognizing a private right against securities fraud).

194. *See Broudo*, 544 U.S. at 343 (dismissing securities action for failure to state a claim).

individuals."[195] They do not seek to decide "abstract questions of wide public significance" that should be directed to the political branches.[196]

Nor does a private suit seeking to vindicate a private right seek to use the courts to exercise a power reserved to the other branches. Those suits do not ask courts to exercise the legislative power of Congress. To the extent they involve legislation at all, they seek to enforce rights that Congress has already created.[197] Similarly, those suits do not threaten the President's Article II power to enforce the law. Article II empowers the President to enforce public federal rights in his capacity as the representative of the public.[198] It does not authorize him to enforce private rights held by private individuals.[199] As John Marshall put it, a "private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it."[200]

195. Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992) (quoting Marbury v. Madison, (1 Cranch) 137, 170 (1803)).

196. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

197. *See* Sunstein, *supra* note 126, at 1472 (arguing that claims seeking to enforce statutes do not usurp the political process because "the political resolution" is already "expressed in law"). To be sure, resolving a suit alleging the violation of a federal statutory right depends on the interpretation of a federal statute, and interpreting a statute presents a potential interbranch conflict because the Court's theory of interpretation depends on its perception of the judiciary's relationship with Congress. John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 9 (2014) (stating that the purpose of interpretation is to ascertain "what Congress actually decided or, in the terms of the trade, 'intended' "). But that conflict is not the kind of threat to separation of powers against which standing seeks to guard. Standing seeks to prevent individuals from using the courts to address social issues, not determine how courts should interpret statutes. The theories of statutory interpretation, which separation of powers also informs, handle that issue. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56–57 (2001).

198. *Lujan*, 504 U.S. at 576 (stating that "[v]indicating the public interest . . . is the function of Congress and the Chief Executive").

199. *Cf.* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982) (stating that the States cannot represent the rights of individuals); Pennsylvania v. Porter, 659 F.2d 306, 316 (3d Cir. 1981) (en banc) (recognizing the United States's standing to challenge violations of civil rights only insofar as the violation constitutes "harm to interests shared by all members of the community").

200. Representative John Marshall, Speech Delivered to the U.S. House of Representatives on the Resolutions of the Honorable Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (Mar. 7, 1800), *in* 4 THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984) (1799–1800); *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 291 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (stating that the right of "taking reparation [for violation of private right] . . . belongs only to the injured party") (emphasis removed).

To be sure, the political branches can take steps to remedy the violation of a private right. For example, Congress may enact private legislation providing relief for the complaining party—such as a statute directing the Treasury to disburse money to the complainant.[201] But that legislation does not vindicate the right that has been violated; it creates a new entitlement for the beneficiary.[202]

Perhaps Congress could also enact legislation authorizing the Executive to bring suit on behalf of an individual to seek a remedy for the violation of that individual's private rights.[203] The right to be enforced, however, would still be the private right held by the individual. In bringing suit to vindicate that right, the Executive would not be acting in its capacity to enforce public rights under Article II; instead, it would be acting as a representative of the individual whose right she seeks to vindicate, comparable to a guardian bringing suit on behalf of its ward.[204]

Congress could also create a *public* right, held by the government, prohibiting the same conduct underlying violation of the private right. The creation of that public right would not destroy the private right held by the person injured by the tortfeasor.[205] (Of course, Congress might be able to abrogate the private right altogether. But in that case, the suit would no longer involve a private right.) An individual could still bring suit to vindicate that private right without interfering with the President's power to enforce the law.[206]

Because a party asserting private rights does not present a relevant threat to the powers of Congress or the President, for those

201. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995) ("Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court.").

202. Dalehite v. United States, 346 U.S. 15, 24 (1953) (noting that private bills create entitlement to compensation).

203. *But see* LOCKE, *supra* note 200, at 291 (stating that the right of "taking reparation [for violation of private right] . . . belongs only to the injured party" (emphasis removed)). Such a statute would not be barred by restrictions on third-party standing, because third-party standing is a prudential doctrine that can be "abrogated by Congress." Bennett v. Spear, 520 U.S. 154, 162 (1997) (citing Warth v. Seldin 422 U.S. 490, 501 (1975)).

204. *See, e.g.*, 39 AM. JUR. 2D *Guardian and Ward* § 1 (2008) (defining a guardian as one appointed to care for the property interests of the ward).

205. *See* Woolhandler & Nelson, *supra* note 80, at 696 (explaining that malfeasance potentially gives rise to both criminal actions and tort actions).

206. *See* 3 BLACKSTONE, *supra* note 79, at *118 (explaining that violent torts are "always attended with some violation of the peace for which in strictness of law a fine ought to be paid to the king").

types of claims, standing doctrine is not necessary to protect Congress or the President.[207]

One might argue, even if standing is unnecessary in suits to enforce private statutory or common law rights, it is nevertheless essential for claims challenging the constitutionality of an act of another branch of the federal government. That is because a determination of unconstitutionality effectively results in the court revising the actions of the other government branch.[208] A ruling that a federal law is unconstitutional results in the court voiding congressional legislation and telling Congress the limits of its legislative power;[209] similarly, a determination that an executive officer's action was unconstitutional effectively enjoins the Executive from using its power as it sees fit in the future.[210] Concerns of this sort have prompted the Court to say that the "standing inquiry [is] especially rigorous when reaching the merits of the dispute" and entails deciding "whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[211]

These concerns may justify a rigorous standing requirement for claims invoking structural provisions of the Constitution, such as the requirements that laws must pass both houses of Congress to be valid[212] or that a federal law be justified by an enumerated power in the Constitution, such as the commerce clause.[213] Those provisions do not confer a right on any individual but instead establish how the branches of government should operate and the limits of its power.[214]

207. Suits against private individuals may implicate important federal interests—for example, the liability of private actors performing government contracts. *See* Boyle v. United Tech. Corp., 487 U.S. 500, 504 (1988). But the presence of a federal interest does not suggest that the federal courts should be more hesitant to act. To the contrary, protecting a federal interest is reason for more aggressive federal judicial intervention. Indeed, federal courts have offered the presence of a federal interest as a justification to create federal common law. *See id.* at 504–06 (holding that important federal interest justified creation of federal common law).

208. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 152 (1893) (arguing that judicial review gives "judges . . . the power to revise the action of other departments").

209. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("[A] law repugnant to the constitution is void[.]").

210. *See, e.g.*, Kirk v. Louisiana, 536 U.S. 635, 635–36 (2002) (holding unconstitutional search supported by probable cause but conducted without warrant).

211. *E.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (discussing the purpose of standing doctrine).

212. U.S. CONST. art. I, § 7, cl. 2.

213. *Id.* art. I, § 8.

214. *See* THE FEDERALIST NO. 84, at 575–76 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (distinguishing between structural provisions and "rights"); Aziz Z. Huq,

Accordingly, under the Court's vision of separation of powers, enforcement of these provisions should be left to the political branches unless an individual establishes an injury supporting standing.[215]

But these concerns do not justify imposing a standing requirement on plaintiffs asserting private constitutional rights, such as their Fourth Amendment right against an unreasonable seizure.[216] A private right deriving from the Constitution is still a private right.[217] Such rights are held by each individual, and the violation of an individual's right may provide the basis for recovery.[218] Resolving claims asserting private constitutional rights thus falls squarely within the federal judiciary's core function of deciding on rights of individuals. Accordingly, even though the decision may limit the power of Congress or the Executive, it does not involve resolving a dispute more appropriately addressed to the other branches of government.[219]

To be sure, as a *prudential* matter, courts might want to avoid resolving cases that pass on the constitutionality of the actions of the other branches, even though they clearly have the power to do so.[220] A determination that another branch acted unconstitutionally raises the possibility that unelected judges are implementing their policy preferences instead of those enacted by elected branches.[221] It also creates a confrontation between the branches and potentially signifies

Standing for the Structural Constitution, 99 VA. L. REV. 1435, 1514–15 (2013) (arguing that structural constitutional principles are not individualistic rights).

215. *See supra* notes 103–11 and accompanying text.

216. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

217. *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 351–52 (1993) (discussing private rights endowed by the Constitution and the interests those rights protect).

218. *See, e.g.*, *Bivens*, 403 U.S. at 395 (affording damages remedy for violation of constitutional rights).

219. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 168 (1803) (concluding that an injury to a private right justifies a remedy even when doing so limits powers of other branches).

220. *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (listing instances in which courts should avoid constitutional questions in cases in which they possess jurisdiction); Hessick, *supra* note 13, at 95–96 (arguing that comity should be a basis for declining jurisdiction).

221. *See* Lino A. Graglia, *Judicial Review on the Basis of "Regime Principles": A Prescription for Government by Judges*, 26 S. TEX. L.J. 435, 451 (1985) (noting the threat that "judicial review amounts simply to law-making according to the preferences of unelected government officials holding office for life.").

disrespect of that other branch's judgment.[222] These concerns are particularly acute in cases involving core executive functions, such as foreign affairs or the military. But these concerns do not bear on whether a dispute *can* be resolved by a federal court—that is, whether the dispute involves "decid[ing] on the rights of individuals";[223] rather, they go only to whether the court *should* resolve the dispute.

Another potential objection is that, when a plaintiff seeks a remedy for a potential *future* violation of her rights, standing plays an important role in protecting the roles of the elected branches. Although courts can provide prospective relief to remedy threatened harms, limiting standing to those who can establish that the threat of injury is "real and immediate"[224] confines courts to their appropriate role. Allowing a person to bring suit based on a remote risk of injury would effectively enable courts to resolve generalized grievances because everyone faces at least some probability of suffering a rights violation.[225]

But as I have explained elsewhere, the separation-of-powers concerns underlying standing do not warrant distinguishing between large and small risks of harm.[226] That is because any threatened violation of a private right is particularized. A person who faces a small risk of being assaulted, for example, has a personalized interest in preventing that assault. Setting the probability threshold extremely low may vastly expand the number of people who have standing. But each of those people has a personalized interest in not being assaulted.[227] Because separation of powers does not justify treating those risks of harm differently, standing is unnecessary to weed out low probability risks of harm.

Of course, saying that standing is an unnecessary inquiry in suits raising private rights requires one to determine whether the law

222. *See* United States v. Morrison, 529 U.S. 598, 607 (2000) (avoiding declarations of unconstitutionality out of "[d]ue respect for the decisions of a coordinate branch of Government" (citations omitted)).

223. Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992) (quoting *Marbury*, 5 U.S. (1 Cranch) at 168). To be sure, under the political question doctrine, courts lack the power to address some constitutional issues. Nixon v. United States, 506 U.S. 224, 228 (1993). But that doctrine is limited to the few issues that the Constitution entrusts exclusively to another branch. *See id.* at 228–29.

224. O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (citations omitted).

225. *See* Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1295 (D.C. Cir. 2007) (arguing that "remote and speculative [claims] are properly left to the policymaking Branches," because otherwise "virtually any citizen" would have standing to challenge government action).

226. Hessick, *supra* note 13, at 85.

227. *Id.* at 87.

confers an individual right or instead establishes a regulatory prohibition on particular action. Often it is easy to determine whether a law establishes an individual right or establishes a prohibition that protects the public interest—the Fourth Amendment, for example, clearly provides an individual right against unreasonable searches and seizures,[228] while the constitutional provisions regulating impeachment clearly outline structural limitations.[229] But for other provisions it may not be so clear.[230] The difficulty of resolving this question does not justify extending standing's requirements to all cases; rather, it justifies requiring a plaintiff claiming that he is asserting a private right to establish that he is indeed asserting a private right and therefore need not establish standing. Moreover, courts regularly resolve whether particular laws confer rights or establish structural requirements in a number of contexts aside from standing. For example, courts must resolve the same question in cases brought under 42 U.S.C. § 1983, which affords a remedy against state officials only for the deprivation of an "individual" right under the Constitution,[231] and pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[232] which provides analogous remedies against federal officials.[233] Those decisions often settle whether a law confers a right, making it unnecessary to reconsider the matter.[234]

3. Protecting Legitimacy

As explained earlier, standing is not a sensible tool to protect judicial legitimacy.[235] Judicial legitimacy turns much more on the issues in a case and the way in which a court decides those issues, rather than whether the appropriate person raised the issue before the court.[236] But even accepting the claim that standing protects legitimacy, standing is not necessary to protect judicial legitimacy in suits alleging the violation of private rights because those suits do not raise relevant concerns about judicial legitimacy.

228. U.S. CONST. amend. IV.
229. *Id.* art. I, §§ 2–3.
230. *See* United States v. Richardson, 418 U.S. 166, 187 n.6 (1974) (Powell, J., concurring) (raising this concern).
231. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 284–85 (2002).
232. 403 U.S. 388 (1971).
233. *See id.* at 389, 396.
234. *Id.* at 388–89.
235. *See supra* notes 137–53 and accompanying text.
236. *See supra* text accompanying notes 150–53.

Recall that the theory is that standing protects judicial legitimacy by indicating to the public that courts do not simply provide legal advice but act only when necessary to protect individual rights.[237] There is usually little public interest in run-of-the-mill tort suits between two private parties. Over a thousand torts suits are filed in federal court each year.[238] Yet one does not hear about trial court rulings in private suits unless the suits involve a widespread injury like a toxic tort, the suits result in huge verdicts, or one of the parties is famous—much less about claims that trial decisions in private suits are illegitimate because of a lack of standing.[239]

Suits involving private constitutional rights may garner greater public attention. For example, there were a number of media reports on the lawsuit challenging the refusal of Kim Davis, a Kentucky county clerk, to issue marriage licenses to same-sex couples.[240] But those suits are the exception rather than the norm, given the large number of suits involving private constitutional rights filed each year that do not receive public attention.[241]

More importantly, standing is simply unnecessary in suits alleging violations of private rights to protect judicial legitimacy in the sense described by the Court. In the Court's view, the role of the judiciary is to act when necessary to protect individual rights.[242] That is precisely what a court does when a person alleges the violation of a private right. Of course, the plaintiff will not win if she fails to establish that her rights have been violated. But denying relief on that ground does not undermine judicial legitimacy in the sense that the

237. *See supra* text accompanying notes 132–234.

238. ADMIN. OFFICE OF U.S. COURTS, TABLE C-2: U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2013 AND 2014, at 1 (2014), http://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Mar14.pdf [https://perma.cc/RL67-WF89].

239. Searches in the "News and Journals" and "Law Reviews" databases of Westlaw conducted in February 2017 revealed no claims that a district court ruling in a private suit was illegitimate, for lack of standing or otherwise.

240. *See, e.g.*, *Couple Who Sued Kentucky Clerk Kim Davis Marry*, 6ABC (Oct. 25, 2015), http://6abc.com/news/couple-who-sued-kentucky-clerk-kim-davis-marry/1050560/ [http://perma.cc/KV2P-5L3M].

241. In 2014, prisoners filed over 39,000 civil rights or habeas suits and in total plaintiffs filed over 35,000 civil rights suits. ADMIN. OFFICE OF U.S. COURTS, TABLE C-2: U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2013 AND 2014, at 2–3 (2014), http://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Sep14.pdf [https://perma.cc/5ARD-KD24]. Although not all of these suits involved constitutional claims, it stands to reason that many did.

242. *See supra* text accompanying note 112.

court has gone beyond its appropriate sphere. In that case, the court has determined that an award is not necessary to protect individual rights.

4. Protecting the Executive from Congress

Standing requirements are also not necessary in private-rights suits to prevent Congress from eroding the President's Article II power to enforce the law. Article II authorizes the President to enforce public rights; it does not empower the President to vindicate private rights.[243]

That said, as noted above, Congress may be able to authorize the President to enforce private rights by statute, and it certainly may create a public right that runs parallel to a private right.[244] For example, Congress may enact a criminal law prohibiting breaches of contracts occurring in interstate commerce that accompanies the private action for breach of contract. But in private suits seeking to enforce a private instead of a parallel public right, standing is unnecessary to guard against congressional commandeering of executive power.[245]

This is not to say that there are no limits on Congress's power to create private rights. Congress cannot create private rights if doing so violates some other constitutional provision. For example, if Article II vests exclusive power in the President to enforce public rights, Congress cannot create a private right to compel the President to enforce public rights.[246] But these limitations on Congress's power do not flow from Article III. Although *Lujan* suggests that Article III prohibits federal courts from hearing private suits to enforce public rights even when Congress has authorized those suits,[247] nothing in *Lujan* or other opinions suggests that Article III defines what constitutes a private right or a public right. Instead, the limitations on

243. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982) (stating that for a state to have standing, "[it] must articulate an interest apart from the interests of particular private parties"); *see also* United States v. City of Philadelphia, 644 F.2d 187, 200–03 (3d Cir. 1980) (refusing to infer implied right of action for the United States under Section 5 of the Fourteenth Amendment to enforce individual rights).

244. *See* Sunstein, *supra* note 91, at 231 n.300 ("Parallel public and private remedies are most familiar to American law; they do not violate the Constitution.").

245. *See* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 203 (2011) (arguing standing is proper for private enforcement of private rights but possibly not for private enforcement of parallel public right).

246. F. Andrew Hessick, *Understanding Standing*, 68 VAND. L. REV. EN BANC 195, 205 (2015).

247. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–77 (1992) (contrasting between suits to vindicate individuals' rights and suits to vindicate the public interest).

what private rights Congress may create must come from other provisions in the Constitution.

B. Suits Asserting State Interests

A second category of suits in which Article III standing is unnecessary are those seeking to assert state interests. These include suits seeking to force the state government to comply with the law or to exercise one of its powers, as well as suits seeking to exercise a power of the state governments. These "state interest" suits are the state analog of those federal suits that do raise the kinds of separation-of-powers concerns underlying standing. But they do not threaten the separation of powers because they do not implicate the other branches of the federal government; instead, the only sovereign interests at stake are those of the state. Accordingly, if Article III standing rests on separation of powers, establishing standing is unnecessary in those cases.

1. History

State-interest suits are analogous to the historical category of suits seeking to vindicate public interests. Citizens of a state share a collective interest in protecting the state's interests, ensuring state government compliance with the law, and seeing the state's criminal and other public laws enforced.

As noted above, historically, the representative of the public had the primary responsibility of enforcing public rights.[248] But the legislature could authorize public rights that individuals could enforce.[249] Although the Supreme Court has concluded that individuals generally cannot enforce federal public rights,[250] states have been less restrictive about the enforcement of state public rights. Many states permit broad private enforcement of public rights. For instance, thirty-six states allow taxpayer standing,[251] and a number of other states waive standing requirements in cases that raise an important public interest.[252] Moreover, a number of states have

248. *See supra* note 87 and accompanying text.

249. Woolhandler & Nelson, *supra* note 80, at 694.

250. *See supra* notes 39–46 and accompanying text.

251. Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1277 (2012).

252. *See, e.g.*, Youngblood v. S.C. Dep't of Soc. Servs., 741 S.E.2d 515, 518 (S.C. 2013) (recognizing "public importance exception" (citing Freemantle v. Preston, 728 S.E.2d 40, 43 (S.C. 2012))); Gregory v. Shurtleff, 299 P.3d 1098, 1104 (Utah 2013) (waiving standing in suit of "significant public importance" (quoting Cedar Mountain Envtl., Inc. v. Tooele

concluded that standing is a prudential doctrine subject to modification by the state legislature.[253]

Allowing federal courts to hear suits by private individuals to enforce state public rights under these state doctrines is entirely consistent with historical practice. It does not result in the courts hearing suits that they traditionally could not hear because the relevant sovereign has authorized private enforcement of public rights.[254]

To be sure, one might argue that enforcing Article III standing doctrine is essential to limiting federal courts to their historical role when state law does *not* authorize private enforcement of public rights. But historically those suits would have been dismissed on the ground that the plaintiff had not demonstrated that he was entitled to the remedy requested,[255] not that the court lacked the power to decide whether the plaintiff was entitled to the remedy.[256] Federal courts continue to be able to dismiss suits on that ground today: a plaintiff cannot maintain an action under a law that does not entitle the plaintiff to relief.[257]

More importantly, the rationale for using Article III standing to limit federal courts to the historical role of courts does not apply to cases raising state public rights. The reason for limiting federal courts

County *ex rel.* Tooele Cty. Comm'n, 214 P.3d 95, 98 (Utah 2009))); To-Ro Trade Shows v. Collins, 27 P.3d 1149, 1155 (Wash. 2001) (waiving standing when "the interest of the public . . . is overwhelming" (quoting *In re* Deming, 736 P.2d 639, 660 (Wash. 1987) (en banc) (Utter, J., concurring)).

253. *See, e.g.*, Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010) (calling standing "prudential"); Sierra Club v. Dep't of Transp., 167 P.3d 292, 312 (Haw. 2007) (describing "standing doctrine" as "prudential rules of judicial self-governance"); Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1382 (Del. 1991) ("Standing [is] a matter of self-restraint . . . .").

254. *See supra* text accompanying notes 87–88.

255. *See, e.g.*, O'Brien v. Norwich & Worcester R.R., 17 Conn. 372, 376 (1845) (concluding that a plaintiff without special injury seeking an injunction for a public nuisance is "not entitled to relief"); *see also* Barr v. Stevens, 4 Ky. 292, 292–93 (1808) (affirming order relating to nuisance, as opposed to dismissing appeal for lack of jurisdiction, on the ground that the appellants were not specially harmed)

256. *Compare* 3 BLACKSTONE, *supra* note 79, at *219–20 (stating that "no [private] actions lies for a public or common nuisance"), *and* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS IN ENGLAND AND AMERICA § 922 (stating that the proper "remedy" for public nuisance is suit by the government), *with* 3 BLACKSTONE, *supra* note 79, at *301 (pleas for lack of jurisdiction), *and* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS IN ENGLAND AND AMERICA § 921, (13th ed. 1886) (noting the "jurisdiction" of chancery courts over public nuisances).

257. *See* FED. R. CIV. P. 12(b)(6). One might try to extend this same reasoning to federal public rights. *See, e.g.*, Fletcher, *supra* note 20, at 236 (arguing that standing should be a merits question).

to their historical role is to prevent those courts from infringing on the domains of the other branches of the federal government.[258] That concern does not apply to suits seeking to vindicate state public rights. The President does not have the power to enforce state public rights.[259] Nor does Congress have any say over the content of state public rights.[260] Instead, in suits seeking to vindicate state public rights, the only sovereign interests at stake are those of the state.

Instead of involving separation of powers, the argument that federal courts should refuse to hear unauthorized private suits seeking to enforce state public rights sounds in federalism. Denying standing in those cases enforces the state arrangement of power among its branches of government, not the federal allocation of power.[261] It accordingly is not compelled by the separation-of-powers argument underlying Article III standing. At most, those concerns may provide prudential grounds for a federal court to decline to hear a case to avoid undermining the state's scheme for enforcing its public rights.[262]

2. Protecting the Democratically Accountable Branches

Article III standing also does not serve to protect the power of the other federal branches of government in suits asserting state interests. As noted above, the enforcement of state rights or exercise of state powers does not implicate the powers of the President or Congress.[263] The creation of state public rights and how those rights are enforced are decisions solely for the state. Accordingly, for those state law disputes, standing is not necessary to protect the other branches of the federal government.

One might argue that the Article III standing doctrine nevertheless is necessary to prevent judiciary encroachment of the

258. Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009) ("[L]imiting the judicial power . . . to the traditional role of Anglo-American courts . . . . 'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.' " (quoting Warth v. Seldin 422 U.S. 490, 498 (1975)))

259. *See* Medellin v. Texas, 552 U.S. 491, 525 (2008) (noting the President's inability to control enforcement of state law when no federal law is implicated).

260. *See, e.g.*, Printz v. United States, 521 U.S. 898, 924 (1997) (holding that Congress cannot direct enactment of state laws).

261. Hessick, *supra* note 9, at 101 (stating that federal justiciability doctrines "enforce the federal allocation of power" that "[m]any states have rejected").

262. *Cf., e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971) (directing federal courts to abstain from issuing injunctions barring state criminal prosecutions); La. Power & Light Co. v. Thibodaux, 360 U.S. 25, 28 (1959) (requiring abstention in cases that implicate an important "sovereign prerogative" and in which state law is unclear).

263. *See supra* notes 258–60 and accompanying text.

elected branches of the state governments. That argument is based on federalism instead of separation of powers. It seeks to avoid federal interference with the state's administration of its affairs,[264] instead of seeking to define the allocation of power among the branches of the federal government.[265]

The Supreme Court has not invoked federalism as a rationale for standing; instead, it has insisted on grounding standing in separation of powers even in suits that raise only federalism concerns. For example, in *Arizona Christian School Tuition Organization v. Winn*,[266] the Court denied taxpayer standing to challenge a state tax.[267] It explained that "[t]he legislative and executive departments of the Federal Government, no less than the judicial department, have a duty to defend the Constitution"[268] and therefore the federal courts lack "unconditioned authority to determine the constitutionality of [state] legislative or executive acts."[269]

This conclusion is a non sequitur. That the President and Congress have a duty to defend the Constitution has no bearing on the relationship between the federal courts and the states. Article III standing enforces the federal allocation of power among the courts, Executive, and legislature.[270] That effort to protect the division of federal powers does not translate into protecting federalism. Many states have adopted distributions of power among their governmental departments that differ from the federal arrangement.[271] Some states do not place all executive power in a single office but instead disperse it among several elected officials; some allow direct participation of their citizens through popular referenda; and some confer more power on their judges because those judges are subject to elections.[272] Because of these differences and others, various states have

264. *See* Alden v. Maine, 527 U.S. 706, 748 (1999) (stating federalism refers to state and national governments as "joint participants in the governance of the Nation" (citations omitted)).

265. *See* Clinton v. Jones, 520 U.S. 681, 699 (1997) ("The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government.").

266. 563 U.S. 125 (2011).

267. *Id.* at 130.

268. *Id.* at 133 (citing U.S. CONST. art. VI, cl. 3).

269. *Id.* (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982)).

270. Flast v. Cohen, 392 U.S. 83, 95 (1968) (noting that justiciability "define[s] the role assigned to the judiciary in a tripartite allocation of power" among the judiciary, the President, and Congress).

271. *See* Hershkoff, *supra* note 137 at 1886–96.

272. *See id.* (giving examples of states with these characteristics).

developed different standing doctrines, and many of these doctrines allow for broader enforcement of public rights.[273] Applying Article III standing to suits seeking to enforce state public rights therefore does not faithfully protect the decisions of the state about when an individual may appropriately invoke the judicial power.[274]

Far from undermining federalism, dispensing with Article III standing in private suits seeking to enforce state public rights may promote federalism. Imposing federal standing requirements in those cases may prohibit suit when the state would permit it. Applying federal standing doctrine interferes with these state schemes for directing which institution–the judiciary or a political body—should decide particular disputes.

The Article III restriction on taxpayer standing for state taxpayers provides an example. As noted earlier, most states allow taxpayer standing to challenge unlawful activity.[275] Various reasons justify that decision. The states may have concluded that allowing private enforcement actions is the best way to vindicate the public right to government compliance with the law, or that private enforcement is essential for providing an avenue to challenge unlawful actions that do not hurt anyone in particular. But federal courts have refused to apply those state taxpayer standing rules, and instead have held that state taxpayer status does not confer Article III standing.[276] Prohibiting those taxpayers from proceeding in federal court undermines the state's interest in allowing those suits.[277] It impairs the enforcement of state interests in federal court.

273. *See supra* text accompanying notes 251–52.

274. Although justiciability doctrines do not seek to promote federalism, courts may use justiciability doctrines to protect state interests. *See* Taub v. Kentucky, 842 F.2d 912, 919 (6th Cir. 1988) (recognizing that justiciability doctrines were not created with federalism in mind, but explaining that justiciability could nevertheless be used to further federalism). But that practice does not establish that standing is designed to protect federalism; it shows only that courts may *use* the doctrine to protect federalism. *See* Hessick, *supra* note 9, at 102 n.303.

275. *See supra* text accompanying note 252.

276. *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989) ("[W]e have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of 'direct injury[.]' " (quoting Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 434 (1952))); Cantrell v. City of Long Beach, 241 F.3d 674, 683 (9th Cir. 2001) (denying standing to California taxpayers for state law claims, despite acknowledging that California recognizes taxpayer standing).

277. Although federal standing should not apply to cases assessing the constitutionality of state laws, federal courts perhaps should apply state standing doctrines as a matter of comity to avoid unnecessary conflicts with state governments. *Cf.* Younger v. Harris, 401 U.S. 37, 44 (1971) (invoking comity in abstaining from ruling on legality of state criminal proceedings). Federal courts accordingly should abstain from hearing a state case when state standing laws would not permit the same suit to go forward in state court.

The Court's denial of standing in *Hollingsworth v. Perry* provides another example of how Article III standing may undermine state interests.[278] There, after the executive department of California refused to appeal a federal district court's ruling that Proposition 8 was unconstitutional, the State of California explicitly authorized the official proponents of Proposition 8 to appeal the ruling on behalf of California.[279] Despite that authorization, the Supreme Court held that the proponents lacked Article III standing to pursue the appeal.[280] That determination impaired California's ability to pursue its interests. The referenda process allows the citizens of California to enact laws that California's political officials refuse to enact.[281] Allowing the proponents to represent California's interest in defending the law if California's officials refuse to do so provided a way of preventing officials from undermining the referendum process.[282] In other words, the *Hollingsworth* decision removed one of California's critical mechanisms for defending the constitutionality of its referenda. Moreover, by denying standing to the proponents, the Supreme Court deprived the voters of California of a central means contemplated by the State of challenging the district court ruling that their proposition was unconstitutional.[283]

One might contend that this argument justifies dispensing with standing in suits that raise challenges under state laws or constitutions, but not in suits raising federal constitutional challenges to state laws because constitutional determinations about state laws may apply to federal laws in future cases.[284] This concern does not apply to private rights conferred by the Constitution. As explained above, suits alleging violations of private rights do not present a relevant threat to the other branches of government.[285] But the concern may apply to structural provisions. The Constitution imposes several structural constraints on the states. For example, Article I, Section 10 prohibits the states from engaging in a handful of actions,

278. 133 S. Ct. 2652, 2661 (2013).

279. *Id.* at 2660.

280. *Id.* at 2662.

281. Perry v. Brown, 265 P.3d 1002, 1006 (Cal. 2011) ("[T]he initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt . . . the measure . . . .").

282. *Id.* at 1024 ("The initiative power would be significantly impaired if there were no one to assert the state's interest in the validity of the measure when elected officials decline to defend it in court or to appeal a judgment invalidating the measure.").

283. *See* Elliott, *supra* note 12, at 446.

284. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 759 (2010) (noting that incorporated rights apply equally to state and federal governments).

285. *See supra* text accompanying notes 217–19.

such as entering into treaties, coining money, or keeping troops during peacetime except with Congress's consent.[286] But almost none of the structural constraints imposed on the states in the Constitution apply to the federal government. Some, like those in Article I, prohibit the states from engaging in certain acts because those acts are reserved to Congress;[287] others oblige the states to follow certain procedures inapplicable to the federal government;[288] and still others establish obligations between the states that do not apply to the federal government.[289] The only exception is that the Constitution prohibits both the federal government and the states from granting titles of nobility.[290]

More importantly, the possibility that a ruling against a state might establish precedent applicable against the federal government does not raise the kinds of separation-of-powers concerns that underlie Article III standing. The purpose of standing is to limit the occasions when federal courts may exercise the Article III "judicial Power."[291] According to the Court, "the 'judicial Power' is one to render dispositive judgments."[292] Judgments are the means by which courts resolve cases and controversies. They settle the rights and obligations of the respective parties. Standing assures that the dispute before the court is a case or controversy susceptible to resolution by a dispositive judgment. Standing thus "identif[ies] those *disputes* which are appropriately resolved through the judicial process."[293]

286. U.S. CONST. art. I, § 10.

287. *Id.*

288. *See, e.g.*, *id.* art. II, § 1 (defining the states' role in electing the President).

289. *See id.* art. IV, §§ 1–2 (requiring each state to give full faith and credit to the acts of other states, and to return fugitives from another state at the latter's request).

290. *Id.* art. I, §§ 9–10. The commerce clause imposes a structural limitation on both the federal government and the states. It authorizes the federal government to regulate only interstate, foreign, and Indian commerce. *Id.* art. I, § 8. The dormant commerce clause prohibits states from discriminating against out-of-state commerce, *see* Comptroller of Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1794 (2015), or unduly burdening interstate commerce, *see* General Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997). Although the scope of power granted to Congress used to be tied to the scope of the limits on the states under the clause (whatever Congress could regulate, the states could not, and vice versa), *see* Brown v. Maryland, 25 U.S. 419, 448 (1827), the two are no longer mirror images, *see* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992) (noting the evolution of the doctrine). Therefore, determinations about one do not affect the other.

291. *See* Honig v. Doe, 484 U.S. 305, 341 (1988).

292. Camreta v. Greene, 563 U.S. 692, 717 (2011) (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995)).

293. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (emphasis added) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

Unlike the resolution of disputes through judgments, creating law through opinions is not an exercise of the judicial power.[294] Opinions are merely by-products of the exercise of the judicial power of resolving disputes.[295] Their function is to provide explanations for the judgments that resolve cases and controversies, but opinions do not themselves resolve cases and controversies.[296] Indeed, federal courts may issue judgments without opinion if they so choose.[297] And they regularly discuss in opinions matters unnecessary to the judgment, even when that discussion is on constitutional issues that may affect the federal government in future cases.[298]

Because judicial lawmaking is not an exercise of the judicial power, standing does not seek to limit it. It is for this reason that the same standing doctrine that applies in district courts applies in the circuit courts and the Supreme Court. Although district courts lack the power to create law, they exercise the judicial power of rendering dispositive judgments.

3. Protecting Legitimacy

Suits involving the vindication of state interests often garner substantial public attention, at least among the residents of that state who may be affected by the decision. But the legitimacy of a federal court's ruling in such a case does not turn on whether the plaintiff has Article III standing. That is not only because, as noted earlier, standing has little bearing on legitimacy.[299] It is also because Article III does not limit the states,[300] and many states have developed standing rules that differ from the federal ones or have concluded that

294. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126–27 (1999) ("[O]pinions . . . are not necessary to the judicial function of deciding cases and controversies.").

295. *See* Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) ("Federal Courts . . . do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution . . . . They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.").

296. Hartnett, *supra* note 294, at 126 ("The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment.").

297. *See, e.g.*, King v. Ill. Bd. of Elections, 522 U.S. 1087, 1087 (1998) (affirming lower court decision without opinion).

298. Leval, *supra* note 147, at 1269–73 (noting the widespread acceptance of dicta on constitutional issues).

299. *See supra* notes 137–64 and accompanying test.

300. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts . . . .").

it is crucial not to have a limitation on judicial power.[301] Those rules establish the situations under which the states have deemed it appropriate for courts to rule on their state laws.[302] Nothing suggests that those state rules have undermined the legitimacy of the state courts. To the contrary, people in those states expect judicial action when the state rules of justiciability are satisfied.

One might argue that requiring a plaintiff to establish Article III standing to vindicate a state interest is more important to maintaining the legitimacy of federal courts than of state courts because a ruling of the federal court involves federal intrusions into state laws. That argument sounds in federalism instead of separation of powers and accordingly is not what has driven standing doctrine. Moreover, limiting standing to those who satisfy the Article III test as opposed to the state test for standing may imperil the legitimacy of the federal court insofar as it may be seen as the application of federal law at the expense of state interests.[303] In *Hollingsworth*, for example, the denial of Article III standing to the proponents of Proposition 8 after the Supreme Court of California stated that they could defend the proposition on behalf of the State impaired California's ability to defend its laws, no doubt upsetting those Californians who supported the proposition.[304]

4. Protecting the Executive from Congress

Standing is also not necessary in suits involving state interests to prevent Congress from encroaching on the President's Article II enforcement power. Suits seeking to vindicate state interests do not implicate Article II. Article II does not authorize the President to enforce state public rights or otherwise vindicate state interests.[305] The state has sole control over the enforcement of its laws. Because the President has no power to vindicate state interests, it is not necessary to use Article III standing to prevent Congress from interfering with the President's enforcement power in those cases.

301. Hessick, *supra* note 9, at 66–67 (gathering different state standing rules).

302. *See id.* at 95–98 (explaining that state justiciability rules reflect state determinations of when adjudication is appropriate).

303. *Cf.* Todd C. Berg, *Experts Say Critics of Michigan Supreme Court's Environmental Law Ruling Are Wrong*, MICH. LAW. WKLY., Oct. 15, 2007, 2007 WLNR 30394644 (reporting criticisms of the Michigan Supreme Court for adopting restrictive standing requirement).

304. *See supra* text accompanying notes 278–83.

305. Medellin v. Texas, 552 U.S. 491, 525 (2008) (noting the President's inability to control enforcement of state law when no federal law is implicated).

IV. IMPLICATIONS

Eliminating the standing inquiry in private-rights and state-interest suits would have at least two consequences. First, it would obviously prevent those types of cases from being dismissed for lack of standing. Second, it would reduce discrepancies in standing law and potentially increase the stringency of standing's requirements in suits that do threaten the separation of powers.

A. Removing the Standing Obstacle

The most obvious effect of eliminating Article III standing requirements in private-rights and state-interest suits is that it would prevent those suits from being dismissed on standing grounds. Thus, standing would no longer pose an obstacle in suits in which individuals assert individual rights. Decisions such as *City of Los Angeles v. Lyons*, in which the Court denied standing to an individual who sought an injunction barring police from using a chokehold that he claimed violated the Fourth Amendment,[306] would not be dismissed for lack of standing. Similarly, standing would no longer pose a bar in state taxpayer suits, like *Arizona Christian School Tuition Organization v. Winn*,[307] or in suits seeking to defend state laws, like *Hollingsworth v. Perry*.[308]

Eliminating standing as a threshold inquiry in these cases would remove a substantial obstacle preventing many litigants from obtaining the relief that they request. As many scholars have argued, courts often use standing to achieve particular outcomes.[309] For example, several scholars have argued that the Court denied standing in *Hollingsworth* to avoid ruling that the Constitution obligates the states to recognize gay marriage.[310]

Of course, dispensing with Article III standing may not change the ultimate outcome in many suits, because many individuals who

306. 461 U.S. 95, 106, 111–12 (1983).

307. 563 U.S. 125, 130 (2011).

308. 133 S. Ct. 2652, 2661, 2667–68 (2013).

309. *See* Elliott, *supra* note 245, at 171–72 (recounting arguments that standing allows courts "to manipulate outcomes"); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758 (1999) (describing standing as a "tool[] to further [judges'] ideological agendas").

310. *See* Fallon, *supra* note 49, at 1100 (arguing that the Court may have denied standing in *Hollingsworth* "to avoid a ruling on the merits of that case"); Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 146 (2013) (asserting that the Court in *Hollingsworth* likely avoided the constitutional issue because some of the Justices "were not yet prepared to impose gay marriage on the states").

lack standing will run into other legal barriers to their claims. Most prominently, many individuals lack standing *because* they fail to state an actionable claim.[311] To have Article III standing under current doctrine, a plaintiff must allege a judicially cognizable injury, and whether an injury is judicially cognizable turns on whether the law confers a right on the plaintiff to seek redress for that injury.[312] If an injury is not judicially cognizable, it does not provide a basis for seeking redress. For example, the Court has denied standing to plaintiffs seeking information from the government under the expenditures clause of the Constitution,[313] but found standing for plaintiffs seeking information from the government under the Federal Election Campaign Act ("FECA").[314] The only relevant difference between those decisions is that FECA provides a private right to information while the expenditures clause does not.[315] Because the expenditures clause does not create a right to the information, the plaintiff would not be entitled to the information under the expenditures clause, even if standing were established.

But dismissing those suits on the merits instead of on standing would have several effects. First, it would improve conceptual clarity. Because standing inherently involves questions about the substantive rights at stake,[316] efforts to keep standing separate from the merits have resulted in standing doctrine becoming incoherent and confusing.[317] Eliminating the standing inquiry would ameliorate this

311. *See* Fletcher, *supra* note 20, at 236. Another barrier applies to individuals seeking an injunction. A plaintiff may obtain an injunction only to prevent "a probable ground of possible injury." 1 JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA, ch. 2, § 9, at 9 (10th ed. 1892). A party who lacks standing to challenge a threatened injury because the risk is not "real" likely does not face a probable ground of injury. Whitmore v. Arkansas, 495 U.S. 149, 155, 160 (1990).

312. *See* Lewis v. Casey, 518 U.S. 343, 350 (1996) (denying standing to inmate for denial of access to law library, because the inmate had no right to a law library). The overlap between standing doctrine and the need to state a claim is unsurprising given that the two doctrines serve the same purpose. The function of standing is to ensure that the judiciary stays within its "province . . . to decide on the rights of individuals[,]" Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803), and the function of the requirement that the plaintiff allege a claim entitling him to relief is to allow courts to provide relief only to vindicate individual rights.

313. United States v. Richardson, 418 U.S. 166, 179–80 (1974).

314. Fed. Election Comm'n v. Akins, 524 U.S. 11, 20–21 (1998).

315. *See* Hessick, *supra* note 23, at 306.

316. *See* Fletcher, *supra* note 20, at 236.

317. Nichol, *supra* note 171, at 115–60.

problem. It would also save the resources that parties spend litigating, and courts spend resources resolving, standing issues.[318]

Second, dismissing these suits on the merits instead of on standing grounds could improve judicial legitimacy. Instead of being perceived as avoiding vindicating substantive rights through an easily manipulated standing doctrine,[319] courts would confront the question about the scope of the substantive rights at issue. To be sure, resolving the case on the merits would not result in the plaintiff receiving relief, and in some circumstances, forcing courts to address substantive rights may result in a narrowing of those rights to avoid awarding intolerable remedies that they previously avoided through standing.[320] But it would at least prevent the impression that the courts are trying to avoid the merits.

Third, dismissing these suits on the merits would expand the power of Congress and state legislatures. Article III is a constitutional limitation on the courts that legislatures cannot change. But legislatures can define the scope of substantive rights and say who may enforce those rights. Thus, if a court determines that existing rights do not provide a basis for relief, a legislature may overturn that decision by creating a new right. Even when the dismissed claim is based on a constitutional right, a legislature can create statutory rights that provide broader protections than the Constitution.[321]

B. Changing Standing Doctrine

Restricting standing's application to suits that do raise relevant threats to the separation of powers may also affect the content of standing doctrine. Currently, courts apply the same standing test in all

318. *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 7–8 (2011) (discussing litigation costs of unpredictable jurisdictional rules). This is not to say that eliminating standing from these cases would reduce total costs. Dispensing with Article III standing could potentially result in more federal lawsuits. Although many of those suits would likely be dismissed at preliminary stages for failing to state a claim, at least some could go forward. It is a difficult empirical question whether the extra costs of the new suits would exceed the savings from not having to litigate standing in other suits.

319. Pierce, *supra* note 309, at 1758.

320. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 684 (2006) (suggesting that expanding standing may result in constriction of rights to avoid awarding intrusive remedies).

321. *See, e.g.*, Holt v. Hobbs, 135 S. Ct. 853, 859–60 (2015) ("Congress enacted [the Religious Freedom Restoration Act of 1993] in order to provide greater protection for religious exercise than is available under the First Amendment." (citing Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760–61 (2014))).

cases.[322] But as the aphorism "hard cases[] make bad law" suggests, the particular considerations that drive the outcome of a case play a large role in shaping the doctrine produced by that case.[323] Evidence suggests that the degree to which finding for the plaintiff would interfere with the other branches of the government informs the decision.[324] For instance, Professor Fallon has argued that courts grow more likely to deny standing in suits against the government as the intrusiveness of the remedy against the government increases.[325] Thus, standing cases that present a real, relevant threat to separation of powers are more likely to produce stringent standing doctrines, while cases that do not threaten the separation of powers are likely to generate less demanding doctrines.[326]

Compare, for example, *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*[327] with *Summers v. Earth Island Institute, Inc.*[328] In *Associated General Contractors*, non-minority contractors claimed that a government program that gave preference to minority businesses violated their equal protection rights.[329] Although the plaintiffs could not prove that they would have received the contracts if race were not a factor, the Court held "the denial of equal treatment resulting from" the

322. *See* Fallon, *supra* note 49, at 1067 (noting that the test for Article III standing does "not vary with the merits of a plaintiff's claim").

323. N. Sec. Co. v. United States, 193 U.S. 197, 364 (1904) (Homes, J., dissenting); *see also* Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870) ("It is the merit of the common law that it decides the case first and determines the principle afterwards."); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 883 (2006).

324. Hessick, *supra* note 13, at 76 (arguing that, although the same standing test applies in all cases, courts may actually base their standing decisions on other considerations).

325. *See* Fallon, *supra* note 320, at 648–50 (developing a thesis that jurisdiction doctrines reflect concerns about remedies).

326. *See* Fallon, *supra* note 49, at 1078 (arguing that standing is applied more strictly in cases threatening core executive functions); *see also* Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 378 (1973) (arguing that judges necessarily exercise choice in every decision, even when it appears they are simply following the law). Indeed, the desire to achieve outcomes has led the Court to impose heightened standing requirements even in some suits asserting private rights. For example, in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), the Court denied standing in a Fourth Amendment challenge to a government surveillance program, suggesting that standing is less likely to exist in suits challenging "intelligence gathering." *Id.* at 1147. But as the Court has described it, standing doctrine is targeted at ensuring that courts decide only on rights, not at preventing courts from hearing particular issues. Under the Court's own rationale, the threat to intelligence gathering provides a reason to avoid deciding the case, not for lacking the power to decide it.

327. 508 U.S. 656 (1993).

328. 555 U.S. 488 (2009).

329. 508 U.S. at 666.

preference, "not the ultimate inability to obtain the benefit," sufficed for standing.[330] By contrast, the Court held in *Summers* that a group of environmentalists lacked standing to challenge Forest Service regulations that excluded certain types of projects from various procedural requirements.[331] Like the program in *Associated General Contractors*, the regulations in *Summers* posed a barrier to a benefit desired by the plaintiffs. In the former, the plaintiffs desired the ability to compete equally for contracts, while in the latter they desired stronger environmental protections.[332] Nevertheless, the Court held the harm in *Summers* was too "generalized" to support standing.[333] The only apparent difference between the cases is that, in *Associated General Contractors*, the plaintiffs sought to enforce their equal protection rights, while the plaintiffs in *Summers* sought to vindicate, not their individual rights, but the public interest in securing government protection of the environment.[334]

Because the same standing test applies in all cases, these two types of cases pull standing doctrine in opposite directions and generate inconsistencies in standing.[335] Dispensing with standing in cases that do not threaten the separation of powers would eliminate many of these inconsistencies. The cases that do not threaten the separation of powers would no longer generate standing decisions that seem incompatible with decisions in cases that do threaten the

330. *Id.*

331. 555 U.S. at 490, 497.

332. *Id.* at 490; *Associated Gen. Contractors*, 508 U.S. at 658.

333. 555 U.S. at 494–96 (citing Sierra Club v. Morton, 405 U.S. 727, 734–36 (1972)).

334. This is not to say that courts always impose higher barriers to standing in suits raising separation-of-powers concerns. They do not. In *Lujan v. Defs. of Wildlife*, for example, the Court stated that standing to challenge a federal action can be based solely on the action's interference with the plaintiff's ability to observe animals in other countries, "even for purely esthetic purposes." 504 U.S. 555, 562–63 (1992) (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)); *see* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986) (finding "a sufficient 'injury in fact' in that the whale watching and studying of their members [would] be adversely affected by continued whale harvesting" (citing Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970))). The point is that when courts do impose higher barriers to standing they tend to involve cases implicating the powers of other branches.

335. *See, e.g.*, Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2246–48 (1999) (noting inconsistencies in the application of the doctrine to private and public cases); Hessick, *supra* note 23, at 276 (noting the incoherence and confusion); Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 639 (1999) (stating that standing doctrine rests on "extremely complex and unwieldy threshold issues of fact, ill-suited to judicial resolution").

separation of powers. Standing law thus would become more coherent and predictable.[336]

A second consequence is that eliminating standing from cases that do not threaten the separation of powers would tend to make standing more stringent in cases in which it still applies. That is because non-threatening cases would no longer generate opinions tending to dilute standing doctrine. The only cases addressing standing would be those that present the sort of threat to the separation of powers that standing is designed to handle, and the decisions in those cases would tend, over time, to create a more demanding law of standing than currently exists. Standing accordingly would apply to a narrower set of cases. But the constraints imposed by standing would be stronger.

For example, in challenges to administrative regulations (which do not rest on private rights),[337] courts might eventually curtail standing based on emotional or aesthetic injury, based on the conclusion that those injuries are inherently subjective and allow for broad standing to challenge government action.[338] Likewise, they may limit standing based on injuries that plaintiffs create through their own deliberate actions, because of the ease of creating standing to challenge those actions.[339]

A more stringent standing law in these areas would have at least two consequences. First, it would better insulate government decisions. That would lead to fewer government resources being required to fend off court challenges. It could also result in agencies being more willing to adopt new regulations because they are less likely to face successful court challenges. Further, it could lead to increased scrutiny of government actions by other institutions, such as Congress and the public, because a more stringent standing doctrine

336. Of course, it would not prevent all inconsistencies. Different theories of separation of powers held by different Justices create inconsistencies in standing doctrine in cases that do raise separation-of-powers concerns. For example, *FEC v. Akins*, 524 U.S. 11, 13 (1998), written by Justice Breyer, who holds a broad view of standing, granted standing to individuals seeking information under the Federal Election Campaign Act, but *United States v. Richardson*, 418 U.S. 166, 170 (1974), written by Chief Justice Burger, who held a narrower view, denied standing to individuals seeking information under the Constitution.

337. *See supra* text accompanying notes 181–85.

338. *See, e.g.*, ACLU of Ill. v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986) (denying standing based solely on harm caused by seeing public display of cross); Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 85 (2010) ("[A]esthetic" injury [is] an inherently subjective concept.").

339. *See* Pushaw, *supra* note 338, at 94.

would reduce the availability of judicial oversight, which currently plays a large role in constraining government action.

Second, a more demanding standing doctrine may also increase the political capital of the courts. Courts depend on other governmental institutions to enforce their orders; if the judiciary enters too many disfavored decisions, those other institutions may refuse to enforce the orders.[340] Affording greater protection for government decisions through more rigorous standing requirements reduces the opportunity for courts to render decisions unpopular with the other branches. Accordingly, if a court were to enter a disfavored order in a suit in which it did find standing under the more rigorous test, the other branches of government may be more willing to submit.

CONCLUSION

If separation of powers is the "single basic idea" motivating Article III standing,[341] Article III standing is overbroad. Many suits do not raise the kinds of threats to separation of powers that Article III standing doctrine purports to combat. If we accept the Court's justifications for standing, standing should not apply in those cases. Federal courts should skip the standing inquiry and proceed to apply the other substantive and procedural rules for deciding cases.

Dispensing with standing in cases in which its rationale does not apply will have various benefits. It will save the resources and effort spent on resolving standing—which is often difficult to resolve—in cases in which it should not apply. It will also remove the unnecessary opportunity for erroneous rulings in those cases.

Restricting the application of standing to cases in which its separation-of-powers reasons apply will also improve the quality of standing doctrine. Despite the insistence that a single standing test applies to all cases, standing doctrine has badly fragmented into different strands. That fragmentation is due in large part to different values and concerns influencing standing decisions.[342] Removing the standing inquiry from cases in which standing should not apply would

340. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 55–59 (1980).

341. Raines v. Byrd, 521 U.S. 811, 820 (1997) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).

342. Hessick, *supra* note 13, at 76 ("Although framing their decisions in terms of whether a threat is speculative or not, courts may actually base their standing decisions on matters such as separation of powers, federalism, efficiency, docket size, or some other concern.").

decrease that fragmentation, thereby increasing coherence and consistency. Moreover, confining the standing inquiry to cases that actually raise salient separation-of-powers issues will have the tendency over time to change the doctrine so that it more accurately implements the purpose behind standing. Cases that do not present separation-of-powers concerns will no longer have a diluting influence on the doctrine.[343]

This is not to say, however, that standing *should* extend to the cases that raise these threats to the separation of powers. Some commentators have strongly argued that standing should impose no impediment to lawsuits, even to private actions asserting public rights,[344] or that courts should dispense altogether with standing as a separate jurisdictional limitation.[345] But irrespective of whether standing should apply to those types of actions, it should not apply to cases that do not threaten the separation of powers.

Of course, although the Court has said that separation of powers is the only consideration underlying standing, its decisions do not always match its rhetoric. Standing decisions often seem to reflect other concerns, such as protecting federalism, preserving the autonomy of plaintiffs, and controlling the docket size. Likewise, it is entirely possible that standing doctrine actually rests on a different conception of separation of powers than the one the Court has articulated in justifying standing. To the extent that courts think standing should be used for these reasons, the doctrine should be expressly reformulated to embrace those concerns. But if the Court firmly believes that standing exists solely to protect the separation of powers, as articulated by the Court, that doctrine is vastly overbroad.

343. *See* Hessick, *supra* note 23, at 322 (noting the effects of the facts of the case on the development of standing).

344. *See* Monaghan, *supra* note 107, at 1370–71.

345. *See* Fletcher, *supra* note 20, at 221–24.