7-15-2010

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91 Boston Law Review 159 (2011)

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[*] Associate Professor, the University of Alabama School of Law. Work on this paper was partially funded by grants from the University of Alabama School of Law and from the Columbus School of Law, The Catholic University of America. I presented an early draft of this paper at a workshop at the University of California, Berkeley School of Law, and a mature draft at the Southeast Regional Junior Faculty Working Papers Conference at the University of Florida Levin College of Law. I received valuable comments from the late Paul Mishkin and from Cara Drinan, Malcolm Feeley, Amanda Frost, Andy Hessick, Paul Horwitz, Bob Kagan, Ron Krotoszynski, Amanda Leiter, Brad Mank, Anne Joseph O'Connell, Liz Porter, Bo Rutledge, Martin Shapiro, Justin Smith, Max Stearns, Sasha Volokh, and David Zaring. Penny Gibson of the Bounds Law Library and Mary Baschab, Emily Fisher, Hannah Richard, Aaron Dendy, and Sam Rosten provided valuable research assistance. Thanks to my colleagues, particularly Dean Ken Randall, for their support.

Some critics of the Supreme Court's restrictive Article III standing doctrine – knowing that the Court is unlikely to change course – have argued that Congress could take steps to expand standing to sue. Yet no scholar has systematically examined Congress's options in conferring standing. This Article fills that gap, demonstrating that Congress's power is far more limited than previously recognized.

Congress has three options to expand standing. First, Congress may enact statutes that define injury-in-fact, causation, and redress under Article III, thus establishing standing for certain classes of plaintiffs. But this approach will fail if the Court finds such statutes unconstitutional, and the Court's increasing insistence on its role as the sole arbiter of constitutional meaning (revealed in cases under the Commerce Clause and the Fourteenth Amendment) suggests it would reject a congressional effort to create standing through legislative findings.

Second, critics have suggested that Congress provide a bounty to victorious plaintiffs, thus giving them the concrete stake in litigation that the Constitution demands. The Court has held that bounties in certain situations do satisfy Article III; to expand bounties to a wide variety of situations is, however, unlikely to pass Article III muster. Such an expansion may also interfere with the President's Article II power to "take Care that the Laws be faithfully executed" and presents serious practical problems.

Third, Congress may create one or more Article I tribunals to hear certain lawsuits, just as, for example, the Article I Tax Courts do. Article III standing doctrine by definition does not apply to such bodies. Moreover, locating such tribunals in the Executive Branch would alleviate concerns under the "take Care" clause. But this approach may well raise other constitutional problems, such as the improper delegation of judicial power, and has extensive practical problems that have gone unnoticed.

After analyzing these three options, I conclude that Congress is essentially unable to undertake these efforts. Where it does have power to solve standing problems, the practical problems with exercising that power ensure that Congress is no more likely than the Court to solve standing. Even worse, it is possible that congressional efforts to expand standing may prompt the Court to impose even stricter standing requirements, thus worsening the problem such efforts would intend to ameliorate.

INTRODUCTION

Most critics[1] of the Supreme Court's Article III standing doctrine suggest ways the Court itself might fix the doctrine.[2] But the Court has not responded to the numerous calls to change the doctrine, issuing decisions, frequently 5 to

[1] *See infra* Part I.A.2; *see generally* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 466-67 (2008) (summarizing standard critiques of the Court's Article III standing doctrine).

[2] *See* Elliott, *supra* note 1, at 508-10; *infra* Part I.B.

4, that tinker at the margins but further entrench the tripartite test of injury-in-fact, causation, and redressability.[3] Even with recent changes in its lineup,[4] the Court seems unlikely to undertake reconstruction of the doctrine in the near- or medium-term.[5]

Yet the doctrine is rife with problems. As Professor Fletcher wrote almost twenty-five years ago:

> The structure of standing law in the federal courts has long been criticized as incoherent. It has been described as "permeated with sophistry," as "a word game played by secret rules," and more recently as a largely meaningless "litany" recited before "the Court . . . chooses up sides and decides the case."[6]

Some compare certain standing cases to *Lochner v. New York* as examples of judicial abuse of power,[7] others argue that standing doctrine usurps

[3] *E.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009).

[4] Amy Goldstein & Paul Kane, *Sotomayor Wins Confirmation*, WASH. POST, Aug. 7, 2009, at A1; Carl Hulse, *Senate Confirms Kagan as Justice In Partisan Vote*, N.Y. TIMES, Aug. 6, 2010, at A1.

[5] The Northern District of California recently found that California's ban on gay marriage violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), and efforts to appeal that case have raised unusual questions of who has standing to bring the appeal. *See* Order Certifying a Question to the Supreme Court of California, Perry v. Schwarzenegger, No. 10-16696, 2011 WL 9633 at *1 (9th Cir. Jan. 4, 2011). This case provides the most obvious incentive for the conservative wing of the Court to broaden standing (although, as I discuss below, normal issues of appellate procedure may preclude appeal, regardless of the decision on standing). If it does so, however, it is certain to do so in a carefully cabined way; the conservative wing also risks losing on the merits, with Justice Kennedy joining the four liberal justices to affirm the lower court's decision in favor of gay marriage. *See infra* notes 109-123 and accompanying text.

One can, of course, disagree about how much of a problem the Court's standing doctrine actually poses. First, one may find a salutary effect in standing's restrictions. *See infra* notes 36-51 and accompanying text. Second, one can conclude that standing is not really so restrictive. If, for each problem one might want to sue over, someone can be found to act as plaintiff who has the requisite injury-in-fact, etc., then the doctrine poses little real obstacle. For the remainder of this Article, I operate from the conclusion that the Court's current standing doctrine imposes real restrictions and that the consequences of those restrictions are often negative.

[6] William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (footnotes omitted) (quoting 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983)); *see also* Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting); Abram Chayes, *The Supreme Court 1981 Term – Foreword: Public Law Litigation & the Burger Court*, 96 HARV. L. REV. 4, 22, 23 (1982).

[7] *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 191 (1992).

congressional power,[8] and still others complain that standing exacerbates existing inequalities in politics and society more broadly.[9]

Because the Court has continued essentially the same restrictive approach to standing for three decades,[10] critics have suggested that Congress[11] take steps to expand standing.[12] Indeed, an early version of the recent climate change bill would have done just that, attempting to surmount the Article III test by defining both injury-in-fact and causation very broadly.[13] This recent proposal, abandoned in later versions of the bill,[14] takes one approach long suggested by critics[15] – that Congress might overcome the Court's cramped standing doctrine by making legislative findings of standing. Critics have also suggested that Congress might amend current citizen-suit provisions to provide

[8] *See, e.g.*, Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1198-1200 (1993).

[9] *E.g.*, Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 305 (2002).

[10] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992) ("[S]tanding contains three elements. First, the plaintiff must have suffered an 'injury in fact[;' s]econd, there must be a causal connection between the injury and the conduct complained of[; and t]hird, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'") (quoting Allen v. Wright, 468 U.S. 737, 756 (1984); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41-43 (1976); Warth v. Seldin, 422 U.S. 490, 508 (1975)).

[11] The Executive Branch might have options for transcending the Court's Article III limitations (at a minimum, appointing federal judges who are friendly to an expansive view of standing); such Executive Branch options are beyond the scope of this Article. However, as I discuss *infra* Part I.A, the Executive Branch seems unlikely to attempt expansions of standing doctrine, as that branch often invokes the Court's restrictive standing doctrine to prevent challenges to agency action or other litigation. *See, e.g.*, Brief for Petitioners at 28, Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009) (No. 07-463). However, the Executive Branch supports citizen standing in some situations. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 27, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (No. 98-822).

[12] Thus, my response to these proposals will not discuss the issues raised when Congress attempts to keep certain categories of cases *out* of the federal courts, for example, through jurisdiction-stripping statutes. *See generally*, Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts – Opposition, Agreement, Hierarchy*, 86 GEO. L.J. 2445 (1998) (Symposium).

[13] STAFF OF H. COMM. ON ENERGY & COMMERCE, 111TH CONG., DISCUSSION DRAFT OF AMERICAN CLEAN ENERGY & SECURITY ACT OF 2009 § 336(a), at 527-28 (Mar. 31, 2009), http://energycommerce.house.gov/Press_111/20090331/acesa_discussiondraft.pdf. See *infra* notes 141-146 and accompanying text for a more detailed discussion of the proposed provision.

[14] *See* American Clean Energy & Security Act of 2009, H.R. 2454, 111th Cong. (as introduced in the House, May 15, 2009).

[15] See *infra* Part II for a discussion of this proposed solution.

a reward, or bounty, to victorious plaintiffs.[16] More recently, some critics[17] have suggested taking Article III courts out of the equation altogether: Congress might place at least some disputes in Article I tribunals, which are not constrained by Article III standing doctrine.

As I discuss in more detail below, the suggestion that Congress step into the gap reflects, as does the debate between the critics and defenders of standing doctrine, a larger argument about the proper functioning of the federal government.[18] Proponents of a restrictive standing doctrine contend that a high standing bar plays an essential role in managing the judicial function under Article III;[19] other proponents add that standing plays an important part in insuring that the courts do not impinge upon the executive's duties to "take Care that the Laws be faithfully executed" under Article II.[20] Such invocations of the "take Care" Clause reflect a fear that citizen suits and other private enforcement actions permit Congress to conscript the courts in its battle with the Executive, resulting in an imbalance among the branches.[21] For supporters of a restrictive standing doctrine, the Court should strictly police the boundaries of its power.

Critics of standing doctrine, by contrast, contend that current standing doctrine prevents suits in many situations where Congress has authorized them,[22] thus interfering with Congress's legislative powers. Moreover,

[16] See *infra* Part III for a discussion of the False Claims Act and the application of bounties to the standing context.

[17] See *infra* Part IV for a detailed discussion of Article I tribunals and the problems they pose. *See also* James Dumont, *Beyond Standing: Proposals for Congressional Response to Supreme Court Standing Decisions*, 13 VT. L. REV. 675, 684-89 (1989); David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301, 308 (2007); Preston Carter, Note, *"If an (Endangered) Tree Falls in the Forest, and No One Is Around . . . .": Resolving the Divergence Between Standing Requirements & Congressional Intent in Environmental Legislation*, 84 NOTRE DAME L. REV. 2191, 2212-22 (2009); Timothy C. Hodits, Note, *The Fatal Flaw of Standing: A Proposal for an Article I Tribunal for Environmental Claims*, 84 WASH. U. L. REV. 1907, 1907 (2006).

[18] *See infra* Part I.A.

[19] *See, e.g.*, MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 282 (2000); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 519-20 (1994).

[20] U.S. CONST. art. II, § 3, cl. 4 (Take Care Clause)*; see also* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1684 (2004); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983). The Court has never directly addressed the question of whether Article II prohibits suits brought, for example, by citizens under citizen-suit statutes, or by relators in *qui tam* actions under the False Claims Act, 31 U.S.C. § 3730 (2006). I discuss these issues in Parts II and III, *infra*.

[21] *See* Elliott, *supra* note 1, at 492-500.

[22] According to these critics, *Lujan* presents an excellent example of judicial interference

because the Court's doctrine gives broad court access to those who are regulated by government action while limiting suits from those who benefit from government regulation,[23] standing doctrine privileges anti-regulatory challenges over pro-regulatory challenges.[24] Because of this asymmetry in access, as well as the interference with congressional authority, these critics think that standing needs fixing. If the Court will not do it, they have argued, perhaps Congress can.

I belong to this latter group of critics,[25] and in my view the turn to Congress is appealing, given the Court's seemingly permanent adoption of a restrictive view of standing and the problems raised by those restrictions.[26] But few critics have given more than cursory attention to these congressional options – whether to enact findings supporting standing, to confer bounties on victorious plaintiffs, or provide alternate tribunals – and no one has examined the full array of options Congress might have in solving standing problems.

In this Article, I undertake that examination in light of the dramatic changes in many areas of Supreme Court doctrine over the last twenty years.[27] To my dismay, I find that Congress has far less power to alter standing doctrine than has been thought.

The primary arguments for the legislative findings option, for example, were put forward almost two decades ago. No one has reexamined the findings

with congressional power. *See* Pierce, *supra* note 8, at 1181-82; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992). As I discuss below, citizen suits authorized by Congress frequently raise these separation-of-powers concerns and consequently present Article III standing problems. *See infra* Part I.A.

[23] *See, e.g.*, *Lujan*, 504 U.S. at 561-62 ("[When] the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.").

[24] *See* Elliott, *supra* note 1, at 491-92; *cf.* Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 38-40 (1993) (describing the Court's lack of guidance as to how to characterize "injury" for the purposes of standing).

[25] *See* Elliott, *supra* note 1, at 500.

[26] Some cases, for example *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 173-74 (2000), have been praised as welcome correctives to the Court's limited approach to standing. *See, e.g.*, William W. Buzbee, *Standing & the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 249 (2001). That praise is, in general, overstated. While the majority in *Laidlaw* found that standing existed in circumstances that could have justified – or *demanded*, as Justice Scalia wrote, *Laidlaw*, 528 U.S. at 201-02 (Scalia, J., dissenting) – the opposite conclusion, *Laidlaw* still unquestioningly adopts the tripartite test, rooted in the text of Article III, that distresses the critics of standing. *Id.* at 180. That test, and its narrow view of who should have access to the federal courts, dates at least to *Allen v. Wright*, 468 U.S. 737, 752 (1984). Thus *Laidlaw*, albeit welcome, is not a game-changer.

[27] *See* Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 291, 292 (2005) ("I've suspended work on a revision [of my constitutional law treatise] because . . . conflict over basic constitutional premises is today at a fever pitch.").

suggestion in light of recent and surprising limitations on Congress's legislative power under the Commerce Clause and under Section 5 of the Fourteenth Amendment.[28] Despite Justice Kennedy's repeated assertions that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,"[29] I conclude that other doctrinal changes portend failure for any congressional efforts to make real changes to standing doctrine.

Those who have put forward the bounty option have some decisions on their side,[30] but it is far from clear that the Court would accept a wholesale expansion of bounties. Moreover, these critics have not seriously explored what it would mean to make bounties broadly available: Is it financially feasible? Will it create more problems than it solves? And while both the findings and the bounty approaches are designed to overcome the restrictions current Article III standing problems impose,[31] they do little to resolve potential problems under Article II's Take Care Clause, a concern to at least some members of the Court.[32]

The Article I tribunal is the most unconventional option. Such tribunals could receive a vastly broader number of complainants regardless of their standing to sue because Article III standing doctrine does not apply to administrative agencies.[33] These tribunals might also solve the Article II problem, if they are located in the executive branch, because the President would ultimately supervise them.[34] This option also presents the intriguing

[28] City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (limiting Congress's powers under Section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549, 562-63 (1995) (limiting Congress's powers under the Commerce Clause); *see infra* notes 177-196 and accompanying text. Both *Lopez* and *Boerne* are part of what has been called "the Rehnquist Court['s] . . . sustained assault on congressional power." Neal Devins & Keith E. Whittington, *Introduction in* CONGRESS & THE CONSTITUTION 1, 3 (Neal Devins & Keith E. Whittington eds., 2005) (discussing the history of the Court's relationship to congressional action). At least one scholar has suggested that Congress continues to retain the authority to establish standing by statute, but the analysis ignores broader trends in the Court's doctrine, addressing only the equivocal standing cases themselves. *See* Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1025 (forthcoming) (manuscript on file with author).

[29] Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (Kennedy, J., concurring).

[30] *See, e.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000) (finding adequate grounds for standing in relationship between United States and *qui tam* relator); *see also* Sprint Commc'ns. Co. v. APCC Servs., Inc., 554 U.S. 269, 270 (2008) (finding same between assignor and assignee).

[31] Under either approach, however, Article III problems may remain. *See infra* Parts II.C, III.C.

[32] *See infra* notes 88-93 and accompanying text; *infra* Part III.C.2.

[33] *See* Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n, 59 F.3d 1281, 1289 (D.C. Cir. 1995).

[34] Krinsky, *supra* note 17, at 317-20. As I discuss below, however, the Article II

possibility that Congress could create an institution that overcomes some of the limitations of traditional litigation.

At the same time, however, such tribunals raise significant concerns about the improper delegation of judicial power, an Article III problem separate and apart from standing doctrine.[35] They also present serious – and perhaps insuperable – practical problems that have largely been ignored by those who would have Congress create them. How would these tribunals interact with the Article III courts? What if challenges to a regulation are brought simultaneously in both the tribunal and an Article III court? If we cannot find good answers to these questions, the Article I tribunal almost certainly creates more problems than it solves.

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The Article is structured as follows. In Part I, I give a brief overview of the standing doctrine and its failings, emphasizing in particular the problems caused by the doctrine for citizen suits. I review various pleas made to the Court to fix the doctrine, explain why the Court is unlikely to change course, and argue that the problems caused by the doctrine nevertheless need fixing. In Parts II-IV, I ask what options Congress might have for addressing these problems, examining the usefulness of each option in light of not only the Article III standing problem, but also the Take Care Clause problem that the Court has adumbrated but never resolved. Part II addresses the legislative findings option; Part III, bounties; and Part IV, the Article I tribunal. My overall conclusion is that Congress lacks power to undertake many of these efforts and that, where it does have power to solve standing problems, the practical problems with exercising that power ensure that Congress is no more likely than the Court to solve standing.

In the end, I conclude, our only resort is in the Court: the hope of persuading a majority to expand the existing doctrine slightly at the margins and the possibility that future changes in personnel might make deeper revisions of the doctrine feasible.

problems raised regarding citizen standing in federal courts may apply equally to proceedings before Article I tribunals. *See infra* Part IV.C. Others have suggested encouraging states to open their courts to certain challenges, a suggestion beyond the scope of this Article. *See* William Grantham, Note, *Restoring Citizen Suits After* Lujan v. Defenders of Wildlife*: The Use of Cooperative Federalism To Induce Non-Article III Standing in State Courts*, 21 VT. L. REV. 977, 978 (1997). One might also suggest amending the Constitution to change the doctrine directly; that option, of course, opens up Pandora's Box – there is no guarantee that an amendment to Article III would produce the outcome that critics of standing desire.

[35] *See infra* Part IV.D. The Court has decided a number of cases in the area of judicial non-delegation. *See, e.g.*, Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 51-52 (1989); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593-94 (1985); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982).

I. STANDING

In any lawsuit in an Article III court, standing doctrine requires (1) that the plaintiff have suffered, or be threatened with, an injury in fact that is "'actual or imminent, not conjectural or hypothetical;'" (2) that at least a portion of that injury be "fairly traceable" to the actions of the defendant; and (3) that the relief requested in the suit redress at least some of the plaintiff's injury.[36] While this tripartite test speaks in ordinary terms of injury and causation, it has loftier goals: standing and the other justiciability doctrines "relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[37] In the remainder of this Part, I give a short overview of standing's history; summarize the problems created by the doctrine and the suggestions made for its rehabilitation; argue that the current Court is unlikely to make satisfactory changes to the doctrine; and make a case for why looking outside the courts for a solution is worthwhile.[38]

A. *Standing and Its Problems*

1. The Development of the Doctrine

Most critics of Article III standing doctrine believe that the doctrine was created in the Twentieth Century.[39] Cass Sunstein has described five stages in

[36] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

[37] Vander Jagt v. O'Neill, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (Bork, J., concurring); *accord* Allen v. Wright, 468 U.S. 737, 750 (1984). The other justiciability doctrines include ripeness, mootness, the political question doctrine, and the various abstention doctrines. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3529, at 612 (3d ed. 2008).

[38] In addition to *constitutional* standing limitations, courts also apply *prudential* standing doctrines, such as the zone-of-interests test. *See* 13A WRIGHT ET AL., *supra note 37*, § 3531, at 16. These prudential doctrines are beyond the scope of this discussion.

[39] By contrast, the Court has recently described the doctrine as an "essential and unchanging" requirement of the Constitution, *Lujan*, 504 U.S. at 560, though a number of scholars have demonstrated that such strict limitations to access to the courts would have been foreign to the Founders. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418-25 (1988); *see also* Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 817-18 (1969); Sunstein, *supra* note 7, at 170-79. *But see* Bradley S. Clanton, *Standing & the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1007-08 (1997) (arguing that access to the courts was more limited at the Founding than Winter, Sunstein, and Berger admit); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, & the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 5-6 (2001) (asserting that the Founders would have supported the injury-in-fact threshold that the Court has implied from Article III);

the doctrine's development, beginning in the first decades of the Twentieth Century;[40] the tripartite test of injury-in-fact, causation, and redressability had emerged by 1978.[41] The most recent stage, beginning in the late 1970s, has been characterized by increasingly strict standards for finding standing.[42] Indeed, Elizabeth Magill has argued that this strict version of standing, far from a constitutional mandate, emerged as a reaction against the explosion of public interest litigation starting in the late 1960s.[43]

The Court has rooted standing doctrine in the text of Article III, which gives the federal courts authority to hear only "Cases" and "Controversies" and serves to maintain the constitutional balance between the branches.[44] Indeed, the Supreme Court has stated that standing "is built on a *single basic idea* – the idea of separation of powers."[45] In addition to ensuring that the plaintiff presents a case suitable of judicial resolution (the traditional concept),[46] standing doctrine also works to prevent courts from hearing cases involving

George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10028, 10034-37 (1999); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) ("[H]istory does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning.").

[40] According to Professor Sunstein, the Court first created standing hurdles to prevent the federal courts – famously friendly to economic interests, *see* Lochner v. New York, 198 U.S. 45, 53 (1905) – from interfering with Progressive and New Deal initiatives. Sunstein, *supra* note 7, at 179-81. Congress then opened the courts to those suffering a "legal wrong" under statute or common law, permitting such individuals to sue under the Administrative Procedure Act. *Id.* at 181-82. As Professor Magill has shown, during this period the Court allowed plaintiffs to file suit as private attorneys general, requiring no showing of personal interest in the lawsuit at all. Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1139-41 (2009). The courts, in the 1960s, expanded the concept of "legal wrong" under the APA to allow suits by regulatory beneficiaries. Sunstein, *supra* note 7, at 183-84. The Court then, in the fourth stage, departed from the concept of "legal wrong," inventing instead the idea of injury in fact in *Ass'n of Data Processing Organizations v. Camp*, 397 U.S. 150, 152 (1970). Sunstein, *supra* note 7, at 185-86.

[41] Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 79 (1978).

[42] Sunstein, *supra* note 7, at 193-97; *see* Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977). *But see* Buzbee, *supra* note 26, at 249.

[43] Magill, *supra* note 40, at 1183-95.

[44] U.S. CONST. art. III, § 2. *See generally* Elliott, *supra* note 1. For a sophisticated argument that judges and scholars have misinterpreted Article III by ignoring the difference between "Cases" and "Controversies," see Pushaw, *supra* note 19, at 449-50.

[45] Allen v. Wright, 468 U.S. 737, 752 (1984) (emphasis added).

[46] Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Massachusetts v. EPA, 549 U.S. 497, 517 (2007); Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (1992) (Stevens, J., concurring) ; *Duke Power*, 438 U.S. at 72 (1978); Elliott, *supra* note 1, at 468-75.

issues better addressed by the political branches,[47] and, at least in certain cases (primarily those written by Justice Scalia), has suggested that a restrictive standing doctrine is necessary to prevent Congress from using citizen suits (and thus the courts) in an improper effort to exert control over the Executive Branch.[48]

This last concern arises from the worry that, when the courts hear too broad a range of citizen suits, they impinge on the executive power to "take Care that the laws be faithfully executed."[49] The Court has not held that Article II, by itself, imposes limitations on who may sue.[50] Instead, the Court has inflected the Article III standing analysis with Article II concerns.[51] The idea, overall, is to ensure that the courts stay within their constitutionally-assigned role; without a doctrine that limits access to the courts, we would see an inappropriate expansion of the federal courts' power, at the expense of Congress and the President.[52]

The narrowness of the Court's current doctrine has a significant effect upon who may sue. First, some categories of would-be plaintiffs cannot bring suit in the federal courts. Second, that fact causes an asymmetry in the cases the courts *do* hear: the doctrine admits regulated entities easily,[53] while regulatory

[47] *See* Warth v. Seldin, 422 U.S. 490, 499-500 (1975); Allen, 468 U.S. at 750; Elliott, *supra* note 1, at 475-92; Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 329-39 (1996) (arguing that standing doctrine has largely subsumed the political question doctrine).

[48] *See, e.g.*, Lujan, 504 U.S. at 577 (restrictions on standing limit Congress's ability to turn the courts into "virtually continuing monitors of the wisdom and soundness of Executive action" (internal quotation marks and citation omitted)). *See also* Elliott, *supra* note 1, at 492-501. Whether a plaintiff satisfies the tripartite test of injury-in-fact, causation, and redressability often has little to do with the kind of issue that the plaintiff raises, the proper forum for resolving that issue, or the possibility that the issue involves one of Congress's battles with the executive branch. *See* Elliott, *supra* note 1, at 483-92, 497-500.

[49] U.S. CONST. art. II, § 3, cl. 4; *see* Elliott, *supra* note 1 at 487-92.

[50] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) ("Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. . . . In my view these matters are best reserved for a later case.").

[51] *Lujan*, 504 U.S. at 577 ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the [President's] most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)); *see also Allen*, 468 U.S. at 761.

[52] *See* Sierra Club v. Morton, 405 U.S. 727, 740 (1972).

[53] *See Lujan*, 504 U.S. at 561-62 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." (quoting *Allen*, 468 U.S. at 758)); *see also* Sunstein, *supra* note 7, at 195.

beneficiaries who bring citizen suits to enforce, for example, the Endangered Species Act, are more likely to lack standing.[54]

2. Problems with Standing

Standing doctrine has, of course, been criticized extensively. At the most basic level, standing doctrine is confusing and unpredictable.[55] Indeed, Justice Harlan, in dissent, described the doctrine as a "word game played by secret rules"[56] and the Court itself has called it "one of the most amorphous [concepts] in the entire domain of public law."[57]

This unpredictability leads to further, deeper criticisms. As I show in what follows, standing has been criticized as a doctrine that, despite its asserted purpose to limit the power of the courts, gives far *too much* power to courts in a variety of ways, often at the expense of consistency, congressional authority, and even basic fairness. At the same time, however, defenders of the doctrine argue that it is an essential bulwark against overreaching by private litigants; still others contend that a restrictive standing doctrine is necessary to control Congress itself.

a. *Standing: Carte Blanche or Important Tool?*

A standard critique of standing doctrine holds that the doctrine is so malleable that courts have unseemly opportunities to implement their policy preferences under the guise of a jurisdictional dismissal.[58] In an empirical study, Professor Richard Pierce found that standing doctrine creates space for "the strong tendency of judges to engage in ideologically driven doctrinal manipulation."[59] Professors Amy Wildermuth and Lincoln Davies have suggested something similar.[60] Some critics even argue that standing doctrine

[54] *See Lujan*, 504 U.S. at 561-62.

[55] Fletcher, *supra* note 6, at 231 (describing the doctrine as "incoherent"); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 480 (1996) (describing the doctrine as "theoretically incoherent"); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 75 (2007) (describing standing and other justiciability doctrines as "pointless constraint[s] on courts"); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988) (calling standing "manipulable" and permeated with "doctrinal confusion"); Winter, *supra* note 39, at 1418-25 (describing the doctrine as lacking a historical foundation).

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

[57] *Id.* at 99 (majority opinion) (quoting *Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary on S. 2097*, 89th Cong. 498 (1966) (statement of Paul A. Freund, Professor, Harvard University School of Law)); *see also id.* at 94 (asserting that the Case or Controversy provision of Article III has "an iceberg quality, containing beneath [its] surface simplicity submerged complexities").

[58] *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742-43 (1999).

[59] *Id.* at 1760.

[60] Amy J. Wildermuth & Lincoln L. Davies, *Standing, On Appeal*, 2010 ILL. L. REV. 957,

verges on the abuses of the *Lochner* era: "the injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process."[61] The contention overall is that standing doctrine gives courts *carte blanche* to manipulate outcomes.

Maxwell Stearns has argued, to the contrary, that standing is required to prevent, not *judicial* manipulation but manipulation of precedent by would-be plaintiffs.[62] Because stare decisis causes doctrine to take certain paths based on the order in which cases are decided,[63] and because the federal appellate courts are collective decisionmakers, paradoxes inherent in collective decision making[64] may cause a court to reach different results in sequential cases depending solely on the order in which the cases are decided. Thus, interest groups have incentives to manipulate the sequence in which cases arise, and standing doctrine makes that manipulation more difficult.[65]

b. *Standing as a Cause of Asymmetry in Decisionmaking*

Some critics argue that current standing doctrine imposes an asymmetry in access, admitting the lawsuits of regulated entities far more readily than those

963-68 (arguing that appellate review from agency decisions presents unique standing problems for individual litigants).

[61] Sunstein, *supra* note 7, at 167; *see* Fletcher, *supra* note 6, at 233; Sunstein, *supra* note 55, at 1480 (likening standing decisions to those of the *Lochner* period, "when constitutional provisions were similarly interpreted so as to frustrate regulatory initiatives in deference to private-law understandings of the legal system").

[62] STEARNS, *supra* note 19, at 249-51; Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1329-84 (1995) [hereinafter *Standing Back from the Forest*]; *see* Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995) (providing historical evidence in support of *Standing Back from the Forest*); *see also* Maxwell L. Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321, 343-57 (2001). Stearns's arguments focus on the Supreme Court, but presumably would extend to any court that makes decisions by panel.

[63] *Standing Back From the Forest*, *supra* note 62, at 1309.

[64] *Id.* at 1329-33. Technically, this is the intransitivity in preferences known as the Condorcet Paradox. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 63-65 (1989) (explaining cycling and its role in majority rule).

[65] *Standing Back from the Forest*, *supra* note 62 at 1310. Because the tripartite test demands that litigants make a factual showing "that is largely beyond the litigants' control," it limits the ability of litigants to control the timing of cases. *Id.* at 1361-62. Thus "standing serves the critical function of encouraging the order in which cases are presented to be based upon fortuity rather than litigant path manipulation." *Id.* at 1359. To be sure, litigants can control some of the factual bases of standing. *See* Siegel, *supra* note 55, at 115 ("Ideologically interested parties are permitted to place themselves in harm's way in order to suffer an injury that can serve as the basis for standing" and thus have "considerable, if not unlimited" control over the timing of cases.). But, as I discuss below, I believe that current standing doctrine places real restrictions on who may sue. *See infra* Part I.C.

of regulatory beneficiaries.[66] Professor Pierce contends that such an asymmetry in the courts necessarily bleeds back into the agencies themselves – the agencies, knowing that citizens have no traction in court, will try to please those who can get such traction: the regulated industry.[67] This, in turn, will facilitate regulatory "capture;" this is a version of the phenomenon the Framers called 'factionalism.' Thus, standing doctrine may "maximiz[e] the potential growth of the political pathology the Framers most feared and strived to minimize."[68]

This asymmetry in access also may produce a "one-way ratchet" against regulation.[69] Regulated entities usually have standing to sue, and they usually seek to strike down rules or to stop the over-enforcement of statutes.[70] Regulatory beneficiaries, on the other hand, have a harder time getting standing to challenge the *under*-enforcement of the law.[71] An agency, when faced with a certain lawsuit for over-enforcement, might choose to err on the side of under-enforcement, reasoning that a lawsuit challenging such under-enforcement faces a much tougher standing hurdle.

Of course, for those who believe in a limited central government, the limitations that standing doctrine imposes are essential. Specifically, the asymmetry in access properly gives regulated entities a stronger voice, and the resulting doctrinal asymmetry is appropriate.[72] But one need not adopt such a

[66] *See supra* notes 53-54 and accompanying text.

[67] Pierce, *supra* note 8, at 1194-95. *See* Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27, 43, 45 (2003) (comparing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 109-10 (1998), which rejected the plaintiffs' standing and "rests on a narrow, grudging, indeed hostile, reading of Congress's citizen suit provisions," with *Bennett v. Spear*, 520 U.S. 154, 166 (1997), which found standing for ranchers under the Endangered Species Act even though their victory would harm protected species and which may be "a manifestation of greater concern for business interests alleging economic harm from government"). The asymmetry extends not just to decisions about standing, but also to decisions about the availability of judicial review. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 661 (1985). *But see* A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen-Suit Provisions of Environmental Legislation*, 12 DUKE ENVTL. L. & POL'Y F. 1, 18-20 (2001) (contending that environmental groups have the advantage, given generous citizen suit provisions and broad availability of standing).

[68] Pierce, *supra* note 8, at 1195.

[69] Sunstein, *supra* note 67, at 666.

[70] This, of course, is not always true. *See* Am. Chemistry Council v. Dep't of Transp., 468 F.3d 810, 815-22 (D.C. Cir. 2006) (finding that a regulated entity lacked standing when the entity sought further regulation from the Department of Transportation because of a troublesome lacuna in the existing regulations).

[71] *See, e.g.*, William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 788-89 (1997).

[72] *See* Scalia, *supra* note 20, at 894-95 (arguing that individuals with concrete injury more properly have recourse to the courts in addition to the legislature).

political view to wonder whether the asymmetry argument is empirically true. Other scholars have done extensive work arguing that, far from fostering a one-sided agency capture, the tripartite standing test is essential in reducing the power of *all* interest groups to use litigation to force courts down doctrinal paths favorable to their agendas.[73]

c. *Battle Between Congress and the President*

Many critics have argued that recent standing doctrine has improperly "reduc[ed] the permissible role of Congress in government policymaking."[74] Congress, these critics contend, has the authority to write statutes that include complicated remedial schemes; those schemes may include citizen suits and other mechanisms that invite private citizens to go to court to ensure that Congress's goals are met.[75] The courts, by deciding when suits may go forward, interfere with that power.

Professor Pierce marks *Lujan v. Defenders of Wildlife*[76] as the beginning of this interference with "legislative supremacy."[77] Cases prior to *Lujan* had treated nonstatutory standing cases – those in which Congress had said nothing about standing – differently from statutory standing cases.[78] In the former cases, the Court frequently imposed demanding tests to avoid reaching constitutional questions.[79] In statutory standing cases, however, the Court had "consistently resolved the standing issue in accordance with its interpretation of congressional intent."[80] Moreover, those pre-*Lujan* decisions were consistent with other doctrines that limited the courts' ability to interfere with Congress:

> [T]he Court has distinguished clearly among: the judicial obligation to compel agencies to use *statutorily* mandated procedures, and the lack of judicial discretion to require agencies to use *judicially preferred* procedures not required by statute; the judicial obligation to entertain *statutorily* created private rights of action for alleged violations of agency administered statutes, and the lack of judicial discretion to imply private

[73] See *supra* note 62 and accompanying text for Professor Stearns's argument that standing allows *courts* to have some measure of control over the order in which they deal with substantive issues.

[74] Pierce, *supra* note 8, at 1170; *see also* Krinsky, *supra* note 17, at 304; Nichol, *supra* note 9, at 305.

[75] Pierce, *supra* note 8, at 1195.

[76] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[77] *Id.* at 1199.

[78] *But see* Magill, *supra* note 40, at 1168-69 (arguing that the Court, by implication, started treating statutory standing cases differently starting in the early 1970s).

[79] Pierce, *supra* note 8, at 1192.

[80] *Id.* Thus, for example, it is well established that Congress can, by statute, require the federal courts to abandon *prudential* standing requirements. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 163-64 (1997).

> rights of action *that Congress did not create*; [and] the judicial obligation to set aside agencies' statutory interpretations that are inconsistent with *congressional* resolutions of policy disputes, and the absence of judicial discretion to attribute to Congress resolutions of policy issues *Congress did not address*.[81]

But *Lujan* "transpose[d] a doctrine of judicial restraint into a judicially enforced doctrine of congressional restraint.[82] Thus, Pierce says that a standing doctrine that reduces court involvement in national policymaking is a useful one, paralleling *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[83] and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[84] in leaving such decisions to Congress and its agents. *Lujan*, however, is a departure in kind because it is "an evisceration of the principle of legislative supremacy."[85] Professor Sunstein has made a similar point: "[T]here is a huge difference between cases reflecting judicial reluctance to invoke the Constitution to challenge legislative outcomes and cases in which Congress, the national lawmaker, has explicitly created standing so as to ensure bureaucratic conformity with democratic will."[86] Similarly, Professor Stearns states that, "contrary to long-standing federal court practice, [*Lujan*'s version of] standing doctrine imposes a set of minimum justiciability criteria to which even Congress is bound."[87]

Some instead defend the standing doctrine on the ground that citizen suits improperly take enforcement power from the executive branch, invading the executive power conferred on the President by the Take Care Clause of Article II.[88] Then-Judge Scalia argued in 1983 that broad standing "will inevitably produce . . . an overjudicialization of the processes of self-governance."[89] A federal court is "solely[] to decide on the rights of individuals,"[90] reining in democratic excesses. Federal courts are not to help the majority impose its will, for the majority has recourse to the political branches.[91] To put it a

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[81] *Id.* at 1198-99 (emphasis added).

[82] *Id.* at 1199.

[83] 467 U.S. 837, 842-44 (1984) (requiring courts to defer to agency interpretations of statutes when the statute is ambiguous and Congress has given the agency the authority to interpret and fill gaps in the statute).

[84] 435 U.S. 519, 545-47 (1978) (holding that courts lack authority to impose procedures on agencies more extensive than those imposed by Congress in the Administrative Procedure Act, 5 U.S.C. § 553(b) (2006)).

[85] Pierce, *supra* note 8, at 1201.

[86] Sunstein, *supra* note 7, at 211.

[87] *See* STEARNS, *supra* note 19, at 282.

[88] U.S. CONST. art. II, § 3, cl. 4 ("[The President] shall take Care that the Laws be faithfully executed.").

[89] Scalia, *supra* note 20, at 881.

[90] *Id.* at 884 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

[91] *Id.* at 894.

different way, "[f]or parties who already have lost the battle in the political process, litigation provides a second bite at the apple . . . ."[92] If standing doctrine means that cases cannot be pursued to enforce the legislative will and, as a result, the laws are not strictly enforced, that outcome is the majority's will: laws may well lapse into desuetude, and that is a "good thing."[93]

Critics of the standing doctrine say, to the contrary, that Article II is violated when the executive branch fails in its duty to execute the laws. Citizen suits, it is argued, provide the proper balance by empowering citizens to hold the executive accountable. As Professor Sunstein has pointed out, the Take Care Clause confers "both a duty *and* a power."[94]

For similar reasons, Sunstein rejects Justice Scalia's desuetude argument.[95] If a law has survived the gantlet of Congress, it is not for the executive branch to decide to ignore that law[96]: "the 'take Care' clause does not authorize the executive to fail to enforce those laws of which it disapproves."[97] For this reason, the "second bite at the apple" argument[98] has it backward: citizen suits do not attempt to get the courts to do what Congress would not do, but instead to have the courts enforce that law.

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[92] Bressman, *supra* note 20, at 1705. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 210 (2000) (Scalia, J., dissenting) ("Elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed."). Note that the Article II problems are not really about whether a plaintiff presents a justiciable case. Even when parties present a justiciable issue, there are serious questions (raised most often by Justice Scalia) about the encroachment on Article II power when Article III courts become executive enforcers at the insistence of private plaintiffs.

[93] Scalia, *supra* note 20, at 897 (quoting Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (Skelly Wright, J.)) ("Does what I have said mean that, so long as no minority interests are affected, 'important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?' Of *course* it does – and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday's herald is today's bore . . . ." (alteration in the original)).

[94] Sunstein, *supra* note 7, at 212 (emphasis added). It should be noted that the Court has also limited review of executive decisions by making it very hard to review agency inaction. But, as Professor Bressman has pointed out, agency inaction as much as action can be arbitrary, and arbitrariness – or the making of decisions under the wrong influences and for the wrong reasons – is one of the things we most want to avoid. Bressman, *supra* note 20, at 1686 ("[C]ourts committed to combatting [sic] such improper influences should do so however they are manifested, whether as action or inaction.").

[95] Sunstein, *supra* note 7, at 216-18.

[96] *Id.* at 217-18.

[97] Sunstein, *supra* note 67, at 670, 669-71 (discussing presumption of unreviewability of agency inaction under *Heckler v. Chaney*, 470 U.S. 821 (1985)).

[98] *See supra* note 92 and accompanying text.

To be sure, there is a difference between suits *against the government* for regulatory failures and suits *against private entities* for violations of the law. Sunstein does concede that, in the latter case, "there is a lurking issue about private interference with the exercise of prosecutorial discretion, and hence with the President's 'Take Care' power."[99] But, he says, any such problem does not rise to "constitutional status," because "[p]arallel public and private remedies are most familiar to American law; they do not violate the Constitution."[100]

It is not my intention here to resolve these debates. It is enough for my purposes to note them and – as I do in the next subpart – discuss the court-centered solutions that critics of the doctrine propose.

B. *Court-Centered Solutions*

The vast majority of suggestions for dealing with the problems of standing doctrine focus on changing or abandoning the doctrine itself. One option is, of course, for the Court to "simplify the applicable doctrines, objectify the doctrines, [and] increase the consistency with which it describes and applies the doctrines . . . ."[101] Another is to recognize the problems caused with rooting the whole doctrine in the words "case" and "controversy" and to return standing to its former status as a prudential analysis of whether a court should exercise its power.[102] Still others suggest alterations in the way the Court approaches the three prongs of the standing inquiry – injury-in-fact, causation, and redress[103] – or in the factors that should influence standing decisions.[104]

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[99] Sunstein, *supra* note 7, at 231 n.300.

[100] *Id.* Professor Johnson argues that there is no Article II problem, even with pure citizen suits – which, because the citizen sues in the public interest and not because of any particularized injury, might not be permitted under Article III – because under the functionalist balancing test the Court applies to this kind of question, citizen suits do not sufficiently interfere with the power of the President to amount to a violation of Article II. Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383, 402 (2001). The only presidential option the citizen suit forecloses is the freedom to see that *no one* enforces a particular law, but the Constitution does not order the President to "take care that the laws be faithfully suppressed." *Id.*; *cf.* Sunstein, *supra* note 67, at 670 ("The 'take Care' clause is a duty, not a license.").

[101] Pierce, *supra* note 58, at 1776.

[102] *See* Pushaw, *supra* note 19, at 531.

[103] *See* Robin Kundis Craig, *Removing "The Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 CARDOZO L. REV. 149, 158 (2007) (arguing for a modification of the injury-in-fact requirement in the context of public health).

[104] *See* Bressman, *supra* note 20, at 1710-11 (suggesting that courts, in deciding which citizen suits to permit, should consider what kinds of claims are raised); *cf.* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 85 (2002) (arguing that courts cannot apply a one-size-fits-all test to citizen suits and need instead to "draw nuanced distinctions between useful citizen

Some contend that standing doctrine cannot be fixed and should instead be abandoned altogether. Professor (now Judge) Fletcher suggests that the courts instead simply ask whether the plaintiff states a claim.[105] At least in the federal courts, the People, through the Constitution and through Congress, confer the right to sue, either under the Constitution itself or under a duly enacted statute, and this approach to the problem thus counsels much greater deference to Congress.[106]

Despite decades of criticism, the Court has resisted calls to overhaul the doctrine, and it seems unlikely to heed that call anytime soon.[107] Recent retirements have made the Court, overall, more conservative.[108] The tripartite test of injury-in-fact, causation, and redressability is well-entrenched, and recent cases wobble back and forth across a margin that is markedly narrower than the standing cases of the 1960s and 1970s.

There is one case rising through the federal system that might tempt the conservative Justices to make an exception to their otherwise strong adherence to the three-part standing test. In *Perry v. Schwarzenegger*, two gay couples challenged Proposition 8 (Prop 8), a ballot initiative that amended the California Constitution so as to ban gay marriage.[109] The couples, represented by superstar Supreme Court litigators Theodore Olson and David Boies,[110] argued that Prop 8 violated their rights to substantive due process and equal protection.[111] The various government defendants refused to defend Prop 8; the district court allowed proponents of the ballot initiative to intervene to defend it.[112] The district court ruled that Prop 8 violated the Federal Constitution and enjoined its enforcement.[113]

There were no standing problems in the district court, of course, because the plaintiffs clearly suffered injury-in-fact, caused by Prop 8's barrier to their marriages, which would be redressed by a judgment that Prop 8 was

suits that ameliorate failures of agency enforcement and those that disrupt productive cooperation").

[105] Fletcher, *supra* note 6, at 290-91 ("[W]e should ask, as a question of law on the merits, whether the plaintiff has the right to enforce the particular legal duty in question.").

[106] *Id.* at 243-44; *see also* Nichol, *supra* note 74, at 336-37; Pierce, *supra* note 58, at 455; Sunstein, *supra* note 7, at 235; Sunstein, *supra* note 55, at 1481. As I have argued, leaving the question entirely in Congress's hands is at least somewhat problematic, because Congress does have the incentive "to shunt difficult questions to the courts" in ways that might disturb the balance of power among the branches. Elliott, *supra* note 1, at 509.

[107] *See supra* notes 3-4 and note 24 and accompanying text.

[108] *See* Adam Liptak, *The Roberts Court: The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1.

[109] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

[110] Olson, the former Solicitor General of the United States, and Boies were opponents in their most famous case together, *Bush v. Gore*, 531 U.S. 98, 99 (2000).

[111] *Perry*, 704 F. Supp. 2d at 929-30.

[112] *Id.* at 920-29.

[113] *Id*. at 927.

unconstitutional. The standing problem arose once the district court entered judgment. The government defendants refused to appeal the district court's decision, and, under the logic of *Arizonans for Official English v. Arizona*[114] the Prop 8 proponents, who litigated the case in the district court as intervenors, may lack standing to appeal.[115] The Ninth Circuit has stayed the district court's judgment and certified to the California Supreme Court the question of the proponents' standing to sue.[116]

What is the argument that the proponents lack standing to appeal? The Prop 8 proponents are not themselves bound by the district court's injunction, which prevents California state and local officials from denying marriage to gay couples but binds no private actors. And the Supreme Court strongly suggests in *Arizonans* that Article III standing requirements would prevent the Prop 8 proponents from litigating in defense of a successful ballot initiative later declared unconstitutional.[117]

Yet the idea that no one could challenge the lower court's opinion in this case seems problematic. If what the Constitution demands is a case or controversy, one already exists here, regardless of Imperial County: the dispute between the plaintiffs and the ballot initiatives seems clearly to satisfy the requirement in *Baker v. Carr* that "the appellants allege[] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[118] And it seems very odd to say that one federal district judge has the final say because California officials have declined to appeal, when what is at stake is a proposition chosen by the people of California at the ballot box. To be sure, the ballot proponents seem almost certain to lose on the merits: they put on almost no factual case,[119] and Judge Walker's decision invalidating Prop 8 is exhaustive, well-reasoned, and sound.

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[114] 520 U.S. 43, 64-66 (1997).

[115] Order Granting Mot. to Stay, Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010) (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 66 (1997); *see also* Order Denying Mot. to Stay, Perry v. Schwarzenegger, No. 10-16696, 702 F. Supp. 2d 1132, 1135-39 (N.D. Cal. Aug. 12, 2010).

[116] Order Certifying a Question to the Supreme Court of California, Perry v. Schwarzenegger, No. 10-16696, 2011 WL 9633 at *1 (9th Cir. Jan. 4, 2011).

[117] *Arizonans*, 520 U.S. at 65-66 (1997). The standing issue here overlaps with more prudential and procedural issues that arise on appellate review. *See, e.g.*, 15A WRIGHT ET AL., *supra note* 37, § 3902, at 94-101 (3d ed. 2008) (stating, for example, that parties may settle a lawsuit, thus making it impossible for an appeal to be had by non-parties).

[118] Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (quoting same language from *Baker*); Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (1992) (Stevens, J., concurring) (same); Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 72 (1978) (same).

[119] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 929-30 (N.D. Cal. 2010).

If the Ninth Circuit rejects the appeal because the Prop 8 proponents lack standing, would the Supreme Court take the case? The Justices who support the narrow view of standing – Chief Justice Roberts and Justices Scalia, Thomas, and Alito[120] – also likely oppose gay marriage.[121] They may thus be tempted to relax their view of standing in this case to take a crack at the gay marriage issue. But even so, they are unlikely to expand the current restrictive view of standing; instead, they would almost certainly find a way to grant standing in this particular case without altering the larger framework.[122]

They might not even stretch to find standing in this case, however. It is not at all clear that they could get a fifth vote on the merits of gay marriage: It is widely expected that Justice Kennedy would join the liberal wing of the Court in a case raising the issue.[123] The standing controversy in the gay-marriage appeal may be most useful in highlighting the absurdities of the current doctrine.

C. *What's at Stake*

The current restrictive standing doctrine raises a number of controversies, and yet the Court has resisted invitations to alter the doctrine. Do we need some other solution? The answer to that question depends, first, on whether the doctrine is in fact imposing any real limitations on who can sue. It could be argued that the Court's so-called "restrictive" standing doctrine is not really terribly restrictive, since it is usually possible to find a plaintiff who satisfies the Article III standing requirements. I reject this view.

First, as the Court's decisions have shown, what counts as an injury changes over time, so that plaintiffs who might once have met the doctrine's requirements may no longer do so.[124] Second, the Court's willingness to ignore common-sense chains of causation suggests that plaintiffs may be

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[120] *See, e.g.*, Sprint Commc'ns. Co. v. APCC Servs., Inc., 554 U.S. 269, 299 (2008) (Roberts, C.J., dissenting, joined by Justices Scalia, Thomas and Alito).

[121] *See, e.g.*, Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 253, 297-98, 303-08 (discussing established anti-gay-marriage views of Justices Scalia and Thomas and probable anti-gay-marriage views of Chief Justice Roberts and Justice Alito).

[122] *Cf.* Bush v. Gore, 531 U.S. 98, 109 (2000).

[123] Justice Kennedy is noted for his divergence from the conservative justices on gay issues. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1704 (2010). I am assuming, as does Dean Chemerinsky, *id.* at 1708, that Justices Sotomayor and Kagan would join Justices Ginsburg and Breyer in voting in favor of gay marriage.

[124] *See* Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151-52 (2009) (describing as "hitherto unheard-of" a test for standing that the lower courts had fairly widely accepted); *e.g.*, Natural Res. Def. Council v. EPA, 464 F.3d 1, 6 (D.C. Cir. 2006); Baur v. Veneman, 352 F.3d 625, 634 (2d Cir. 2003); Cent. Delta Water Agency v. United States, 306 F.3d 938, 947-48 (9th Cir. 2002).

harder to find than expected.[125] Finally, there are certain kinds of cases in which the doctrine may be impossible to satisfy and yet we believe access to the courts is desirable. Bradford Mank, for example, has shown that the current standing test makes it very difficult to bring suits involving interests of future generations, even though such interests are often central to the dispute raised by litigation.[126]

Whether we need a solution to standing problems also depends, in part, upon whether one finds citizen-driven litigation valuable.[127] Congress has authorized citizen suits under many statutes,[128] so the answer to this question affects a wide range of interests.

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I will assume for the remainder of this Article that standing doctrine is too restrictive and that it is worth thinking about ways, apart from begging the Supreme Court, to broaden access to the federal courts. Scholars have suggested that Congress may have the power to make these changes. The primary suggestions are for Congress to make legislative findings that certain persons or groups have standing, thus overriding the courts' contrary conclusions (discussed in Part II); to enact statutes conferring bounties on successful citizen plaintiffs akin to *qui tam* bounties, thus creating the concrete stake required by Article III (discussed in Part III); or to create one or more Article I tribunals as an alternative to the Article III courts (discussed in Part IV).

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[125] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 752, 756-61 (1984).

[126] *E.g.*, Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 4-5 (2009).

[127] Some have criticized citizen suits. *See, e.g.*, Barnett & Terrell, *supra* note 67, at 9-18 Others have described citizen suits as essential tools for Congress. *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1230 (2009); Robert V. Percival, Massachusetts v EPA*: Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111, 158 (2007); Van Cleve, *supra* note 39, at 10028. *But see* Sunstein, *supra* note 7, at 221-22 (stating that "[t]here is no reason to think that the citizen suit is a fundamental part of modern regulatory reform" and describing the citizen suit as a "band-aid" necessary under unsuccessful command-and-control regulatory regimes).

[128] *See, e.g.*, Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 797(b)(5) (2006); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2006); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(a) (2006); 33 U.S.C. § 1365(g) (2006) ("[A]ny citizen may commence a civil action on his own behalf."); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2006); Clean Air Act, 42 U.S.C. § 7604 (2006); 42 U.S.C. § 9659 (2006) ("[A]ny person may commence a civil action on his own behalf."). In addition, the Administrative Procedure Act (APA) allows those "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to go to the courts for review. 5 U.S.C. § 702 (2006).

II. LEGISLATIVE FINDINGS

Many have suggested that Congress solve problems with the Supreme Court's Article III standing doctrine by enacting statutes that factually identify instances of injury, causation, or redressability. In other words, Congress would identify by legislation plaintiffs who (according to Congress, at least) satisfy Article III's case-or-controversy requirement.[129] Some argue that such findings would overcome the Court's cramped view of standing to sue. This approach would succeed, its proponents say, because Congress would be finding *facts* rather than rewriting the Constitution, and the Court should defer to such factual findings. As I demonstrate below, this "findings approach" is hard to square with decisions over the last twenty years establishing the Court as the final arbiter of constitutional content.

A. *The Suggestions*

A number of scholars have outlined how Congress might open the courts to a broader class of citizens.[130] At a minimum, it is suggested, Congress should make clear in statutes (1) that it intends to extend standing to the maximum extent permitted by the Constitution; (2) that it intends to overcome prudential barriers to third-party standing; and (3) that it intends to protect the broadest

[129] I treat separately, in *infra* Part III, suggestions that Congress enact legislation providing bounties or other economic stakes to citizen suitors.

[130] Some have gone beyond human plaintiffs to argue that Congress give standing to animals. *See* Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1359-61 (2000) (arguing that Congress should grant standing to animals in an effort to supplement public enforcement); Joanna B. Wymyslo, *Standing for Endangered Species: Justiciability Beyond Humanity*, 15 U. BALT. J. ENVTL. L. 45, 59-65 (2007). Others have suggested expanding standing to environmental resources generally. *See* Carter, *supra* note 17, at 2222-36 (2009); Cormac Cullinen, *Do Humans Have Standing to Deny Trees Rights?*, 11 BARRY L. REV. 11, 20 (2008). Suggestions of this sort have arisen from time to time since the early 1970s, when Christopher Stone published his landmark article, *see* Christopher D. Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 *passim* (1972), and Justice Douglas adopted Stone's argument, promoting standing for "valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air," *Sierra Club v. Morton*, 405 U.S. 727, 742-43 (1972) (Douglas, J., dissenting).

I need not resolve the question whether such entities can have standing, although I doubt that Justice Scalia would look with favor upon a statute that granted standing for trees. *Cf.* Minnesota v. Carter, 525 U.S. 83, 98 n.3 (1998) (Scalia, J., concurring) (describing the idea that trees have rights as "druidical"). Certainly entities that can feel pain should satisfy the injury-in-fact requirement, and such sentient beings, if they cannot represent themselves, can be represented by others, as are corporations, children, and ships. *See* Sunstein, *supra*, at 1360-61 (explaining that Congress has conferred legal rights to juridical persons, in addition to trusts, municipalities, and ships). My concern here is not with statutes creating causes of action for entities that clearly fall within the existing standing paradigm, but with statutes that purport to overturn the Court's decisions regarding who has standing to sue.

possible interpretation of interests.[131] That approach asks Congress to make clear that a statute imposes no limits to standing other than those contained in Article III itself.[132]

This minimal approach, of course, does nothing to solve the problem that critics identify with the Court's standing doctrine, although such language would make clear that Congress intends to force the constitutional question.[133] The Supreme Court's current standing doctrine locates the required injury-in-fact, causation, and redressability *in Article III* itself.[134] To the extent that Congress simply clarifies that it imposes no *additional* restrictions on standing – by, for example, excluding those suffering economic injury from the class of those who may sue under certain environmental statutes[135] – the problems with the current standing doctrine remain.

Because the minimal approach does so little to solve the problem, critics have instead suggested that Congress can do something more: find, by statute and as a matter of legislative fact, that certain persons or groups satisfy Article III's tripartite test, even if the courts, without such findings, would conclude otherwise.[136] This broader approach respects Congress's "institutional capacity for gathering evidence and taking testimony."[137]

Professor Pierce thus suggests that Congress could overcome the Court's decision in *Lujan* by explicitly adopting one or more of the standing theories that the plaintiffs argued in that case; Congress would explain in statutory text how particular events would cause harm to particular classes of citizens.[138] Congress could, for example, adopt by statute one of the "nexus" theories that the Court described and rejected in *Lujan*, thus finding that zookeepers or

[131] Robert B. June, Note, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 793-97 (1994); *see also* Dumont, *supra* note 17, at 678-81 (proposing statutory language).

[132] Congress can successfully take this tack. *See* Bennett v. Spear, 520 U.S. 154, 163 (1997) ("Congress legislates against the background of our prudential standing doctrine, which applies *unless it is expressly negated*." (emphasis added)); Warth v. Seldin, 422 U.S. 490, 501 (1975).

[133] When Congress has made clear it intends to force a constitutional question, it has precluded application of the canon of constitutional avoidance. *Cf.* Ernest Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1575-77 (2000).

[134] *See supra* notes 36-54 and accompanying text.

[135] *See* Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 77 (D.C. Cir. 1999).

[136] *E.g.*, JOHN D. ECHEVERRIA & JON T. ZEIDLER, BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE FEDERAL ENVIRONMENTAL LAW 20 (Georgetown Univ. Envtl. Pol'y Project 1999); Daan Braveman, *The Standing Doctrine: A Dialogue Between the Court and Congress*, 2 CARDOZO L. REV. 31, 38-39 (1980); Dumont, *supra* note 17, at 678-81; Pierce, *supra* note 8, at 1181-82; Sunstein, *supra* note 7, at 230; June, *supra* note 131, at 793-95.

[137] United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting).

[138] Pierce, *supra* note 8, at 1181-82.

wildlife biologists *are* injured when distant members of the species they work with are threatened with extinction.[139] Professor Sunstein similarly suggests that Congress could define chains of causation and redressability by statute: "At a minimum . . . Congress can create rights foreign to the common law[, such as] the right to be free from discrimination . . . . Congress [also] has the power to find causation, perhaps deploying its factfinding power, where courts would not do so."[140]

Congress has recently taken steps in this direction; an early draft of the 2010 climate-change bill contained the following provision:

> SEC. 336. ENFORCEMENT.
>
> (a) CITIZEN SUITS.—Section 304 of the Clean Air Act (42 U.S.C. 7604) is amended by adding the following new subsection at the end thereof:
>
> "(h)(1) The persons authorized by subsection (a) to commence an action under this section shall include any person who has suffered, or reasonably expects to suffer, a harm attributable, in whole or in part, to a violation or failure to act referred to in subsection (a).
>
> "(2) For purposes of this section, the term 'harm' includes any effect of air pollution (including climate change), currently occurring or at risk of occurring, and the incremental exacerbation of any such effect or risk that is associated with a small incremental emission of any air pollutant (including any greenhouse gas as defined in title VII), whether or not the effect or risk is widely shared.
>
> "(3) For purposes of this section, an effect or risk associated with any air pollutant (including any greenhouse gas as defined in title VII) shall be considered attributable to the violation or failure to act concerned if the violation or failure to act slows the pace of implementation of this Act or compliance with this Act or results in any emission of greenhouse gas or other air pollutant at a higher level than would have been emitted in the absence of the violation or failure to act."[141]

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[139] Lujan v. Defenders of Wildlife, 504 U.S. 555, 565-67 (1992). In that case, the plaintiffs sought to challenge U.S. funding for overseas projects that threatened the extinction of certain endangered species. The plaintiffs argued that any person who used an ecosystem contiguous with that affected by the extinction would have standing under an "ecosystem nexus" theory; that any person who wished to study or see those animals would be hurt by their extinction under an "animal nexus" theory; and that any person whose "had a professional interest in such animals" would have standing under a "vocational nexus" theory. *Id.* at 565-67. Pierce thus suggests that Congress could adopt these theories by statute even though the Court expressly rejected them. Pierce, *supra* note 8, at 1182.

[140] Sunstein, *supra* note 7, at 230-31; *see also* ECHEVERRIA & ZEIDLER, *supra* note 136, at 20 (suggesting "more detailed legislative definition of the injury and chains of causation Congress is seeking to address").

[141] DISCUSSION DRAFT OF AMERICAN CLEAN ENERGY & SECURITY ACT OF 2009, *supra*

This recent proposal – abandoned in later versions of the bill[142] – attempts to overcome the Court's narrow standing doctrine in two ways. First, it defines injury-in-fact (harm) very broadly, including not only current effects of air pollution, but also risks of air pollution *and* incremental increases in such risk.[143] To be sure, the Court has long accepted certain risks as sufficient for injury-in-fact, but the risk of harm must be "imminent"[144] – the draft bill quoted here imposes no such limitation. Moreover, the circuit courts are divided on whether any incremental increase in risk is sufficient to meet the injury-in-fact standard.[145]

This provision of the climate-change bill would also have defined causation much more broadly than the Court has. Section (h)(3) would deem that a harm is "*attributable* to [a] violation or failure to act" whenever that violation or failure to act "slows the pace of implementation of this Act or compliance with this Act or results in *any* emission of greenhouse gas or other air pollutant at a higher level than would have been emitted in the absence of the violation or failure to act."[146] Quite attenuated chains of causation would result from this definition: Congress would deem the causal link established even if the plaintiff could show no relation between the particular violation and the particular harm claimed.[147]

note 13, at 527-28.

[142] *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 336 (as introduced in House, May 15, 2009) (omitting language quoted above).

[143] DISCUSSION DRAFT OF AMERICAN CLEAN ENERGY & SECURITY ACT OF 2009, *supra* note 13, at 527-28.

[144] *See, e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148 (2009); *Lujan*, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)); Los Angeles v. Lyons, 461 U.S. 95, 108 (1983).

[145] *Compare* Baur v. Veneman, 352 F.3d 625, 634 (2d Cir. 2003), *with* Ctr. for Law and Educ. v. Dep't of Educ., 396 F.3d 1152, 1161 (D.C. Cir. 2005), *and* Shain v. Veneman, 376 F.3d 815, 818 (8th Cir. 2004). For useful discussions of the debate over probabilistic injury, see Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391 (2009); Bradford Mank, *Standing and Statistical Persons*, 36 ECOLOGY L.Q. 665 (2009); Cassandra Sturkie & Nathan H. Selzer, *Developments in the D.C. Circuit's Article III Standing Analysis: When Is an Increased Risk of Future Harm Sufficient to Constitute Injury-in-Fact in Environmental Cases?*, 37 ENVTL. L. REP. 10287 (2007); Cassandra Sturkie & Suzanne Logan, *Further Developments in the D.C. Circuit's Article III Standing Analysis: Are Environmental Cases Safe from the Court's Deepening Skepticism of Increased-Risk-of-Harm Claims?*, 38 ENVTL. L. REP. 10460 (2008).

[146] H.R. 2454, 111th Cong. § 336 (discussion draft version, Mar. 31, 2009) (emphasis added).

[147] Michael Solimine offers other examples of congressional efforts to confer standing. *See* Solimine, *supra* note 28, at 1052-54 (noting a "wholesale" proposal in the 1970s to confer standing broadly to "enforce federal constitutional and statutory law" and a number of "retail" proposals).

B. *The Genesis*

The idea that Congress can create standing by statute arises from the standing cases themselves. So, for example, the Court in *Sierra Club v. Morton* said that "where a dispute is *otherwise justiciable*, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' is one within the power of Congress to determine."[148] In *Warth v. Seldin*, the Court stated the proposition more broadly: "The actual or threatened injury required by Art. III may exist *solely* by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[149]

The Court has, however, clarified that Article III imposes an outside limit on Congress's authority to grant standing. For example, *Gladstone Realtors v. Village of Bellwood* made clear that "[i]n no event . . . may Congress abrogate the Article III minima."[150]

Lujan defined the kind of restrictions that Article III imposes on Congress's power to define injuries: Congress may "elevat[e] to the status of legally cognizable injuries *concrete, de facto injuries that were previously inadequate in law*."[151] But it may not ignore Article III standing limitations:

> Whether the courts were to act on their own, *or at the invitation of Congress*, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch – one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.[152]

Lujan is far from the only case that makes these limitations clear. Chief Justice Rehnquist wrote for the Court in *Raines v. Byrd* that "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[153] And *Summers v. Earth Island Institute* says that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."[154] Thus, whatever causes of action Congress creates, the Court will apparently evaluate whether the underlying injuries truly exist out there in the world.

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[148] Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) (emphasis added) (quoting Flast v. Cohen, 392 U.S. 83, 100 (1968).

[149] Warth v. Seldin, 422 U.S. 490, 500 (1975) (emphasis added) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)).

[150] Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979).

[151] Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (emphasis added). As noted above, a number of scholars view *Lujan* as a decided break with prior standing law. *See supra* note 74 and accompanying text.

[152] *Lujan*, 504 U.S. at 576.

[153] Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).

[154] Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009).

To be sure, Justice Kennedy, in his *Lujan* concurrence, stated that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[155] The Court quoted this language in *Massachusetts v. EPA*.[156] But it is not clear how far Justice Kennedy believes Congress could go. In *Summers*, he reprised his *Lujan* concurrence, but the language is slightly different: "This case would present different considerations if Congress had sought to provide redress for a *concrete* injury 'giv[ing] rise to a case or controversy where none existed before.'"[157] It is entirely consistent with his language in *Lujan* ("*define* injuries and *articulate* chains of causation")[158] and *Summers* ("provide redress for a *concrete* injury")[159] that Congress can only *identify* injuries that the Court would agree are concrete and can only elevate to *de jure* status injuries that the Court would already recognize as *de facto*.

C. *Is It Constitutional?*

As the above discussion indicates, Congress can successfully use legislative findings to expand standing only if the Court accepts that expansion, and whether the *current* Court will accept it depends very much on Justice Kennedy. Is his *Lujan* concurrence meant broadly? This is not at all clear, and other recent doctrinal trends suggest that the legislative-findings approach will meet with hostility.[160]

One key issue is how the Court would classify such congressional findings: Are they factual findings or legal findings? The Court has traditionally reviewed legislative *factual* findings deferentially. Congress is not even required to make findings, in most circumstances. True, the Court has encouraged Congress to make findings even when not required: in the context of a Commerce Clause challenge, for example, "congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial

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[155] *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 126 n.22 (1998) (Stevens, J., dissenting) (quoting Justice Kennedy's *Lujan* concurrence). Professor Sunstein explores that statement, concluding that "Congress does possess power to define [lost opportunities, increases in risks, and attempts to alter incentives] as injuries for purposes of standing." Sunstein, *supra* note 7, at 231.

[156] 549 U.S. 497, 516 (2007).

[157] *Summers*, 129 S. Ct. at 1153 (Kennedy, J., concurring) (emphasis added) (quoting *Lujan*, 504 U.S. at 580)(emphasis added, internal quotation marks and citation omitted).

[158] *Lujan*, 504 U.S. at 580 (emphasis added).

[159] *Summers*, 129 S. Ct. at 1153 (Kennedy, J., concurring) (emphasis added).

[160] For this reason, analyses of Congress's power to grant standing that predate the Rehnquist Court are inapplicable. *See, e.g.*, Braveman, *supra* note 136. And analyses that focus on the Court's standing opinions, without considering those opinions as they are affected by larger trends in constitutional law, are unhelpful. *See* Solimine, *supra* note 28, at 1024-26.

effect was visible to the naked eye."[161] But, in general, "Congress need [not] make particularized findings in order to legislate."[162] In the context of a challenge to the Controlled Substances Act under the Commerce Clause, the Court stated "we have never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech."[163]

Thus, a law that Congress enacts under the Commerce Clause is constitutional if it has a "rational basis."[164] Applying this test, Professor Pierce concludes that, were Congress to make findings adopting the various *Lujan* nexuses, the Court would be hard pressed to find Congress's action irrational.[165] Similarly, Professor Sunstein writes that "[p]erhaps courts will review . . . findings [of injury-in-fact and causation] under a deferential standard."[166] On this view, the findings approach should be successful.

But it is far from clear – indeed, it is highly unlikely – that traditional deference to legislative *fact*-finding will apply in the context of Article III standing, at least in circumstances in which Congress is trying to overcome Court-imposed limitations on standing. This is because, first, it is not clear that these findings would be *factual* findings, and second, even if so, it is not clear what standard the Court would apply in reviewing them.

1. Findings of Fact or Findings of Law?

In developing standing doctrine, the Court has made the real world itself the content of the constitutional provision: one must suffer an injury-*in-fact* to satisfy the tripartite test. As noted above, factual findings are usually reviewed deferentially.[167] Hence, it might be concluded, the Court should review factual findings that support standing deferentially.

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[161] United States v. Lopez, 514 U.S. 549, 563 (1995); *accord* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence.").

[162] Perez v. United States, 402 U.S. 146, 156 (1971). Such deference may expect more from Congress than Congress actually provides; because of what Professor Tushnet calls "judicial overhang," legislators may enact laws that they *know* are unconstitutional because the courts will fix them. Mark Tushnet, *Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?: Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 504 (2009) ("Knowing the courts are available to correct (some of) their constitutional errors, legislators have little incentive to expend great effort in enacting only constitutionally permissible statutes.").

[163] Gonzales v. Raich, 545 U.S. 1, 21 (2005) (citing *Lopez*, 514 U.S. 549, 562 (1995); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664-68, (1994) (plurality opinion); and *Perez*, 402 U.S. 146, 156 (1971)).

[164] *Id.* at 22.

[165] Pierce, *supra* note 8, at 1181-82.

[166] Sunstein, *supra* note 7, at 230.

[167] *See supra* Part II.C.

But the Court is increasingly suspicious of "fact-finding" that allows Congress to change the balance of the constitutional structure. In *United States v. Morrison*, for example, the Supreme Court did not accept congressional fact-finding regarding the effect of gender violence on interstate commerce.[168] That case was decided in the context of the Commerce Clause, but the lesson is transferable:

> [T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. . . . Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.[169]

Similarly, if Congress finds factually that injury-in-fact exists, that "does not necessarily make it so."[170] The question is ultimately one for the Court to decide.

The Court used similar language in the partial-birth abortion case, *Gonzales v. Carhart*.[171] There, the Court upheld a congressional ban on partial-birth abortion, but in doing so rejected the idea that Congress's fact-finding was "dispositive": "The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."[172]

The Court is similarly likely to reject broad congressional findings of standing. In the climate-change legislation, for example, Congress would have allowed anyone "harmed" to sue, and defined "harm" in part to mean "any effect of air pollution (including climate change)."[173] The incredibly broad "any effect" language is in severe tension with the last several decades of standing doctrine and would surely be rejected by the Court.[174] Thus, while Congress may "elevat[e] to the status of legally cognizable injuries *concrete*, de facto *injuries that were previously inadequate in law*,"[175] it cannot create "injuries" unrecognizable to the Court as such. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."[176]

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[168] 529 U.S. 598, 614 (2000).

[169] *Id.* (alterations, citations, and internal quotation marks omitted).

[170] *Id.*

[171] 550 U.S. 124 (2007).

[172] *Id.* at 165.

[173] DISCUSSION DRAFT OF AMERICAN CLEAN ENERGY & SECURITY ACT OF 2009, *supra* note 13, at 527-28 (emphasis added).

[174] *Id.*

[175] Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (emphasis added).

[176] Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009).

2. Standard (or Tenor) of Review

Other recent doctrines, which various majorities of the Court have embraced, also damn the legislative-findings approach. The Court is highly unlikely, for example, to apply rational-basis scrutiny to such findings:

> [R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.[177]

Article III standing is a matter of structural constitutional law rather than individual rights,[178] but the Court would almost certainly reject a mere irrationality test in the structural context as well. Instead, the Court will likely take an approach analogous to that seen in *City of Boerne v. Flores*.[179] In that case, the Court struck down a statute in which Congress had purported to overrule First Amendment precedent.[180] The Court found that the statute "contradict[ed] vital principles necessary to maintain separation of powers."[181] Even though Congress was acting under Section 5 of the 14th Amendment, which gives Congress "the power to enforce, by appropriate legislation, the

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[177] D.C. v. Heller, 554 U.S. 570, 628 n27 (2008) (citations omitted).

[178] Individual rights are sometimes waivable. *See, e.g.*, Peretz v. United States, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are . . . subject to waiver."); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) ("[T]he personal jurisdiction requirement is a waivable right . . . ."). But parties are not free to waive a failure of standing. *See* Arizonans for Official English v. Ariz., 520 U.S. 43, 73 (1997) ("Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, *even though the parties are prepared to concede it*." (emphasis added) (alterations, citations, and internal quotation marks omitted)).

[179] 521 U.S. 507, 519 (1997).

[180] *Id.* at 536. The statute was the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, § 2(b), 107 Stat. 1488, 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), which Congress enacted in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* involved a challenge to an Oregon drug law that, while applying to the citizenry generally, had the effect of criminalizing certain religious practices of a Native American Church. *Smith*, 494 U.S. at 874. The Court ruled in favor of the government. *Id.* at 878-79. If strict scrutiny were applied, the government would have to show a compelling justification for burdening the plaintiffs' religious practices. *See e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963). RFRA was thus intended to "restore the compelling interest test as set forth in *Sherbert* . . . and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." RFRA § 2(b).

[181] *Boerne*, 521 U.S. at 536.

provisions of" that amendment,[182] the Court held that "Congress does not enforce a constitutional right *by changing what the right is*. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[183]

Boerne undeniably relies on the Fourteenth Amendment's specific use of the word "enforce" to define Congress's power, and one might say that *Boerne* rests on a unique constitutional provision. Admittedly, the analogy is imprecise.[184] But the *tenor* of *Boerne* is certainly that the Court will reject what it sees as efforts of Congress to "declare what the Law is."[185]

Boerne is of a piece with other recent cases – for example, *United States v. Lopez*[186] and *Seminole Tribe v. Florida*[187] – that upset settled aspects of constitutional law and, in doing so, force Congress into a narrower role.[188] As Professors Post and Siegel have put it, "[n]o longer does the Court emphasize the respect due to the constitutional judgments of a coequal and democratically elected branch of government. Now it claims that only the judiciary can define the meaning of the Constitution."[189] "[T]he decisions emphasize that it is the

[182] U.S. CONST. amend. XIV, § 5.

[183] *Boerne*, 521 U.S. at 519 (emphasis added); *but see* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (arguing that the Rehnquist Court interpreted Congress's power under the 14th Amendment narrowly so as to retain the Court's exclusive claim to Constitutional interpretation).

[184] A persuasive analogy, however, if one considers that Section 5 powers are among its strongest. *See* Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique*, Morrison, *and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 116-17 ("[T]he potential sweep of congressional authority under the Fourteenth Amendment is nothing short of breathtaking."). The same cannot be said for congressional efforts to expand access to the federal courts (unless in the specific context of cases seeking enforcement of civil rights guarantees under the Fourteenth Amendment).

[185] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see Boerne*, 521 U.S. at 536; John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993) ("[T]he legislature is not supreme in our system of government – the Constitution is. Holding a statute unconstitutional because it transgresses Article III is nothing more than a recognition of that principle . . . .").

[186] 514 U.S. 549 (1995).

[187] 517 U.S. 44 (1996).

[188] *See Seminole Tribe*, 517 U.S. at 47; *Lopez*, 514 U.S. at 560-61 (1995); Tribe, *supra note 27* (explaining Professor Tribe's decision to suspend completion of his constitutional law treatise "because conflict over basic constitutional premises is today at a fever pitch. Ascertaining the text's meaning; . . . the relationships among constitutional law, constitutional culture, and constitutional politics; what to make of things about which the Constitution is silent – all these, and more, are passionately contested, with little common ground from which to build agreement.").

[189] Post & Siegel, *supra* note 183, at 1; *see also* DEVINS & WHITTINGTON, *supra* note 28, at 3 (discussing "the Rehnquist Court['s] . . . sustained assault on congressional power"); Timothy Zick, Marbury *Ascendant: The Rehnquist Court and the Power to "Say What the*

Court's special responsibility to mark where Congress has exceeded its constitutional bounds."[190]

It is almost inconceivable, then, that the Court would accept congressional efforts to *redefine* the constitutional limits of standing. If the *Boerne* Court was suspicious of Congress in its exercise of Section 5 powers, today's Court would be even more wary of enactments outside the scope of Section 5.[191] General invocations of the Necessary and Proper Clause[192] or other Article I powers would not suffice to permit Congress to alter the Article III standing requirements.[193]

Boerne's emphasis on the constitutional separation of powers reinforces this conclusion.[194] The tripartite test is, according to current doctrine, required by Article III to maintain the place of the federal courts in the overall federal structure; standing "is built on a single basic idea – the idea of separation of powers."[195] If Congress were to enact statutes that purport to alter outcomes under the tripartite test, it would be rewriting Article III, something the Court

Law Is," 59 WASH. & LEE L. REV. 839, 843 (2002) ("The Court's recent Section 5 jurisprudence is grounded upon a concern that Congress, which has the power to 'enforce' constitutional guarantees, will instead seek to render substantive interpretations of the Fourteenth Amendment that are inconsistent with, or in the Court's view not warranted by, the Constitution.").

[190] Post & Siegel, *supra* note 183, at 1 (internal quotations omitted); *see also* Zick, *supra* note 189, at 843 ("Just as the judiciary is the final authority on issues of statutory construction, so too in the Court's opinion must it render the final decision on matters of constitutional construction. A presumption of congressional carelessness, or worse, accounts for *Marbury*'s ascendance.").

[191] The Court has frequently given Congress wide latitude under Section 5. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003) (departing from a series of cases strongly supporting state sovereign immunity because the statute at issue was enacted under Section 5 rather than under Article I).

[192] U.S. CONST. art. I, § 8, cl. 18.

[193] Indeed, in an article written pre-*Boerne*, one critic of standing doctrine suggested that Congress's powers to define injury using legislative findings would be greater when the relevant statutes were enacted under Section 5. Dumont, *supra* note 17, at 682-84; *see also* Zick, *supra* note 189, at 892.

[194] City of Boerne v. Flores, 521 U.S. 507, 516 (1997) ("The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803))).

[195] Allen v. Wright, 468 U.S. 737, 752 (1984). The Court has repeatedly observed the various functions Article III standing serves in maintaining the separation of powers. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (stating Article III's case or controversy provision limits "'the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process'" (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968))); Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992); *Flast*, 392 U.S. at 95.

has made clear that it cannot do.[196] Congress would not always lose: it could enact a statute conferring standing, and the Court could uphold it. But *the Court* would decide.

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In sum, the Court would view with suspicion Congressional findings purporting to identify new injury-in-fact and new causal chains, the Court would review such findings with distrust, and the Court would reject many such findings, all in aid of protecting the Court's role as constitutional arbiter.[197] Congress can "create" standing where none had existed before, if it identifies an injury (or chain of causation, or means of redress) that, while *already* sufficient to confer Article III standing, had not previously been legally actionable. At the same time, however, Congress cannot redefine what injuries, chains of causation, or means of address are sufficient to confer Article III standing: that is the Court's job.[198]

This is true despite Justice Kennedy's status as the swing Justice and his repeated incantation that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[199] Justice Kennedy wrote the majority opinion in *Carhart*,[200] joined the majorities in *Morrison*[201] and *Seminole*,[202] and concurred

[196] *See supra* note 176 and accompanying text.

[197] As Professor Zick explains: "In practice, the [Section 5] approach boils down to judicial distrust or skepticism concerning the legislature's competence to regulate, its motive in undertaking legislative action, or both. Judicial skepticism is often articulated in terms of a finding that the legislature or other governing body *did not identify a 'real,' as opposed to a conjectural, harm or evil*." Zick, *supra* note 189, at 859 (emphasis added and footnote omitted).

[198] *See* J. Mitchell Pickerill, *Congressional Responses to Judicial Review*, *in* CONGRESS & THE CONSTITUTION 151, 158 (Neil Devins & Keith E. Whittington eds. 2005) (noting that Congress sometimes ignores Supreme Court decisions finding statutes unconstitutional); Zick, *supra* note 189, at 899 ("What has caused Congress fits, and what threatens to scuttle a host of future Section 5 enactments, is not the legislature's inability to compile impressive records of its factual findings, but rather the Court's broad proscription of legislative constructions that do not comport with judicial stare decisis."); *supra* note 176 and accompanying text. Congress has, for example, continued to use the legislative veto regularly despite *INS v. Chadha*, 462 U.S. 919 (1983). *See* Pickerill, *supra*, at 158 (citing Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (1993); Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57 (1990)).

[199] *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring). *See also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 126 n.22 (1998) (Stevens, J., dissenting). Professor Sunstein explores that statement, concluding that "Congress does possess power to define [lost opportunities, increases in risks, and attempts to alter incentives] as injuries for purposes of standing." Sunstein, *supra* note 7, at 231.

[200] 550 U.S. 124, 131 (2007).

[201] 529 U.S. 598, 600 (2000).

[202] 517 U.S. 44, 46 (1996).

in *Lopez*.[203] His concurrences in *Lujan* and *Summers* can be read consistently with my conclusion here,[204] that Congress's power is to convert de facto into de jure and nothing more.

Moreover, all of the foregoing is simply a matter of Article III and the Court's power to interpret it. None of the arguments addresses the Article II problems with expansive citizen suits that some Justices have noted in certain contexts.[205] Allowing broad access to the courts under a statute that makes specific findings of injury, causation, and redressability, may raise the specter of interfering with the Executive Branch's powers to "take Care that the Laws be faithfully executed."[206] One may find, as I do, that the Article II argument should fail as a matter of constitutional law, but it is clearly a live question for some members of the Court.[207]

III. BOUNTIES AND OTHER PROPERTY INTERESTS

Congress has an alternative to legislative findings: rather than identifying putative injuries or causal chains, it can enact legislation that gives a would-be plaintiff a stake in winning a citizen suit, on the model of the *qui tam* relator's or informer's suit.[208] The Court has held that the *qui tam* relator has Article III standing,[209] and so, the argument goes, Congress can overcome the Court's cramped standing doctrine by authorizing bounties for all those who bring meritorious citizen suits. As I discuss below, it is unclear whether the Court would find a wholesale expansion of such suits permissible under Article III.[210] Moreover, there are potential Article II problems, as well as practical problems, with expanding the bounty concept to citizen suits in general.

A. *The Background*

Most citizen suit provisions, particularly those in the environmental arena, give citizen suitors no financial stake in the suit other than the ability to

[203] 514 U.S. 549, 568 (1995) (Kennedy, J., concurring).

[204] *See supra* notes 145-146 and accompanying text.

[205] *See supra* Part I.A.2.c.

[206] U.S. CONST. art. II, § 3, cl. 4.

[207] *See* Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) ("Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States."); Vt. Agency of Nat'l Res. v. United States *ex rel*. Stevens, 529 U.S. 765, n.8 (2000) ("[W]e express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3.").

[208] *See infra* notes 217-225 and accompanying text.

[209] *Vt. Agency*, 529 U.S. at 787-88.

[210] *See infra* Part III.C.1.

recover attorney's fees if successful.[211] When a statute provides monetary penalties, they are paid to the United States Treasury.[212] A few statutes authorize rewards to those who give information leading to criminal prosecutions,[213] and one statute offers a reward for information leading to the imposition of civil penalties.[214] But plaintiffs who sue under citizen suit provisions sometimes receive no share of any penalties paid.[215] Their standing thus hinges on whether they have an injury that meets the Article III requirements of injury-in-fact and causation, and whether the relief they *are* able to pursue will redress that injury.[216]

But what if Congress gave citizen suitors a financial stake in every citizen suit? The two historical models are the *qui tam* action and the informer's action.

1. *Qui Tam* Actions

The False Claims Act (FCA or Act),[217] first enacted just after the Civil War,[218] is the federal *qui tam* statute.[219] It creates liability for anyone who

[211] *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1540(g)(1), 1540(g)(4) (2006) (authorizing citizen suit for injunctive relief only and allowing payment of attorney's fees, expert witness fees, and other costs if the court finds it appropriate); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1270(a), 1270(d) (2006) (authorizing citizen suit against government actors only and authorizing payment of attorney's fees and other costs); Clean Water Act, 33 U.S.C. § 1365(a) (2006) (authorizing citizen suit for injunctive relief and civil penalties); 33 U.S.C. § 1365(d) (authorizing payment of attorney's fees and other costs to "any prevailing or substantially prevailing party"); Friends of the Earth v. Archer Daniels Midland Co., 780 F. Supp. 95, 101 (1992) ("[I]t is well established that civil penalties must be paid to the United States Treasury.").

The Supreme Court has made clear that the availability of attorney's fees alone is insufficient to confer standing on a plaintiff. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).

[212] *See, e.g.*, *Laidlaw*, 528 U.S. at 173; *Steel Co.*, 523 U.S. at 106.

[213] *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(d) (2006); Act to Prevent Pollution from Ships, 33 U.S.C.A. § 1908(a) (West 2010). *But see* James D. Oesterle, *"Citizen Rewards" to Promote Environmental Crimes Prosecutions*, 23-WTR NAT. RESOURCES & ENV'T 46, 47 (2009) ("[V]ery few rewards have been paid under existing legislation.").

[214] Clean Air Act, 42 U.S.C. § 7413(f) (2006), *invalidated by* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2009).

[215] *See supra* note 211 (indicating injunctive relief but not monetary award for various citizen suits).

[216] The Court found standing lacking in *Steel Company* because the plaintiffs sued over wholly past violations and thus had no need for an injunction, nor could they benefit from any alleged deterrent created by the civil penalties payable to the United States. *Steel Co.*, 523 U.S. at 108-09. Moreover, because the defendant had admitted to violations, the plaintiffs could not benefit from declaratory relief.

[217] Federal Claims Act, 31 U.S.C. §§ 3729-3730 (2006). Congress substantially beefed up the False Claims Act with the Fraud Enforcement and Recovery Act, which was enacted

"knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the United States.[220] Violators are "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 [adjusted for inflation, for each false claim submitted] . . . , plus 3 times the amount of damages which the Government sustains because of the act of that person."[221]

If the FCA merely authorized, for example, the Department of Justice to pursue those who defraud the United States, it would be unremarkable. But the Act further authorizes private citizens – called *qui tam* relators – to enforce its requirements on behalf of the United States.[222] A relator who wins his lawsuit receives a bounty: a substantial fraction of any amount recovered in the action.[223]

in the wake of the Great Recession to "improve enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes." Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1617.

[218] *See* Patricia Meader & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 458-61 (1998). The *qui tam* action has a venerable history. *See, e.g.*, J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 567 (2000) (describing the Statute of York, 1318, as an early *qui tam* statute); J. Morgan Phelps, *The False Claims Act's Public Disclosure Bar: Defining the Line Between Parasitic and Beneficial*, 49 CATH. U. L. REV. 247, 250 n.24 (1999) (drawing a parallel to the *qui tam* action in ancient Athens).

[219] "*Qui tam*" comes from the Latin "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*" – "who as well for the king as for himself sues in this matter." BLACK'S LAW DICTIONARY 1282 (9th ed. 2009). The Court has noted that "three other *qui tam* statutes, all also enacted over 100 years ago, remain on the books." Vt. Agency of Nat'l Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000). As I discuss below, at least one of these is more accurately called an informers' action. *See infra* Part III.A.2.

[220] 31 U.S.C. § 3729(a)(1)(A) (2006). The statute also enumerates a number of variations on this theme, prohibiting conspiracy, the submission of false documents, the preparation of false documents, improper handling of government funds, and the like. § 3729(a)(1)(B)-(G).

[221] § 3729(a)(1)(G).

[222] § 3730(b)(1).

[223] § 3730(d) (providing for payment of 15-25% of the amount recovered when the government takes over the case and of 25-30% when the relator is left to pursue the case alone; for a maximum of 10% if the court finds that the relator did not provide the key information leading to the recovery; for reducing or eliminating the reward if the relator participated in the fraud; for the losing defendant to pay the relator's attorney's fees and costs; and for a losing plaintiff to pay the defendant such fees and costs if the action was "clearly frivolous, clearly vexatious, or brought primarily for . . . harassment").

Qui tam lawsuits can involve huge sums of money. *See* Richard Perez-Pena & Danny Hakim, *Lawmakers Hit Deadlock On False Medicaid Claims*, N.Y. TIMES, March 28, 2006, at B1 ("Those . . . suits produce about $1 billion a year in judgments and settlements. . . .

One might think that the relator lacks Article III standing: after all, the Court has repeatedly held that plaintiffs who sue to vindicate the public interest as pure private attorneys general – having no individualized interest in the lawsuit – lack standing.[224] And it certainly looks like the relator sues to vindicate the public interest in preventing fraud on the government, just as a taxpayer might sue over misspent funds. That taxpayer lacks standing.[225]

But when the Court considered whether *relators* have Article III standing, it found they did.[226] It first noted that "the Article III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*,"[227] that "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing," and that "the 'right' [the relator] seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails."[228] The relator still has standing, the Court held, because he is an assignee of the *Government's* claim for damages.[229] The United States suffers injury when it is defrauded; the FCA "can reasonably be regarded as effecting a partial assignment."[230]

This conclusion, the Court said, was reinforced by "the long tradition of *qui tam* actions in England and the American Colonies."[231] The Court found this history "well nigh conclusive": "*qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"[232] The partial-assignment analysis and the historical confirmation "leave[] no room for doubt that a *qui tam* relator under the FCA has Article III

The law lets the plaintiff keep a share of the damages the defendant pays to the government – typically about one-sixth – so a successful whistle-blower can reap millions of dollars.").

[224] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-574 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.")

[225] *E.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 592 (2007).

[226] Vt. Agency of Nat'l Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 773 (2000).

[227] *Id.* at 771 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

[228] *Id.* at 772-73.

[229] *Id.* at 773.

[230] *Id.*

[231] *Id.* at 774. In this way, the government and the relator have a relationship akin to that between an assignor and an assignee of a claim. *Cf*. Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 285-86 (2008).

It is worth noting, however, that the Court's appeal to history is inconsistent with its standing doctrine in general, as historians convincingly argue that the English and colonial courts were open to other actions besides *qui tam* that would clearly fail the current tripartite test. *See* Winter, *supra* note 39, at 1396.

[232] 529 U.S. at 777 (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 102 (1998)).

standing."[233] Importantly, however, the Court did not address the Article II problem.[234] Moreover, four members of the Court recently dissented in a case that found Article III standing for *assignees* who sued under a statute other than the FCA, because the assignees were required to turn all funds recovered over to the assignor.[235]

2. Informers' Actions

Informers' actions essentially create private prosecutors who can proceed against both governmental actors and private defendants for violations of the law; such actions have a long pedigree.[236] Because, by definition, the informer may be empowered to sue under a wider variety of laws than a *qui tam* relator, who sues to recover only sums owed the government, an informer's action can arise in a variety of contexts and "bear[s] a certain resemblance to modern citizen suits inasmuch as individuals were permitted to bring actions that vindicated public rather than private interests."[237] The prevailing plaintiff in an informer's action shares in the bounty of the resulting damages or fines,[238] receiving at least some financial benefit.

The Court has not confronted an informer's suit since the development of the contemporary standing doctrine.[239] As I discuss below, we can only guess what it might say if confronted with such a suit now.

B. *The Suggestions*

Because *qui tam* relators and, possibly, informers, have standing to bring suits that look a lot like citizen suits, several scholars have recommended extending the bounty concept to citizen suits more generally.[240] Suggestions

[233] *Id.* at 778.

[234] *Id.* at 778 n.8 ("[W]e express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of §2 and the 'take Care' Clause of §3.").

[235] *Sprint*, 554 U.S. at 299 (citation omitted). Chief Justice Roberts has also expressed doubts about the constitutionality of *qui tam* standing. *See* Roberts, *supra* note 185 at 1221-22 n.20 (1993) (suggesting that *qui tam* relator practice is a "perhaps constitutionally dubious remnant[]" of "[p]ractice prior to the framing of the Constitution").

[236] United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943); Adams v. Woods, 6 U.S. (2 Cranch) 336, 341 (1805) (opinion of Marshall, C.J.) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [*qui tam*] as well as by information."); *see also, e.g.*, Sunstein, *supra* note 15, at 175; Winter, *supra* note 39, at 1396-98.

[237] Leonard & Brant, *supra* note 39, at 42.

[238] Sunstein, *supra* note 7, at 175 (1992).

[239] The most recent case the Supreme Court has decided under an informer's statute appears to be *United States ex rel. Marcus*, 317 U.S. 537 (1943). A search run in Westlaw, while not definitive, gives supporting evidence (searching for ("informer! action!") and (informer & qui tam), run February 23, 2010)).

[240] Pierce, *supra* note 8, at 1182; Sunstein, *supra* note 7, at 232-34. Note that there are bounties having nothing to do with bringing lawsuits – for example, bounties are offered to

range from the extremely broad – Congress could enact "an exceedingly short amendment to existing law, giving a bounty to all successful citizen plaintiffs"[241] – to the more modest – bounties could be offered in certain other contexts.[242] Whether the bounty option makes sense depends upon what kind of lawsuit and what kind of remedies are involved; the key distinction is between lawsuits against private defendants and lawsuits against the government.

1. Lawsuits Against Private Defendants

In suits against private violators of the law, the citizen suitor should presumably be given a percentage of the civil penalties obtained for the Treasury. This parallels the *qui tam* action[243]: the United States would essentially be assigning part of its claim to the citizen suitor.[244] But adopting the *qui tam* analogy in suits against private defendants, for example, against a company that is allegedly in violation of its Clean Water Act permits,[245] does not resolve the standing problem as a whole.

First, the Court has in the past decade made clear that the plaintiff "must demonstrate standing separately for each form of relief sought."[246] More and more, this requirement has been styled as an essential aspect of separation of powers: "'[t]he actual-injury requirement would hardly serve the purpose. . . of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration.'"[247] A citizen suitor who would receive a bounty if victorious would therefore have standing to pursue civil penalties, but would not have standing to seek an injunction or declaratory relief.

those who give information to the government under the tax, securities, and customs laws. *See generally* Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141. Even members of the Court have noted this possibility. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 129 (1998) (Stevens, J., concurring).

[241] Sunstein, *supra* note 7, at 232; *see also* ECHEVERRIA & ZEIDLER, *supra* note 136, at 19-20.

[242] *See* Jeffrey Manns, *Rating Risk After the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability*, 87 N.C. L. REV. 1011, 1027 (2009).

[243] *See supra* Part III.A.1.

[244] Sunstein, *supra* note 7, at 232. *See also* Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 217-18 (1996) (recommending action modeled on *qui tam* in tax context).

[245] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 187-88 (2000).

[246] *Id.* at 185; *see also* Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009); Lewis v. Casey, 518 U.S. 343, 358, n.6 (1996).

[247] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006) (alterations in original) (quoting *Lewis*, 518 U.S. at 357).

Because injunctive relief is the key relief sought in many citizen lawsuits – indeed, injunctive and declaratory relief are the *only* kinds of relief available under the Administrative Procedure Act[248] – this is a notable flaw.

Of course, civil penalties have deterrent effects, as both Congress and the Court have recognized.[249] Civil penalties obtained by a relator may deter a defendant's future wrongful conduct and that of others who are scared by his example. But injunctions are far more effective than civil penalties in preventing further wrongful conduct: a wrongdoer who decides that he can afford to risk incurring further penalties may well decide to act wrongly,[250] while an injunction "is enforceable by the contempt power. [It] must be obeyed until it is stayed, dissolved, or reversed . . . ."[251] A citizen suit brought by a relator who lacks separate standing to seek an injunction would thus be barred from this valuable form of relief.

Second, it is not at all clear that the "assignment" analogy works when expanded beyond the *qui tam* context. The *qui tam* bounty is a percentage of the money damages that the United States suffers. But, for example, what bounty would be assigned to for a successful Clean Air Act suitor? In that case, an informer[252] could presumably seek not only penalties but also injunctive relief, because the informer's action is more capacious.

2. Lawsuits Against the Government

Suits against the government present thornier problems. Remedies against the government in the citizen suit context are injunctive or declaratory in nature; no damages are involved. The *qui tam* action thus provides no help.

In these cases, Professor Sunstein invokes the informer's action,[253] suggesting that Congress could authorize an award of $500 for any successful citizen plaintiff.[254] Professor Feld has suggested a modified version of this idea, authorizing citizens to go to agencies for a determination that a particular action or inaction violates the law.[255] If the citizen is right, the agency pays her

[248] Administrative Procedure Act, 5 U.S.C. § 702 (2006).

[249] *Laidlaw*, 528 U.S. at 185; *see also* Hudson v. United States, 522 U.S. 93, 102 (1997).

[250] Of course, the offender would need to ensure that he understands what potential penalties he faces: some statutes have additional penalties for repeat offenders, or impose higher penalties for "knowing" violation. *See, e.g.*, 42 U.S.C. § 7413(c)(4-5) (2006) (imposing criminal penalties for the "knowing" violation of ambient air quality standards and doubling both fines and imprisonment for repeat offenders). A defendant who has been fined for prior violations presumably has the requisite scienter when he reoffends.

[251] DAN B. DOBBS, LAW OF REMEDIES 223 (2d ed. 1993).

[252] *See supra* Part II.A.2.

[253] *See supra* notes 240-241 and accompanying text.

[254] Sunstein, *supra* note 7, at 233.

[255] *See* Harold Feld, *Saving the Citizen Suit: The Effect of* Lujan v. Defenders of Wildlife *and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141, 149 (1994). As I discuss below, this approach has some elements of the Article I solution.

$500 and, presumably, fixes the problem; the courts are never involved. If the agency disagrees, the citizen loses $500 she believes she deserves and will have standing to bring a suit challenging the agency's decision.[256]

Alternatively, Congress could give citizens property rights in environmental and other assets.[257] Sunstein suggests, for example, that Congress create a tenancy-in-common in certain environmental assets.[258] The benefit of this approach, for Sunstein, is that it "would build on common law understandings and produce more focused congressional deliberation on the nature of the interest it is creating."[259] Rather than adding a citizen-suit provision to each statute without much thought, Congress would have to consider the "nature and consequences" of each property interest it creates.[260] And rather than deal with citizen suits, the courts would "be faced with . . . suit[s] brought by property holders equipped with causes of action."[261] Finally, Congress could authorize relief for such property holders under various statutes, whether in the form of monetary damages[262] or environmental remediation.[263]

C. *Is It Constitutional?*

Citizen suitors who have been endowed with bounties present problems under both Article II and Article III. Although the Court has answered a narrow version of the Article III question, it has yet to confront the Article II questions.[264] The Court might accept that at least some of these suitors have Article III standing, but it is unlikely the Court would find an across-the-board expansion of bounties consistent with Article III, particularly given that Article's separation-of-powers dimensions.[265]

See infra Part IV.

[256] Feld, *supra* note 255, at 149.

[257] Pierce, *supra* note 8, at 1181; Sunstein, *supra* note 7, at 235.

[258] Sunstein, *supra* note 7, at 234.

[259] *Id.*

[260] *Id.* at 235. As Sunstein points out, Justice Scalia would not be satisfied with this approach, as it gives the citizenry at large the power to enforce the laws. *Id.* I discuss this problem below. *See infra* Part III.C.2.

[261] Sunstein, *supra* note 7, at 235.

[262] *See* ECHEVERRIA & ZEIDLER, *supra* note 136, at 20.

[263] *See id.*

[264] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) ("Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. . . . In my view these matters are best reserved for a later case."); Vt. Agency of Nat'l Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000) ("[W]e express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3.").

[265] *See supra* notes 44-52 and accompanying text.

1. Article III Problems

The appeal of the bounty is that the Court has held that *qui tam* relators have standing under Article III. The bounty suggestion seems to take care of Article III objections: a financial stake parallels the quintessential injury-in-fact.[266] And it cannot matter that the bounty does not compensate the citizen suitor for any injury: as the Court explained at length in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the practice of assigning claims has a venerable history.[267] Indeed, the *Lujan* Court distinguished the *qui tam* action, which has long been accepted in the federal courts, from the citizen suit, which is of recent vintage and which may have plaintiffs of dubious standing.[268]

But it is not at all clear that the Court would accept a wholesale expansion of the *qui tam* concept under Article III. One could easily imagine, for example, Justice Scalia finding that a relator suing for civil penalties under the Clean Water Act is not actually an assignee of anything: too many links are needed to chain together the injury suffered *by the United States* from a Clean Water Act violation and the assignment of that injury to the relator.

Nor is it clear that informers would have standing. *Vermont Agency* allows us to guess about the Court's likely reaction to an informer's action. First, the Court refers in that case to at least two current informers' statutes as *qui tam* statutes, suggesting that the Court views them interchangeably.[269] Second, the informer's action has a historical pedigree similar to that of *qui tam*: it has "been in existence for hundreds of years in England, and in this country ever since the foundation of our government."[270] These two facts suggest that the informer would have standing.

However, there is one aspect of the informer's action that gives pause. The informer, as private prosecutor, may not easily be described as an assignee of the United States. When the United States enforces a criminal law against a wrongdoer, it is not really pursuing redress for an injury to the United States, at least not unless the concept of injury and redress are stretched beyond recognition. Instead, the United States exercises its power *qua* state to hold

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

[267] Vt. Agency, 529 U.S. at 774-77.

[268] Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 (1992); *see also* Sunstein, *supra* note 7, at 233.

[269] *See supra* note 219. For example, the patent statute, 35 U.S.C. § 292(b) (2006), which allows "any person [to] sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States," seems much more like an informer's action (where the plaintiff is a private prosecutor) than a *qui tam* action, since the plaintiff here would be suing a lawbreaker, not someone who defrauded the government.

[270] Martin v. Trout, 199 U.S. 212, 225 (1905); *see also* Winter, *supra* note 39, at 1407-1408.

those who violate the law accountable using the coercive power that is reserved to the government.[271] Or such a prosecution might be seen as seeking redress for the *victim* of the wrongdoing, but in that case the United States proceeds *in parens patriae*, not on its own behalf.

2. Article II Problems

Like the suggestion that Congress fix the Court's current standing doctrine by making findings that support standing, the bounty suggestion does not address the Article II problem. And that problem is significant.

As Professor Sunstein has noted, suits against private individuals "raise a lurking issue about private interference with the exercise of prosecutorial discretion, and hence with the President's 'Take Care' power."[272] Sunstein argues that any such problem does not rise to "constitutional status," because "[p]arallel public and private remedies are most familiar to American law; they do not violate the Constitution."[273]

But individuals who seek private remedies typically have individuated injuries to address; a farmer harmed by pesticides may sue under state tort law, even if the Federal Insecticide, Fungicide and Rodenticide Act also regulates pesticides and allows the government to pursue violators.[274] The farmer sues for *his* injury. Under the *qui tam* approach, however, the Government assigns some of *its* claim to the private party, so that the private party sues to vindicate the rights of *the United States*. That *qui tam* or informer's action seems qualitatively different from the parallel public and private remedies Sunstein discusses. Especially given the Court's recent suspicious treatment of congressional enactments,[275] any statute that purports to create millions of private enforcers, even using bounties, seems doomed to fail under Article II.[276]

D. *Practicalities*

Finally, even though we have long experience with *qui tam* actions, no one seems to have thought through how to implement the informer approach –

[271] *See generally* 13B WRIGHT ET AL., *supra note* 37, § 3531.11, at 95 ("The question of the role that should be played together by the executive and the judiciary is one of the most fundamental and complex questions of judicial authority that can confront the federal courts. Courts understand the difficulties, and no harm has been done by the habit of framing the issue as one of standing. It must be clear, however, that this standing issue is not to be answered by invoking the formulas propounded in private standing cases.").

[272] Sunstein, *supra* note 7, at 231 n.300.

[273] *Id.*

[274] Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005). The farmer's state action may ultimately be *preempted* by federal law, but that has no connection to whether he has *standing* as a constitutional matter.

[275] *See supra* notes 163-166 and accompanying text.

[276] *See supra* notes 89-100 and accompanying text.

which is necessary if we wish to authorize broad citizen suits against the government. Remember, the suggestion is that a $500 bounty be provided every time someone successfully challenges an agency action or inaction.[277] What if multiple parties challenge the action? Does each plaintiff get a bounty? Or only one?[278] How much money is this in the aggregate? After all, numerous challenges are made to agency actions every year, and those challenges are made in a world in which plaintiffs are *not* entitled to any bounty when they win.[279]

Moreover, Professor Beck argues that relators "tend to pursue pecuniary interests at the expense of the common good. The consequence of the . . . bounty is to eliminate the exercise of disinterested prosecutorial discretion . . . and to transform law enforcement into a business pursued for the private enrichment of profit-motivated bounty hunters."[280] It is not only that the incentives change for those who would have brought suit anyway; the bounty makes lawsuits attractive, not only to those who were previously motivated by passion for the issue, but also to those who are now attracted by the money. If the bounty draws additional suits motivated by the money, the federal courts may see an unwelcome increase in frivolous lawsuits.

Perhaps the most straightforward way to address this problem is to make the bounty small. The injury-in-fact requirement can be satisfied with a small yet concrete financial stake in the litigation.[281] One can imagine a statute that calibrates the available bounty in a way that permits standing for those who currently suffer under the Court's strictures, but that provides insufficient incentive for those who would be seeking merely a high-payout lawsuit.

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[277] *See supra* notes 254-255 and accompanying text.

[278] I note that the Court has regularly allowed parties without standing to participate in lawsuits so long as they have the same interests as a party that does have standing. *See* McConnell v. FEC, 540 U.S. 93, 233 (2003).

[279] Most citizen suit provisions provide for attorney's fees and, sometimes, other expenses like expert witness fees. As a consequence, there are a number of public interest law firms that survive on those fees and on public donations. *See* Lincoln L. Davies, *Lessons For an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach Environmentalists Today*, 31 ENVTL. L. 229, 319 (2001); Steven M. Dunne, *Attorney's Fees for Citizen Enforcement of Environmental Statutes: The Obstacles for Public Interest Law Firms*, 9 STAN. ENVTL. L.J. 1, 43 (1990). But few question the sincerity of such organizations – they bring the lawsuits they think will further the cause. Were bounties offered to victorious plaintiffs, many would be tempted to sue simply for the funds, which would change the citizen-suit landscape considerably.

[280] Beck, *supra* note 218, at 549; *see also* Bressman, *supra* note 20, at 1705; Johnson, *supra* note 100, at 407.

[281] *See* Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 291 (3d Cir. 2005); Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 177 (3d Cir. 2001) (positing that standing would have existed "[i]f the plaintiffs had shipped even a small amount of Russian vodka to this country for sale").

Whatever the details, it is clear that, if careful attention is not paid, a Congress that adopts this approach may create more problems than it solves.

IV. AN ARTICLE I TRIBUNAL

Parts II and III were concerned with ways that Congress could empower more plaintiffs to sue in the Article III courts to enforce federal laws, despite the Supreme Court's restrictive standing doctrine. As noted above, there are problems – perhaps insurmountable ones – with both of those options. An alternative is to obviate the Article III inquiry by taking at least some cases out of the federal courts and resolving them instead in some sort of Article I tribunal[282] (Tribunal) that has broad powers to review government action and, possibly, to hear suits by private citizens against violators of the law.[283]

Because Article III standing restrictions do not apply to a non-Article III entity, the Tribunal could be open to as many or as few claims as Congress determined. Indeed, the whole stable of Article III justiciability doctrines would presumably be inapplicable to claims brought before the Tribunal. This means that the Tribunal could potentially hear vastly more cases than the Article III courts, whether unripe, moot, or brought by a plaintiff lacking standing, unless some other constitutional doctrine (for example, the rule against judicial non-delegation established in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[284] or requirements under the Due Process Clause for fair and unbiased adjudication) prevented it.[285] Because one central worry about standing doctrine is that cases are not decided on their merits but rather on sometimes abstruse justiciability grounds,[286] the Tribunal is tempting.

After giving some background on existing Article I (and other non-Article-III) courts, I describe the various Tribunals that critics of standing doctrine have recommended; because most of those recommendations are fairly skeletal, I discuss some problematic details that would have to be worked out. I then discuss whether the Tribunal is constitutional and whether the practical

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[282] An Article I tribunal, as the name makes clear, in one created by Congress under its Article I powers; such tribunals have also been created under Article IV (territorial courts). *See infra* Part IV.A.

[283] Different issues are presented by suits against the government and suits against private defendants. *See infra* Part IV.C.

[284] 458 U.S. 50, 60 (1982).

[285] Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting); *see also* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985).

An Article I tribunal would be bound by no *Article III* requirement to ensure that a case is ripe, is not moot, involves no political question, and is brought by a plaintiff who has standing (although the Due Process Clause may impose outside limits on the tribunal). But because those doctrines serve valuable functions an Article I tribunal certainly might adopt, or Congress might impose by statute, at least some of the justiciability doctrines as a matter of prudence.

[286] *See supra* Part I.A.2.

problems it presents can be overcome. In the end, I conclude that a Tribunal with broad jurisdiction may raise an Article III problem separate from standing: that of improper delegation of judicial power. Moreover, numerous practical problems arise in trying to craft the Tribunal. However, the Tribunal does present an interesting opportunity to create an institution that would overcome some of the acknowledged shortcomings with review in the Article III courts.

A. *The Background*

Congress has created a huge number of non-Article-III courts; Professor Resnik notes that the number of non-Article-III judges – including judges serving on the Tax Court and the Court of Federal Claims, bankruptcy judges and magistrates, and administrative law judges – far outnumber the Article III judges.[287] Furthermore, the number of adjudications undertaken by those non-Article-III courts also greatly outnumber those in the Article III courts.[288] Some such courts exist under articles other than Article I; for example, territorial courts are created under Congress's Article IV power.[289] But Congress has invoked its Article I powers[290] for the vast majority of them.[291]

[287] Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 582 (1985) [hereinafter *Mythic Meaning*]; *see also* Judith Resnik, *Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One's Anomalous Character*, 71 GEO. WASH. L. REV. 798, 808 (2003) ("My assumption is that one hundred years from now, life-tenured judges will at best comprise about one quarter of the federal judicial work force and will mostly do appellate work, reviewing decisions of non-Article III judges."). Resnik herself discusses the potential for an Article I court – a Commerce Court; unlike the potential Tribunals I discuss below, *see infra* Part IV.B, her proposal is merely hypothetical, generated to help us examine our thoughts about Article III. *Mythic Meaning*, *supra*, at 584 (stating that she poses the hypothetical "[t]o ground . . . consideration of the meaning of Article III").

[288] Professor O'Connell reports that, while "Article III and bankruptcy judges conducted about 95,000 adversarial proceedings, including trials" in 2007, "federal agencies completed over 939,000 such proceedings, including immigration and social security disputes." Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009); *see also* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1479 (2009).

[289] U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). The territorial courts, obviously, have had jurisdiction in territories of the United States; they were created as non-Article-III courts for a variety of reasons, perhaps most importantly that the life tenure required for Article III judges is incompatible with the usual temporary status of territories (which tend to turn into states). *See* Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39, 50 (2009).

One special "territorial" circumstance is the District of Columbia, whose local courts were created in 1970, District of Columbia Court Reform and Criminal Procedure Act of

These courts take varying forms, and their judges serve varied roles. Some non-Article-III courts look very much like Article III courts, with judges who, though not life-tenured, serve lengthy terms and may have salary protections;[292] with procedures similar to the rules used in the Article III courts;[293] and with review in one of a variety of Article III appellate courts,[294]

1970, Pub. L. No. 91-357, 84 Stat. 473 (1970), under Congress's Article I power over the District, not under its Article IV power over the territories. *See* U.S. CONST. art. I, § 8, cl. 17. The Supreme Court held these courts constitutional in *Palmore v. United States*, 411 U.S. 389, 390 (1973).

[290] *See* U.S. CONST. art. I, § 8, cl. 8 (giving Congress power over patent and copyright); 35 U.S.C. § 6 (2006) (creating Board of Patent Appeals and Interferences); *see also* John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 2007 PATENTLY-O PATENT L.J. 21, 21, *available at* http://www.patentlyo.com/lawjournal/2007/07/areadministrat.html.

[291] Apart from the territorial courts, *supra* note 289, and certain military tribunals created by the President under Article II, *see, e.g.*, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001) (invoking presidential powers to detain al-Qaeda terrorists and ordering the Secretary of Defense to create military commissions to try such individuals), Congress has created the non-Article-III courts using an enumerated Article I power or the more general Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18.

There is some semantic confusion over how broadly the term "Article I courts" expands. It does not, of course, apply to courts that were created under Article IV, but even under Article I, some seem to use "Article I court" as a narrow term that applies only to the most court-like of those institutions. *See infra* note 373. Here I will use "Article I court" to refer to any adjudicative tribunal, whether very court-like or not, created using an Article I power.

[292] *See, e.g.*, 26 U.S.C. § 7443(e) (2006) ("The term of office of any judge of the Tax Court shall expire 15 years after he takes office."); 28 U.S.C. § 152(a)(1) (2006) ("Each bankruptcy judge shall be appointed for a term of fourteen years, subject to [certain] provisions."); 28 U.S.C. § 172(a) ("Each judge of the United States Court of Federal Claims shall be appointed for a term of fifteen years."); 28 U.S.C. § 631(e) (setting eight-year term for federal magistrate judges). Judges of the Court of Federal Claims and the Tax Court also receive the same salary as the federal district court judges, and thus are presumably protected from diminutions in salary. 28 U.S.C. § 172(b) ("Each judge shall receive a salary at the rate of pay, and in the same manner, as judges of the district courts of the United States."); *see also* 26 U.S.C. § 7443(c). Many of these judges may be removed only for cause, *id.* § 7443(f); 28 U.S.C. § 176(a), and may have further tenure protections, *id.* § 178 (allowing judge who was willing to be but is not reappointed to retire at full salary be recalled for duties akin to those of senior Article III judges); 26 U.S.C. § 7447 (2006).

[293] *See, e.g.*, FED. R. BANKR. P. 1011 ("Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F. R. Civ. P. . . ."); FED. R. CT. CL. Foreword ("The Federal Rules of Civil Procedure applicable to civil actions tried by a United States district court sitting without a jury have been incorporated into the following rules to the extent appropriate for proceedings in this court.").

[294] *E.g.*, 28 U.S.C. § 158 (2006) (establishing appeals from bankruptcy courts to district courts, bankruptcy appellate panels, and federal circuit courts of appeal); 28 U.S.C. § 1295(a)(3) ("The [U.S.] Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of the . . . Court of Federal Claims.").

at least for proceedings that qualify as "Cases" or "Controversies."[295] Indeed, one large category of non-Article-III *judges* are the magistrates who aid the Article III district courts; magistrates serve terms of years and have limited authority but behave much like their life-tenured supervisors.[296]

Other non-Article III tribunals look much less like Article III courts. Most administrative judges and administrative law judges (ALJs) who adjudicate issues under various organic statutes are employees of the federal government, not appointed for terms of years, and have certain employment protections.[297] Their procedures may be quite different from those used in a courtroom. For example, the ALJs who decide Social Security Disability claims meet fairly informally with the applicant claiming disability, with the claimant's representative, and sometimes with a vocational expert who testifies regarding what jobs, if any, the applicant might perform; the goal is to arrive at a correct determination of the applicant's claim, rather than to see which side can litigate better.[298] Similarly, the Merit Systems Protection Board, while more formal than the Social Security Disability adjudication system, similarly seeks correct answers rather than referee disputes between legal gladiators.[299]

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[295] For example, the U.S. Court of Federal Claims has been given the power to issue advisory opinions, something that Article III courts cannot do. 28 U.S.C. § 1492 ("Any bill, except a bill for a pension, may be referred by either House of Congress to the chief judge of the United States Court of Federal Claims for a report in conformity with section 2509 of this title."). *See also* Craig A. Stern, *Article III and Expanding the Power of the United States Court of Federal Claims*, 71 GEO. WASH. L. REV. 819, 819 (2003).

The local courts of the District of Columbia operate largely like state courts and are thus indistinguishable from the typical state court. *See* Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 996 (2002) (describing current structure and jurisdiction of D.C. courts). Courts in territories of the United States may or may not behave like courts within the United States. *Compare* Stanley K. Laughlin, Jr., *The Constitutional Structure Of The Courts Of The United States Territories: The Case Of American Samoa*, 13 U. HAW. L. REV. 379, 385-86 (1991) ("Even today [the Secretary of the Interior] seems to remove judges at will and openly asserts the power to revise judgments of the High Court."), *with* Nicolas, *supra*, at 989 ("The Act [creating territorial courts in Puerto Rico] also provided that the relationship between the local and federal courts in Puerto Rico for removal and the like was to be governed by the same rules operating as between the federal and state courts.")

[296] *See, e.g.*, Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 674 (2005).

[297] *See* 5 U.S.C. § 3105 (2006) (authorizing employment of ALJs). *See generally* 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION §§ 8199, 8211, 8212 (2d ed. 1984).

[298] *See* 20 C.F.R. §§ 405.301-405.383 (2010); Frank S. Bloch et al., *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 26 (2003).

[299] Telephone interview with Bryan Schwartz, Managing Partner, Bryan Schwartz Law, Oakland, Cal. (Feb. 22, 2010).

As a result of this variety, one cannot distinguish between these non-Article-III tribunals and the Article III courts based on behavior alone. Instead, the key difference between these courts and Article III courts is that Article III courts are courts of relatively general jurisdiction.[300] By contrast, non-Article-III courts tend to have narrow jurisdiction. For example, the Court of Federal Claims resolves claims for money against the United States,[301] the Tax Court resolves certain tax issues,[302] the bankruptcy courts may issue final decisions only in core bankruptcy proceedings,[303] and ALJs hear only those issues that their agency's organic statute allows them to hear.[304]

B. *The Suggestions*

One who sets out to establish a tribunal outside the strictures of Article III thus has a wide variety of models to choose from. Nevertheless, the critics of

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[300] Of course, Article III courts are not courts of general jurisdiction the way state courts are: "The district courts of the United States, as we have said many times, are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005) (citation and internal quotation marks omitted). But, within those limits, the Article III courts hear a wide variety of disputes; in addition to almost any case arising under federal law (except those within the jurisdiction of a special tribunal), the federal courts also hear a variety of state law claims under the diversity jurisdiction, 28 U.S.C. § 1332 (2006).

Two of the federal courts of appeal have somewhat specialized jurisdiction. The D.C. Circuit hears vastly more administrative law cases than the other circuits. *E.g.*, 7 U.S.C. § 2 (2006) (granting the D.C. Circuit appellate jurisdiction over certain decisions made by the Commodities Futures Trading Commission); 10 U.S.C. § 950g (2006) (granting the D.C. Circuit appellate jurisdiction over certain judgments rendered by military commissions); 12 U.S.C. § 2266 (2006) (granting the D.C. Circuit appellate jurisdiction over Farm Credit Administration decisions); 21 U.S.C. § 457 (2006) (granting the D.C. Circuit appellate jurisdiction over decisions made by the FDA); 42 U.S.C. § 300j-7 (2006) (establishing the D.C. Circuit as the sole venue for appeal of national primary drinking water regulations). It also has general jurisdiction over federal cases arising from the District Court for the District of Columbia, 28 U.S.C. § 41 (2006), and thus hears non-administrative law cases frequently. The Court of Appeals for the Federal Circuit is the most specialized federal court, hearing appeals in disputes ranging from patent and copyright cases to contract claims against the United States, as well as cases arising out of the Court of International Trade and the Merit Systems Protection Board. 28 U.S.C. §§ 1295-96.

[301] That jurisdiction is partially concurrent with the Article III district courts. *See* 28 U.S.C. §§ 1346, 1491(b)(1).

[302] *See* Thomas D. Greenaway, *Choice of Forum in Federal Civil Tax Litigation*, 62 TAX LAW. 311, 311 (2009).

[303] *See* 28 U.S.C. § 157 (2006).

[304] *See supra* notes 296-298 and accompanying text. Two exceptions to this general conclusion are the magistrate judges, who, as adjuncts to the Article III district courts, hear a broad range of issues, *see* Baker, *supra* note 296, 674-75, and the territorial courts, which have the same general jurisdiction as the Article III courts, *see* Kontorovich, *supra* note 289, at 52-53.

standing doctrine have consistently recommended Tribunals that look very much like the courts bound by Article III and its standing doctrine. To my knowledge, there have been three suggestions for a non-Article-III tribunal to solve existing standing problems; all would invoke Article I powers in creating the Tribunal.[305]

One scholar offers the merest sketch, suggesting "a court specially created to hear, and conclusively determine, complaints under a given act," which parallels the existing tendency for Article I courts to have narrow jurisdictions, or "a court with open-ended jurisdiction to hear and determine complaints under a range of statutes."[306] Congress could also provide an Article I appellate court to review the decisions of this tribunal.[307] The proposed statute creating this Article I court "would not divest article [sic] III courts of their present authority to entertain these matters. Jurisdiction would be in the alternative, at the option of the plaintiff."[308] The author suggests a concrete and fairly simple way to implement this idea: Congress could empower the local courts of the District of Columbia to hear these disputes.[309]

A second scholar calls for an environmental tribunal, again paralleling current Article I courts in the narrowness of the jurisdiction.[310] Because the Court's Article III standing doctrine "compromises environmental protection," we could "start over with congressionally defined rights in an Article I tribunal."[311] The author gives no further details on the form of the Tribunal, choosing instead to focus on arguments for and against it.[312]

The third suggestion is the most ambitious: an Article I tribunal to hear all cases in which the plaintiffs lack standing to sue in the federal courts.[313] The generality of this tribunal's jurisdiction would presumably approach that of the federal courts themselves.[314] How does one know whether standing will be denied in Article III courts? Although the author gives little attention to this

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[305] *See Mythic Meaning*, *supra* note 287, at 581; Carter, *supra* note 17, at 2218-22 (rejecting an Article I tribunal as insufficiently independent).

Harold Feld has suggested an approach that savors of both the Article I forum and the bounty approach by requiring citizens to seek review from the relevant agency before offering citizens a stake in subsequent court action that operates something like a bounty. *See* Feld, *supra* note 255, at 149.

[306] Dumont, *supra* note 17, at 686.

[307] *Id.*

[308] *Id.* at 688. As I discuss below, *see infra* Part IV.C.2, concurrent jurisdiction raises a number of practical and constitutional problems.

[309] Dumont, *supra* note 17, at 689.

[310] Hodits, *supra* note 17, at 1907.

[311] *Id.* at 1934. Mr. Carter similarly suggests a tribunal with a jurisdiction limited to environmental concerns, but ultimately rejects the idea. *See* Carter, *supra* note 17, at 2222-36.

[312] *See* Hodits, *supra* note 17, at 1933-1940.

[313] *See* Krinsky, *supra* note 17, at 301.

[314] *See id.* at 336.

issue, he does suggest that Congress might make lawsuits in this Article I tribunal "available at a stage of agency action during which injuries are still hypothetical."[315] He notes that precedent exists for a Tribunal that hears proceedings that are not cases or controversies, in the Court of Federal Claims's advisory opinions.[316] However, like the other authors, he provides few details regarding the actual structure and operation of the Tribunal.

The options thus range from a Tribunal that reviews decisions under a narrow jurisdiction (the Limited Tribunal) to a Tribunal that has broad jurisdiction over, conceivably, the entire administrative state (the Expansive Tribunal). The choice of a Limited Tribunal, particularly one addressing only environmental issues, is tempting because the vast majority of standing problems arise in the environmental context and because, as I explain below, such a Tribunal may avoid certain practical and constitutional problems.[317] The Expansive Tribunal, however, is the only one that truly solves the standing problem, because important non-environmental cases have foundered under the Court's standing doctrine.[318]

As I show below, the choice between a Limited Tribunal and an Expansive Tribunal affects the degree to which the standing problem is solved, the practical choices that must be made in creating a workable institution, and the constitutionality of the Tribunal.

C. *Problems: Details*

None of the suggestions described above thoroughly engage the details. To evaluate the Tribunal's constitutionality, whether Limited or Expansive, as well as its chances of being adopted, I must supply some details. In this subsection, I address the independence of the adjudicators, the jurisdiction of the Tribunal and its relation to that of the Article III courts, and the coordination of precedent between the two.

1. Independence

A central problem with non-Article III adjudicators is their lack of independence.[319] They lack the life tenure and salary protections that the

[315] *Id.* at 305.

[316] *Id.* at 301-02.

[317] *See* Andrew Long, *Standing & Consensus: Globalism in* Massachusetts v. EPA, 23 J. ENVTL. L. & LITIG. 73, 86-98 (2008).

[318] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 739-40 (1984) (finding that parents of black school children did not have standing to bring suit against the IRS for failure to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools).

[319] *See*, RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 254-57 (1999); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 292-96 (1990); *Cf.* Sunstein, *supra* note 67, at 656 (stating that judicial review helps to avert "undue influence of powerful private groups over the regulatory process").

Constitution accords to Article III judges;[320] they are subject to pressure from Congress, the President, and agency heads;[321] and they may even be removed from office for political reasons.[322] This problem would exist for both the Limited and Expansive Tribunals.

Congress is unlikely to solve the life-tenure and salary problems by giving the Tribunal's adjudicators life tenure and salary protection. If an adjudicator were given life tenure and salary protection by Congress, he would likely be an Article III judge, and his tribunal an Article III court, since nowhere else in the Constitution is life tenure contemplated. But there have apparently been at least a few life-tenured, non-Article III judges.[323] What does it mean to be a life-tenured judge if the tenure is guaranteed by statute and not the Constitution? Presumably the judge could not rely on that tenure or salary protection, because Congress could always change its mind.

A broader question is whether life tenure and salary protection are essential to good judging. Many state judges are elected,[324] and while that practice has been widely condemned,[325] we generally do not think such judges are incapable of independent decisionmaking except in extreme circumstances.[326] Moreover, as already discussed above, some non-Article III adjudicators are

[320] U.S. CONST. art. III, § 1.

[321] *See*, John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33, 40 ("'[T]he ALJs' office and authority are completely controlled by the will of Congress.'" (quoting K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 126 (1995)).

[322] *See* Laughlin, *supra* note 295, at 380 ("[T]erritorial judges have been removed for nothing more than deciding cases contrary to government wishes.").

[323] *See* Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 617 n.23 (2002) (noting that the first United States Court of Claims had judges with life tenure but also had features incompatible with Article III).

[324] *See* Kelley Armitage, *Denial Ain't Just A River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 629-37 (2002); *see also The Debate Over Judicial Elections and State Court Judicial Selection*, 21 GEO. J. LEGAL ETHICS 1347, 1355-428 (2008).

[325] Adam Liptak, *Former Justice O'Connor Sees Ill in Election Finance Ruling*, in N.Y. TIMES, Jan. 27, 2010, at A16 ("'Judicial elections are just difficult to justify in a constitutional democracy in which even the majority is bound by the law's restraints,' Justice O'Connor said . . . .").

[326] *See* Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 543 (1999) ("For the most part, there is very little electoral interference with judicial independence. Most decisions remain unknown except to the litigants. Most judicial terms are so long that many potentially controversial decisions will be long past by the time of the next election. Most incumbent judges face little or no real electoral opposition."). *But see, e.g.*, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009) (holding that a justice of the West Virginia Supreme Court could not avoid the appearance of impartiality if he sat on a case involving a donor who gave $3 million to the justice's election campaign); *see also* JOHN GRISHAM, THE APPEAL 358 (2008).

appointed for lengthy terms, which may make them sufficiently independent.[327] At least one study has found little difference in the decisionmaking of Article I and Article III adjudicators.[328] Professors Pardo and Nash suggest thinking about independence as a continuum, not as a binary, "all-or-nothing" category.[329] On that logic, many Article I adjudicators have a "fair amount" of independence – they serve long terms and are removable only for cause[330]– and the Tribunal's adjudicators could receive the same protections.

The fear that political pressure will influence Article I adjudicators is more troubling. Precisely because it is subject to congressional control, an Article I tribunal might be more subject to capture by special interests than Article III courts. As Daniel Meltzer has argued, the greatest risk to Article III is probably not posed by a congressional attempt to subvert that Article's protections, but by "the accretion of measures, each of which creates a significant jurisdiction in a non-Article III tribunal," measures taken not only due to a "continuing concern about the workload of Article III courts" but also at the behest of "powerful interest groups . . . for the purpose of advancing a specific agenda."[331] Non-Article-III courts are often considered less independent than Article III courts, despite long tenure and other protections. This seems to be a serious problem for the Limited Tribunal.

But, as discussed above, current Article I courts are characterized by narrow purviews.[332] The relative breadth of the Expansive Tribunal's jurisdiction might protect it from some of those political pressures.[333] A fairly generalist reviewing tribunal would not be subject to capture by any particular bar, although it might fall victim to, for example, the United States Chamber of Commerce.[334] Nor would the Expansive Tribunal likely be subject to the

[327] *See, e.g.*, Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can it Be Without Article III?*, 46 MERCER L. REV. 863, 864-68 (1995) (stating that some legal scholars regard non-Article III judges as "imbued with the essential elements of judicial independence").

[328] Bruce A. Carroll, *The Possible Impact of Article I Judges: Collective Analysis of Judicial Decision Making Between Article I and Article III Judges*, 15 TRINITY L. REV. 50, 65 (2008).

[329] Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L.R. 1745, 1765 (2008).

[330] *See id.* at 1765-66.

[331] Meltzer, *supra* note 319, at 292. *Cf.* Sunstein, *supra* note 69, at 656 ("[J]udicial review . . . may guard against the undue influence of powerful private groups over the regulatory process.").

[332] *See supra* Part IV.A.

[333] The proper scope of the Tribunal's jurisdiction is discussed *infra* Part IV.D.1.b.

[334] The Chamber is a general pro-business organization. Of course, business interests are not monolithic, as shown by recent resignations from the Chamber over climate change. *See, e.g.*, *Apple Resigns From U.S. Chamber of Commerce*, N.Y. TIMES, Oct. 6, 2009, at B10.

typical sort of agency capture, which occurs as agency personnel work day in and day out with representatives of the regulated industry to develop rules and policies.[335] Thus the choice between the Limited and the Expansive Tribunal may be important in assessing the Tribunal's independence.

The greatest risk of capture, of course, comes from Congress and the President, and this concern applies whether the Tribunal is Limited or Expansive. The President is the boss of and appoints many Article I adjudicators, as they are located in executive branch agencies under his ultimate authority. Congress creates Article I structures and then gives those structures the resources to function properly.

The concern regarding the President may have a relatively easy solution: the Tribunal could be constituted as an independent commission, like the Securities and Exchange Commission.[336] The President would then lack the ability to fire members of the tribunal if he disapproved of their actions.[337] The concern regarding Congress, though, seems insuperable: Congress must be the one who creates the Tribunal, and Congress could presumably decide to do away with it as well.[338] As a result, Tribunal members might alter their opinions to retain Congress's good opinion.

2. Concurrent Jurisdiction?

A problem that none of the Tribunal advocates confront is the relationship between decisions of the Tribunal, either Limited or Expansive, and decisions of the Article III courts. After all, none of the advocates suggest making the jurisdiction of the Tribunal exclusive of Article III courts, and it is not clear Congress could even do so.[339] If, instead, the Article I tribunal has concurrent jurisdiction with Article III courts, the problems are numerous.

First, if parties are given a choice to proceed before this Tribunal or before an Article III court, one can readily imagine conflicts arising between the two. What if an environmental group, expecting to lose a standing battle, brings its complaint to the Tribunal, while the regulated entity, which has self-evident standing,[340] brings its complaint to the Article III courts? This seems an

[335] *See, e.g.*, Zinn, *supra* note 104, at 83-84, 107-11.

[336] *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1112-13 (2000) ("The independent agencies of the United States government occupy a special, although perhaps ambiguous, constitutional place in the federal establishment. These multi-member boards and commissions, which are the prototype independent agencies . . . are 'independent' of the political will exemplified by the executive branch.").

[337] *See id.* at 1114. If this structure is adopted, however, the Tribunal may not be able to avoid the Article II problem. *See infra* Part IV.D.3.

[338] *See, e.g.*, ICC Termination Act of 1995, § 101, 49 U.S.C. § 701 (2006) (abolishing the Interstate Commerce Commission).

[339] *See supra* Part IV.D.

[340] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992) ("If [the plaintiff is

inevitable result, and the inefficiencies of jurisdictional squabbling would likely impinge on the benefits offered by the Tribunal.

Moreover, any effort to solve this problem using a stay – as is commonly used when lawsuits involving the same transaction or occurrence are filed in two different courts simultaneously[341] – merely replicates one of the central problems created by strict standing requirements. Since an Article III court presumably has the power to stay an action in an Article I court, then the regulated entity gets first crack at the issues raised, the dispute will involve only the regulated entity and the agency, and the decision of the Article III court would be res judicata. Assuming that the environmental group lacks standing to intervene,[342] that decision will not reflect the interests that the group would have raised in the Article I court. Because the Article I court would likely not have the authority to stay the Article III court,[343] the best possible outcome from concurrent jurisdiction would be simultaneous litigation in two fora, and potentially conflicting outcomes.

If, on the other hand, the jurisdiction of this Tribunal is made exclusive, with review only to the Supreme Court,[344] a different sort of jurisdictional squabbling emerges. As discussed below,[345] it seems clear that, whatever Congress's ability to place review of *governmental action* in an Article I entity it is more problematic to require that citizen suits *against private parties* go into the Tribunal. Furthermore, Congress almost certainly cannot take

an object of government action] . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.").

[341] *See, e.g.*, 17A WRIGHT ET AL., *supra note* 37, § 4247, at 450 (stating that, "[a]s between federal district courts . . . the general principle is to avoid duplicative litigation" by granting a stay in one action or the other, and that, as between state and federal court, more exacting requirements must be met to justify a stay (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

[342] Whether standing is required for Rule 24 intervenors is a complicated question. *See generally* Elizabeth Zwickert Timmermans, *Has the* Bowsher *Doctrine Solved the Debate?: The Relationship Between Standing and Intervention As of Right*, 84 NOTRE DAME L. REV. 1411 (2009). Because the D.C. Circuit has jurisdiction over many administrative appeals and follows the more restrictive test, *see* S. Christian Leadership Conference v. Kelley, 747 F.2d 777, 778 (D.C. Cir. 1984), the problem I describe in the text is real.

[343] Congress can grant automatic stays through statute. *See* 11 U.S.C. § 362 (2006). But Congress has mandated that stay to make bankruptcy possible at all: if it did not issue the stay, the resources that would constitute the bankruptcy estate would be depleted randomly by whatever actions happened to be pending at the bankruptcy filing.

[344] The appeal issue is, of course, fraught with standing difficulties. If the party who originally files with the Tribunal lacks Article III standing, one might conclude that no review could be had in an Article III court, even the Supreme Court. But the Court has held that adverse judgments can give rise to standing to appeal from a state court to a federal court. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 618 (1988) and discussion *infra* note 347.

[345] *See infra* Part IV.D.1.

constitutional questions away from the Article III courts. Would parties who prefer the Article III courts therefore frame some parts of their disputes as, for example, due process claims? The resulting inefficiency from jurisdictional squabbling would be little better than the Court's current standing doctrine.

Finally, even if individual cases did not involve jurisdictional disputes and potential stays, concurrent jurisdiction over the more general issues would give rise to extensive problems of coordination. What if the Tribunal reached a statutory interpretation that contradicted an interpretation an Article III court made?

This may look like a circuit split, and thus something that the Supreme Court could resolve.[346] However, the central reason for the Tribunal's existence is to hear claims brought by parties who do not have standing – though, depending on its structure, it may also hear claims that could have been brought in the Article III courts. The Court might well lack jurisdiction to hear appeals from many claims arising from the Tribunal.[347] To be sure, the Court would have jurisdiction over the interpretations arising from the Article III courts, but does that present problems in how the Court would resolve the split? After all, the record in the Article III court may well have been created solely with the participation of the regulated entity and the government, and that might bias the way the Court sees the issues raised. Thus the Tribunal would, in the end, have little effect on the law – even though one reason for its existence would be to overcome the asymmetry in access the Court's standing jurisprudence created.

The possibility of divergent interpretations also raises serious long-term problems for the development of doctrine. For example, would the Article III courts defer to the Tribunal's decisions the way it defers to agency decisions?[348] If the Tribunal has a broad jurisdiction, probably not; one of the justifications for agency deference is the expertise of the agency.[349] Nor could

[346] SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.").

[347] It is possible that the *Government* could appeal an adverse determination by the Tribunal, because the Court has held that such an adverse judgment can confer standing. *ASARCO*, 490 U.S. at 618. It is far from clear that the Court would accept a similar argument from citizen suitors who *lose* before the Tribunal, given the Court's repeated admonitions against bootstrapping in the standing context. *See supra* notes 245-251 and accompanying text; *supra* note 211. Whether the potential absence of Supreme Court review of Tribunal decisions presents a constitutional problem for the existence of the Tribunal is something I discuss below. *See infra* Part III.D.

[348] *E.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 837 (1984).

[349] *Id.* at 865 ("Judges are not experts in the field, and are not part of either political

this impasse be resolved in the way differences between state and federal courts are resolved. The state and federal courts have long since worked out methods of dealing with such conflict, but they rely on federalism concerns as well as the Supremacy Clause, neither of which would apply to the Tribunal because the Tribunal would hear only federal law cases.[350] Again, if the hope is to reduce the effect the Court's current standing doctrine has had on the development of the law, these issues are troubling.

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In the end, both recommended Tribunals, Limited or Expansive, are dramatically under-conceptualized. As I have shown above, there are significant practical problems to be addressed – which may be insoluble. I turn now to potential constitutional problems.

D. *Problems: Constitutionality*

> [W]ould [it] violate the Constitution to create a federal administrative agency and then provide that judicial review of that agency will be in a federal legislative tribunal . . .[?] Does the bare possibility of certiorari jurisdiction in the Supreme Court satisfy the concept of [A]rticle III "control" as posited in *Crowell* [*v. Benson*]? I am, I admit, not certain how to answer this question.[351]

When Professor Bator wrote these words nearly twenty years ago, he believed that this question need not be answered because "[n]o institutional necessity has even been felt to transfer judicial review of administrative agencies from the [A]rticle III to an [A]rticle I court."[352] As I have outlined above, however, some have suggested that the necessity has emerged – and in a more extensive form than Professor Bator imagined: to truly solve standing problems, the Tribunal would have to have a relatively broad jurisdiction. But if the Tribunal is unconstitutional, then further quibbling about its structural details is unwarranted.

If Congress were to foreclose access to Article III courts in favor of the Tribunal, that action would raise at least Article III and Due Process problems.[353] The central problem is whether the power given to the Tribunal would constitute an unconstitutional delegation of judicial power in violation

branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.").

[350] U.S. CONST. art. VI, cl. 2.

[351] Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 270 (1990) (citing Crowell v. Benson, 285 U.S. 22, 22 (1932)).

[352] *Id.*

[353] Sunstein, *supra* note 7, at 235 n. 311.

of Article III. In what follows, I outline the Court's judicial-delegation doctrine, apply it to the Tribunal, and discuss Due Process and other constitutional problems that the Tribunal raises.

1. The Constitutional Background

Article III states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[354] Those who read Article III literally thus contend that "the only federal tribunals that can be assigned to resolve justiciable controversies are 'Article III courts,' whose judges enjoy the safeguards of life tenure and undiminished salary."[355]

Certainly, then, an Article III literalist would have a problem with the proposal for the Tribunal; an Article III literalist has a problem with the entire administrative state.[356] But "[n]early everyone agrees that Article III defies literal application."[357] Further, "our institutional history essentially forecloses a literal reading of the text . . . ."[358] Thus, it has long been accepted that non-Article III entities exercise judicial-type power daily.

While Congress has never established a non-Article III court with the broad powers of review of the Tribunal, it has created a variety of non-Article III officials who do what looks very much like judicial work. These judges and courts – including the tax courts, the Court of Federal Claims, and countless administrative law judges – are an essential part of the administrative state and have, for the most part, been found constitutionally proper.[359]

Justice Brennan, in his plurality opinion in *Northern Pipeline*, divided non-Article III tribunals into three categories: territorial courts, courts-martial, and tribunals that hear "public rights" cases.[360] The public rights category

[354] U.S. CONST. art. III, § 1.

[355] Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919 (1988). Professor Resnik has suggested that Congress's power to create Article I tribunals is limited only by Article I itself; however, as she notes, the Court long ago imposed greater limits. *Mythic Meaning*, *supra* note 287, at 587.

[356] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994); *see also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1189 (1992); *cf.* Laura B. Bartell, *Contempt of the Bankruptcy Court – A New Look*, 1996 U. ILL. L. REV. 1, 48.

[357] James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004).

[358] *Id.* at 660.

[359] For example, Stern has argued that the Court of Federal Claims survives constitutional scrutiny because it is essentially acting for the United States in its capacity as a debtor, not an Article III function. Even when the Court of Federal Claims exercises injunctive power, it is essentially the United States deciding what action it will take in response to a claim of debt. Stern, *supra* note 295, at 819.

[360] 458 U.S. 50, 64-67 (1982). See *supra* Part IV.A for a discussion of non-Article III

embraces the vast majority of non-Article III tribunals and comes from *Murray's Lessee v. Hoboken Land & Improvement Co.*, in which the Court stated:

> [T]here are matters, involving *public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, *but which congress may or may not bring within the cognizance of the courts of the United States*, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it *depends upon the will of congress* whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful.[361]

Murray's Lessee was, of course, decided at a time when the federal government was a small fraction of its current size.[362]

A more meaningful test of the constitutionality of non-Article III tribunals came in *Crowell*,[363] at a time when administrative agencies were thoroughly established and about to expand rapidly.[364] There, the dispute did not involve public rights, but what the Court called "private rights" – the rights of a company that the Employees' Compensation Commission found owed injury compensation to someone who may or may not have been an employee at the time of his injury.[365] According to the Supreme Court, the Commission, an Article I court, could determine the facts giving rise to the company's obligation so long as it observed certain limits. The question was which facts the Article I tribunal could determine conclusively, and which had to be reserved for, or reviewed de novo by, Article III courts.

Tribunals, the Court said, could make "conclusive[] . . . findings of fact . . . where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation."[366] "Jurisdictional facts" determine whether the agency acts "within the scope of the authority validly conferred."[367] To protect his rights, a party must have the ability to challenge such determinations in an Article III court. Moreover, "[i]n cases brought to enforce *constitutional* rights, the judicial power . . . necessarily

courts generally.

[361] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855) (emphasis added).

[362] STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 19-35 (1982).

[363] 285 U.S. 22, 49 (1932).

[364] SKOWRONEK, *supra* note 362, at 289.

[365] *Crowell*, 285 U.S. at 36-37.

[366] *Id.* at 58.

[367] *Id.* at 54 n.17.

extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."[368]

When jurisdictional or constitutional questions are involved, "the proceedings of such [tribunals] are always subject to the direction of the court and their reports are essentially advisory . . . ."[369] For "Congress [to] completely oust the [Article III] courts out of all determinations of fact [underpinning such questions] . . . would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system . . . ."[370] The Court quoted the *Murray's Lessee* language, however, to reiterate that public rights cases could be reserved for non-Article III tribunals.[371]

Despite the venerable history of the public-rights category, the Court came close to reviving a version of Article III literalism in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[372] In that case, the Court invalidated portions of the Bankruptcy Act of 1978, which had given extensive adjudicatory powers to the bankruptcy courts.[373] The plurality, written by Justice Brennan, suggested that, while certain exceptions had been made to

[368] *Id.* at 60 (emphasis added).

[369] *Id.* at 61. As a result, the Court held that the Article III court should compile its own record for determining these jurisdictional and constitutional questions. *Id.* at 64. Justice Brandeis strenuously disagreed: "The 'judicial power' of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that Article nothing which requires any controversy to be determined as of first interest in the federal District Courts." *Id.* at 86 (Brandeis, J., dissenting).

[370] *Id.* at 57.

[371] *Id.* at 50.

[372] 458 U.S. 50, 69-71 (1982).

[373] Bankruptcy courts actually fall in a strange in-between-the-Articles category. The Court, at least, has said that they were not intended to be Article I legislative courts. *Id.* at 63 n.13. This is so even though Congress's power to regulate bankruptcy comes from Article I. U.S. CONST. art. I, § 8, cl. 4. Nor are bankruptcy courts Article III courts with life-tenured judges. *See* 28 U.S.C. § 152(b) (2006). Instead, the bankruptcy courts are conceived as "units" of the District Courts. *Id.* § 151. Complicated issues of jurisdiction arise from Congress's division of authority between the district courts and the bankruptcy courts. *See id.* § 157. In 1978, Congress had conferred broad jurisdiction on the bankruptcy courts to decide both bankruptcy issues and virtually all other legal issues that arose with bankruptcy cases. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 105 (2006)). The *Northern Pipeline* Court held that bankruptcy judges, as non-Article-III judges, could not issue final judgments regarding non-bankruptcy issues. *Northern Pipeline*, 458 U.S. at 87. The statute now distinguishes between "core proceedings" and "non-core proceedings." 28 U.S.C. § 157(b) The statute also authorizes bankruptcy judges to issue final judgment as to core proceedings, *id.* § 157(b)(1), and proposed findings of fact and conclusions of law in non-core proceedings, *id.* § 157(c)(1). Appeal, depending on the circumstances, is to the District Courts, the Bankruptcy Appellate Panels consisting of bankruptcy judges, or the federal Circuit Courts of Appeal. *Id.* § 158.

Article III in the past, those exceptions would be cabined in order to "jealously guard[]" the powers guaranteed to the judicial branch by the Constitution.[374]

But the Court soon rejected that plurality opinion, holding in *Thomas v. Union Carbide Agricultural Products Co.* that "[a]n absolute construction of Article III is not possible in this area of 'frequently arcane distinctions and confusing precedents.'"[375] Instead, as Justice O'Connor wrote for the Court, "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."[376] The Court reached a similar result in *CFTC v. Schor*, where it again rejected a literalist interpretation of Article III: "the resolution of claims such as Schor's cannot turn on conclusory reference to the language of Article III."[377] Importantly, in *Schor*, the Court upheld an administrative agency's determination of a party's *state-law counterclaim*; the party's consent to the agency's jurisdiction helped convince the Court that no Article III problem existed.[378] The Court also emphasized that "Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article-III tribunals] for the purpose of 'emasculating' constitutional courts.'"[379] That safeguard cannot be waived.

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[374] *Northern Pipeline*, 458 U.S. at 64-67 (setting out public rights cases, territorial courts, and courts-martial as exceptions to general rule that Article III courts must exercise judicial power, and defining "essential attributes of [federal] judicial power" as hearing private rights cases, being generalists, and having the power to issue final judgments). As Professor Resnik has argued, however, these "essential attributes of federal judicial power" are not very essential because most private rights cases are the business of the *state* courts; at least some Article III courts are specialized courts (notably the Federal Circuit) and the territorial courts can issue final judgments (if they could not, the District of Columbia Courts would be useless). *Mythic Meaning*, *supra* note 287, at 585-601.

[375] Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 583 (1985) (quoting *Northern Pipeline*, 458 U.S. at 90).

[376] *Id.* at 587.

[377] CFTC v. Schor, 478 U.S. 833, 847 (1986).

[378] *Id.* at 848-49 ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.").

[379] *Id.* at 850 (quoting Nat'l Ins. Co. v. Tidewater Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)). Of course,

> [t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

Id. at 850-51 (citations omitted).

Given the confusing history of the judicial delegation doctrine, how are we to decide whether Article III is being "emasculat[ed]"? The Court presents a balancing test:

> Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[380]

Critics of the Court's doctrine in this area have suggested that the balancing test verges on meaningless. Professor Meltzer, for example, would have "the concerns that drove Congress" meet a substantiality standard; the question, he says, is not whether Congress has an acceptable reason to use a non-Article-III tribunal, but that it has a strong one.[381] If Congress creates the Tribunal to evade Article III limitations on federal court access, the Court might quite rightly be suspicious of Congress's motivations. If, however, Congress creates a Tribunal as part of a larger remedial scheme, and solves the standing problem in doing so, the Court might be more accepting.[382]

2. Applying Non-Delegation Doctrine to the Tribunal

As should become clear in what follows, the question of whether the power given to the Tribunal is an unconstitutional delegation of Article III judicial power depends upon the extent of the Tribunal's jurisdiction. The Limited Tribunal would almost certainly survive scrutiny under the nondelegation doctrine, but the Expansive Tribunal presents a much closer question.

a. *The Limited Tribunal*

The Court would likely uphold the Limited Tribunal, so long as review is available in at least the Supreme Court for any Article III cases or controversies the Tribunal hears.

First, the Limited Tribunal, precisely because its jurisdiction would be limited, would not "exercise[] the *range* of jurisdiction and powers normally vested only in Article III courts . . . ."[383] Indeed, the Limited Tribunal looks

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[380] *Id.* at 851.

[381] Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 296 (1990) ("I think it is no less appropriate here than in free speech cases for courts to protect enduring constitutional values likely to be given inadequate weight by the political branches. Indeed, in my view the hard question is not whether the courts will second-guess Congress too much . . . but rather too little." (citation omitted)).

[382] I am indebted to Ron Krotoszynski for helping me think through this point. His own work provides a useful analysis. *See* Ronald Krotoszynski, *On the Danger of Wearing Two Hats*, 38 WM. & MARY L. REV. 417 (1997).

[383] *Schor*, 478 U.S. at 851 (emphasis added).

little different than the typical Article I tribunal; Congress could create a Tribunal intended to review environmental decisions, just as it has created Article I courts to hear claims for money against the United States, tax claims, Social Security disability claims, and the like.[384]

Second, so long as Congress provided at least review by certiorari to the Supreme Court for claims that constitute Article III cases or controversies, the Limited Tribunal would satisfy the requirement that "the 'essential attributes of judicial power' [be] reserved to Article III courts."[385] As Professor Fallon has argued, judicial power is not unconstitutionally delegated so long as review is available at least in the Supreme Court.[386]

Third, the Limited Tribunal would adjudicate public rights, so that "the origins and importance of the right to be adjudicated" are much like any other non-Article-III tribunal that the Court has long upheld.[387] This conclusion stands even if the Limited Tribunal is empowered to hear claims brought by citizen complainants against private parties. Article I courts routinely determine such claims, as *Schor* demonstrates.[388] Private parties would be able to appeal adverse judgments under *ASARCO*, just as the government could.

The Supreme Court would, of course, be unable to review cases decided by the Tribunal when those cases are brought by those without Article III standing. Does that mean that the Tribunal will be exercising Article III power without appellate oversight? I think the answer has to be no. If the Article III courts could never take jurisdiction, then having the Tribunal review these cases takes nothing away from Article III courts. At a minimum, then, the Tribunal would seem to be able to hear those cases that are not susceptible of adjudication under Article III. As already noted, such cases are already unreviewable in the current system. Surely it is better to have review at the Tribunal level, even without ultimate recourse to the Supreme Court, rather than no review at all.

Finally, given that the Limited Tribunal hews fairly closely to the traditional Article I outline, Congress would need no more than its typical justifications when balancing the concerns that drove Congress to depart from Article III requirements against the interference posed with Article III values.

b. *The Expansive Tribunal*

The central proponent of the Expansive Tribunal concludes that the non-Article III tribunal will survive a functionalist analysis, despite its broad

[384] *See supra* Part IV.A.

[385] *Schor*, 478 U.S. at 851.

[386] Fallon, *supra* note 355, at 943-49.

[387] *See Schor*, 478 U.S. at 851.

[388] The problematic claims in *Schor* were the state law counterclaims, which were common-law counterclaims usually considered to be at the heart of the judicial power. *See id.* at 847-59. If the Limited Tribunal hears claims for civil penalties against private parties, it goes nowhere near the common law.

jurisdiction, since it "do[es] not obviously tip the balance of power among the branches in any particular direction."[389] But, on this view, the only cases that the tribunal will hear are those that the Article III courts cannot hear. I have argued above that that limitation is untenable.

If, then, the jurisdiction of the tribunal must be broader, as I think it must be, the balancing test likely tips against the Expansive Tribunal. First, the Expansive Tribunal looks much more like it is "exercis[ing] the range of jurisdiction and powers normally vested only in Article III courts . . . ."[390] As discussed above, only Article III courts have such broad jurisdiction across a range of subject areas.[391] In fact, one useful argument in justifying administrative agencies under the Constitution is that, even though agencies typically exercise legislative, executive, and judicial powers, each agency does so in a narrow subject matter, providing what is essentially another separation of powers.[392] The Expansive Tribunal violates this separation of powers.

Second, and for the same reasons, the Expansive Tribunal would likely violate the requirement that "the 'essential attributes of judicial power' [be] reserved to Article III courts."[393] Even if review is available in Article III courts, the Tribunal looks like a version of a nationwide appellate court along the lines of the D.C. Circuit.[394]

Thus, the scales tip quite strongly against the Expansive Tribunal, since it looks too much like an Article III court in its jurisdiction and authority. What goes on the scale to balance against that? To be sure, the Expansive Tribunal, like the Limited one, would adjudicate largely public rights, so that "the origins and importance of the right to be adjudicated" are much like any other non-Article-III tribunal that the Court has long upheld.[395] Again, this conclusion stands even if the Expansive Tribunal is empowered to hear claims brought by citizen complainants against private parties.[396]

Would "the concerns that drove Congress to depart from the requirements of Article III" be sufficient to overcome the Expansive Tribunal's problematic jurisdiction? It is highly unlikely. While critics of standing doctrine are distressed at the closing of the courthouse door for many plaintiffs, it is hard to say that Congress has such a substantial interest in having such cases reviewed elsewhere that the Expansive Tribunal can be justified.

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[389] Krinsky, *supra* note 17, at 323.

[390] *Schor*, 478 U.S. at 851.

[391] *See supra* note 300 and accompanying text.

[392] Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22 (1992).

[393] *Schor*, 478 U.S. at 851.

[394] *See supra* note 300 and accompanying text (describing the unique specialized jurisdiction of the D.C. Circuit).

[395] *Schor*, 478 U.S. at 850 (quoting Nat'l Ins. Co. v. Tidewater Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).

[396] *See supra* notes 99-100 and accompanying text.

3. Article II Concerns

Particularly if created within the Executive Branch, the Tribunal, whether Limited or Expansive, would seem immune to challenges under Article II. After all, the Article II concern is that citizen suits improperly take away the President's power. But if the Tribunal is ultimately under the authority of the President, as it would be if located in the Executive Branch, then there can be no Article II problem unless Article II doctrine is completely rewritten.

The question is closer if the Tribunal is an independent agency, as suggested above, to reduce chances that it would be subject to improper political pressure.[397] Independent agencies have been upheld as constitutional, but it is plausible that the Court would have trouble with at least the Expansive Tribunal if created as an independent agency. In particular, Justice Scalia – whose central problem is with *private citizens* who may enforce the law, regardless of what the President has chosen as an enforcement strategy – seems likely to strain to find a way to reject the Expansive Tribunal.

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The Tribunal presents a quandary. The form that would be most useful in truly solving standing problems – the Expansive Tribunal – is likely to be found unconstitutional, particularly if it is located outside the Executive Branch. The form that is likely to pass constitutional muster is the less useful Limited Tribunal; its limited jurisdiction makes it much more like a traditional agency, whether within the executive branch or independent. In either case, the practical problems that arise in trying to create the Tribunal, in particular its relationship to the Article III courts, make it unlikely that this approach would meet with much success.

CONCLUSION

Critics have repeatedly called on the Supreme Court to cure deep and persistent problems with Article III standing doctrine. The Court has refused to heed those calls. Could Congress, instead, be the source of a cure? I have reviewed three options offered in the standing scholarship: that Congress might find, by statute, that certain classes of individuals have standing, thus forcing the Court to accept suits previously rejected under Article III; that Congress might provide a bounty to victorious plaintiffs, thus creating the concrete interest that Article III demands; or that Congress might create Article I tribunals to bypass the Article III problem.

As I have shown, each of these options has significant and previously unrecognized flaws. Legislative findings are likely to be rejected by the Court under the logic of *Boerne* and *Morrison*. Bounties, which are expensive and create perverse incentives, also raise problems under Articles II and III. The Article I tribunal raises a number of constitutional problems and practical difficulties, in particular for the hierarchies courts rely upon for precedent.

[397] *See supra* Part IV.C.1.

Moreover, congressional efforts along these lines may well worsen, rather than improve, the problems that critics see with the Court's standing doctrine. Just as *Lujan* reined in standing after Congress enacted a number of broad citizen suit provisions, a future case might limit standing even further if Congress were to jump directly into the standing fray.

If Congress is unable to alter standing doctrine, what else is there to do? We are thrown back onto the Court, hoping that Justice Kennedy will continue to prevent any further constriction of standing, and wondering whether future Justices will see the doctrine's flaws and fix them.