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Congress's Inability to Solve Standing Problems

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CONGRESS’S INABILITY TO SOLVE STANDING PROBLEMS

Heather Elliott*

ABSTRACT

Critics of the Supreme Court’s Article III standing doctrine—“a word game played by secret rules” that restricts access to the federal courts—have fruitlessly suggested a variety of ways that the Court might itself fix the doctrine. Some have instead argued that Congress could solve the standing problem. No one has undertaken a systematic examination of Congress’s options; this Article fills that gap.

Congress has three main courses of action. First, Congress may find, by statute, that certain classes of individuals have standing, in an effort to force the Court to accept those individuals as plaintiffs. The Court, however, is likely to be reluctant to accept such findings. The Court’s increasing insistence on its role as the sole arbiter of constitutional content suggests it would reject this effort to interfere with standing doctrine.

Second, Congress may provide a bounty to victorious plaintiffs, thus establishing the concrete interest that Article III demands of a plaintiff. While the Court has held that bounties in certain situations do confer Article III standing, it remains unclear whether the Court would find a wholesale expansion of such suits permissible under Article III. Such an expansion may also be found to interfere with the President’s Article II power to “take Care that the Laws be faithfully executed,” and, regardless of its constitutionality, presents serious practical problems.

Third, Congress may create one or more Article I tribunals to hear certain lawsuits, just as, e.g., 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 unrecognized.

After analyzing these three options, I conclude that Congress lacks power to undertake many of 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.

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INTRODUCTION

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.”

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.

It 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.

Most critics of the Supreme Court’s Article III standing doctrine suggest ways the Court itself might fix the doctrine—for example, by simplifying it, by abandoning it and returning to the question of whether the plaintiff states a cause of action, or by returning standing to its status as a prudential (not constitutional) limitation. But the Court has not responded to the numerous calls to change the doctrine, issuing (frequently 5-4) decisions that tinker at the margins but further entrench the tripartite test of injury-in-fact, causation, and redressability. Even with recent changes in its lineup, the Court seems unlikely to undertake reconstruction of the doctrine in the near- or medium-term.

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2 Lujan v. Defenders of Wildlife, 504 U.S. 555, 579 (Kennedy, J., concurring).
4 See generally Heather Elliott, The Functions of Standing, 61 Stan. L. Rev. 459, 466-467 (2008) (summarizing standard critiques of the Court’s Article III standing doctrine); see also infra Part I.A.2.
5 See Elliott, supra note 4, at 508-510 (summarizing suggested changes to the Court’s Article III standing doctrine); see also infra Part I.B.
6 E.g., Summers v. Earth Island Institute, 129 S. Ct. 1142, 1149 (2009) (“[A] plaintiff must show that he [has suffered or] is under threat of suffering ‘injury in fact’ that is concrete and particularized; [any such] threat must be actual and imminent, not conjectural or hypothetical; [the injury] must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.”).
8 One can, of course, disagree about how much of a problem the Court’s standing
If change cannot come from the Court, some critics have instead suggested (at least since the landmark standing case, *Lujan v. Defenders of Wildlife*, in 1992) that Congress take steps to relieve plaintiffs of the burdens imposed by the Court’s standing doctrine. 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. This recent proposal – abandoned in later versions of the bill – takes one approach long suggested by critics, that Congress might overcome the Court’s cramped standing doctrine through statutory definitions of who has standing. Critics have also suggested that Congress might amend current citizen-suit provisions to provide a reward, doctrine actually poses. 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. But it is not clear that finding appropriate plaintiffs is so easy. As I discuss below, see infra Part I.C, the doctrine actually does raise serious problems of court access. For the remainder of this Article, I operate from the conclusion that the Court’s current standing doctrine is lamentable.


10 As I discuss below, see infra Part I.A, the Executive Branch is often in the position of invoking the Court’s restrictive standing doctrine to prevent challenges to agency action or other litigation. *See*, e.g., Brief for Petitioners at 28, *Summers*, 129 S. Ct. at 1142 (No. 07-463). However, there are situations where the Executive Branch supports citizen standing, *see*, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners at 27, *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167 (2000) (No. 98-822); the Executive Branch might even 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.

11 Thus I will not be discussing issues raised by, for example, jurisdiction-stripping statutes, where Congress is attempting to keep certain categories of cases out of the federal courts. *E.g.*, Vicki Jackson, *Congressional Control of Jurisdiction and the Future of Federal Courts: Opposition, Agreement, Hierarchy*, 86 Geo. L.J. 2445 (1998) (giving overview of these and other issues).


or bounty, to victorious plaintiffs. More recently, some critics 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.

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. Proponents of a restrictive standing doctrine contend that a high standing bar is essential to keep the courts in their proper place, in part so they do not impinge upon the executive’s duties to “take Care that the Laws be faithfully executed” under Article II. 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. Supporters of the doctrine thus quite happily accept the Court’s dominance in this area.

Critics of standing doctrine, by contrast, note that current standing doctrine prevents suits in many situations where Congress has authorized them, thus interfering with Congress’s legislative powers. Moreover,

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15 E.g., Sunstein, supra note 14, at 232. The bounty suggestion builds on the federal False Claims Act, which allows private citizens to sue on behalf of the federal government to recover federal funds obtained by fraud. 31 U.S.C. §§ 3729-3730. These private citizens have no injury to be redressed by the lawsuit but instead receive a cut of the funds recovered; the Supreme Court held in Vermont Agency that such plaintiffs satisfy Article III standing requirements. Vt. Agency of Nat’l Res. v. U.S. ex rel Stevens, 529 U.S. 765, 765 (2000). See discussion, infra Part III.


17 See infra Part I.A.


19 See Elliott, supra note 4, at 492-500.

because the Court’s doctrine gives broad court access those who are regulated by government action, while limiting suits by those who benefit from government regulation. Standing doctrine privileges anti-regulatory challenges over pro-regulatory challenges. 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.

The turn to Congress—whether to enact findings supporting standing, to confer bounties on victorious plaintiffs, or provide alternate tribunals—is appealing, given the Court’s seemingly permanent adoption of a restrictive view of standing and the desire to restore Congress to its proper place. Few critics have given more than cursory attention to these congressional options, 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 Supreme Court doctrine in many areas over the last twenty years.

The primary arguments for the legislative finding option, for example, were put forward almost two decades ago, and no one has reexamined the findings suggestion since the Court imposed surprising limitations on

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21 Pierce, supra note 14, at 1182-83.
22 See, e.g., Lujan, 504 U.S. at 560-61 (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 Some cases, e.g., Friends of the Earth v. Laidlaw Envtl. Servs. (TOC) Inc., 528 U.S. 167 (2000), have been praised as welcome correctives to the Court’s limited approach to standing. See, e.g., William W. Buzbee, Standing and the Statutory Universe, 11 DUKE ENV'T L. & POL'Y FORUM 247 (2001) (discussing Laidlaw). But that praise is, in general, overstated. While the majority in Laidlaw found that standing existed in circumstances that could have justified (or, as Justice Scalia wrote in dissent, in fact demanded) the opposite conclusion, Laidlaw unquestioningly adopts the tripartite test, rooted in the text of Article III, that distresses the critics of standing. See 528 U.S. at 180 (“The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins … our standing … jurisprudence.”). Thus Laidlaw should be seen as a decision that, albeit a welcome one, is not a game-changer.
25 See, e.g., Laurence Tribe, The Treatise Power, 8 GREEN BAG 2d 291 (2005) (explaining 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.”).
26 See infra notes 138-163 and accompanying text.
Congress’s legislative power under the Commerce Clause and under section 5 of the 14th Amendment. Those doctrinal changes suggest that a harsh response is likely if Congress attempts to expand Article III standing.

Those who have put forward the bounty option have some of the Court’s decisions on their side, 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: can we afford it? will it create more problems than it solves? And while the both the findings and the bounty approaches are designed to solve the Article III problem, they do little to resolve potential problems under Article II, even though the Article II concern is of obvious concern to at least some members of the Court.

The Article I tribunal is the most unconventional option. Such tribunals could be open to a vastly broader number of complainants regardless of their standing to sue, because Article III does not apply to administrative agencies. These tribunals might also solve the Article II problem, if they are located in the executive branch, because they would be under the ultimate supervision of the President. This option also presents the intriguing possibility that Congress could create an institution that overcomes some of the limitations of traditional litigation.

At the same time, however, such tribunals are not clearly constitutional, because they raise concerns about the improper delegation of judicial power. They also present serious—and perhaps insuperable—practical

30 As I discuss below, Article III problems may remain under either approach. See infra Parts II.C, III.C.
31 See supra note 18.
33 Krinsky, supra note 16, at 317-20. As I discuss below, however, the Article II 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 (1993). 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 standing’s critics desire.
34 See infra Part IV.C.3.
35 See infra Part IV.C.1.
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 the tribunal and an Article III court? Would tribunal decisions have any precedential effect in the Article III courts? If we cannot find good answers to these questions, the Article I tribunal likely creates more problems than it solves.

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The Article is structured as follows. In Part I, I give a brief history 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 anytime soon, 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 addressing not only the Article III problem, but also the Article II 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.

I. STANDING

Standing doctrine requires, in any lawsuit in an Article III court, (1) that the plaintiff have suffered (or be threatened with) an injury in fact that is “actual and imminent,” and not “conjectural and 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. 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.”

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36 See supra note 18.
37 Lujan, 504 U.S. at 560-61.
38 Allen, 468 U.S. at 750 (internal quotation marks omitted) (quoting Vander Jagt v. O’Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). The other justiciability doctrines include ripeness, mootness, the political question doctrine, and the
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.

A. Standing and Its Problems

1. The development of the doctrine

It is generally agreed that Article III standing doctrine was created in the twentieth century. Professor Sunstein has described five stages in the doctrine’s development, beginning in the first decades of the twentieth century; the tripartite test of injury-in-fact, causation, and redressability


39 The Court has, in recent cases, described the doctrine as an “essential and unchanging” requirement of the Constitution, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), though a number of scholars have demonstrated that such strict limitations on access to the courts would have been foreign to the Founders. See, e.g., Sunstein, supra note 14, at 170-79 (describing standing as an “historical blunder,” id. at 173, if the proper reference point is practice in the English common-law courts and in the state courts at the Founding, and noting that practice in the early federal courts, while less clearly condemnatory of standing doctrine, provides strong evidence to the contrary); George Van Cleve, Congressional Power to Confer Broad Citizen Standing in Environmental Cases, 29(1) Envtl. L. Rep. 10028 (Jan. 1999) (citing extensive evidence from English practice); Raoul Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 YALE L.J. 816 (1969). But see, e.g., James Leonard & Joanne C. Brant, The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction, 54 RUTGERS L. REV. 1, 5-6 (2001) (asserting that the Founders would have supported the injury-in-fact threshold that the Court has implied from Article III, but balking at claiming that Article III mandates that test); Bradley Clanton, Standing and the English Prerogative Writs: The Original Understanding, 63 BROOK. L. REV. 1001 (1997) (arguing that access to the courts was more limited at the Founding than Sunstein and Berger admit).

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 (1905)—from interfering with Progressive and New Deal initiatives. See Sunstein, supra note 14, at 179-81. Congress then opened the courts to those suffering “legal wrong” under statute or common law, permitting such individuals to sue under the Administrative Procedure Act. See 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 (2009).) The courts, in the 1960s, expanded the concept of “legal wrong” under the APA to allow suits by regulatory beneficiaries. See Sunstein, supra note 14, 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 Association of Data Processing Organizations v. Camp, 397 U.S. 150 (1970). See id. at 185-92.
had emerged by 1978.\textsuperscript{41} The most recent stage, beginning in the late 1970s, has been characterized by increasingly strict standards for finding that standing is present.\textsuperscript{42} Indeed, Professor Magill has argued that this strict version of standing, far from being a constitutional mandate, emerged as a reaction against the explosion of public interest litigation starting in the late 1960s.\textsuperscript{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.\textsuperscript{44} Indeed, the Supreme Court has stated that standing “is built on a single basic idea—the idea of separation of powers.”\textsuperscript{45} In addition to ensuring that the plaintiff presents a case suitable of judicial resolution (the traditional concept), the Court has held that standing doctrine also works to prevent courts from hearing cases involving issues better addressed by the political branches,\textsuperscript{46} and to prevent Congress from using citizen suits (and thus the courts) in an improper effort to exert control over the Executive Branch.\textsuperscript{47}

This last concern arises from the worry that, when they hear too broad a range of citizen suits, the courts impinge on the executive power to “take Care that the laws be faithfully executed.”\textsuperscript{48} The Court has persistently refused to decide whether Article II itself imposes limitations on who may


\textsuperscript{42} Sunstein, supra note 14, at 193-197; see also, e.g., Mark V. Tushnet, The New Law of Standing: A Plea for Abandonment, 62 CORNELL L. REV. 663, 663 (1977). But see, e.g., William W. Buzzbee, Standing and the Statutory Universe, 11 DUKE ENVTL. L. & POL’Y F. 247, 249 (2001) (arguing that the Court, using standing doctrine, has promoted both more and less assertive roles for courts as gatekeepers, most recently embracing “a more limited and deferential judicial standing role” under which “legislative judgments about statutory goals and means … receive substantial deference by courts”).

\textsuperscript{43} Magill, supra note 40, at __.

\textsuperscript{44} U.S. CONST. art. III, § 2. See generally Elliott, supra note 4. For a sophisticated argument that judges and scholars have misinterpreted Article III by ignoring the difference between “Cases” and “Controversies,” see Robert J. Pushaw, Jr., Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 NOTRE DAME L. REV. 447 (1994).


\textsuperscript{46} Elliott, supra note 4, at 475-492; see also, e.g., Linda Sandstrom Simard, Standing Alone: Do We Still Need the Political Question Doctrine?, 100 DICK. L. REV. 303 (1996) (arguing that standing doctrine has largely subsumed the political question doctrine).

\textsuperscript{47} Elliott, supra note 4, at 492-501. As I have argued elsewhere, standing cannot serve these latter two functions. 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 id. at 483-492, 497-500.

\textsuperscript{48} Id., art. II, § 3, cl. 4.
sue.\textsuperscript{49} No matter: “Article III, no less than Article II, has consequences for the structure of our government.”\textsuperscript{50} 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.\textsuperscript{51}

The narrowness of the Court’s current doctrine has a significant effect on 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,\textsuperscript{52} while regulatory beneficiaries bringing citizen suits to enforce, for example, the Endangered Species Act, are more likely to fail the standing test.\textsuperscript{53}

2. Problems with standing

Standing doctrine has, of course, been extensively criticized. At the most basic level, standing doctrine is confusing and unpredictable.\textsuperscript{54} Indeed, the second Justice Harlan, in dissent, described the doctrine as a “word game played by secret rules”\textsuperscript{55} and the Court itself has called it “one of the most amorphous [concepts] in the entire domain of public law.”\textsuperscript{56}

\textsuperscript{49} See, e.g., Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 197 (2000) (Kennedy, J., conc.) (“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.).

\textsuperscript{50} Laidlaw, 528 U.S. at 209 (Scalia, J., dissenting).


\textsuperscript{52} Lujan, 504 U.S. at 561-62 (“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.”).

\textsuperscript{53} See also Sunstein, supra note 14, at 195.

\textsuperscript{54} See, e.g., Lujan, 504 U.S. at 555.


\textsuperscript{56} Id. at 99 (majority opinion) (internal quotation marks omitted) (quoting Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm., 89th Cong. 498 (1966) (statement of Professor Paul A. Freund)); see also id. at 94 (noting that the Case or Controversy provision of Article III has “an iceberg quality, containing beneath [its] surface simplicity submerged complexities”).
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, of Congress’s authority, and even of basic fairness. At the same time, however, defenders of the doctrine argue that it is an essential bulwark against overreaching by Congress and by private litigants.

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. Professor Pierce has found empirically that standing doctrine creates space for “the strong tendency of judges to engage in ideologically driven doctrinal manipulation.” Professors Wildermuth and Davies have suggested something similar. Some critics even argue that standing doctrine verges on the abuses of the Lochner era: “[T]he injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process.” The contention overall is that standing doctrine gives courts a carte blanche to manipulate outcomes.

Professor Stearns has argued, to the contrary of these critics, that standing is required to prevent, not judicial manipulation, but manipulation of precedent by would-be plaintiffs. Because stare decisis causes doctrine to take certain paths based on the order in which cases are decided, and because the federal appellate courts are collective decisionmakers,

58 Id. at 1760.
60 Sunstein, supra note 14, at 167. See also Fletcher, supra note 54, at 233 (describing standing as a form of substantive due process); Sunstein, supra note 54, 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, 83 CAL. L. REV. at 1309.
paradoxes inherent in collective decision making may cause a court to reach different results in sequential cases depending solely on the order in which the cases are decided. Interest groups thus have incentives to manipulate the sequence in which cases arise, and standing doctrine stands as a bulwark against that manipulation.

b. Standing as a cause of asymmetry in decisionmaking

Critics have shown that current standing doctrine imposes an asymmetry in access, admitting the lawsuits of regulated entities far more readily than those of regulatory beneficiaries. Because regulated entities usually seek to strike down regulatory action, these critics contend, this asymmetry in access amounts to a one-way ratchet against regulation. Moreover, as Professor Pierce has argued, 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

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63 Id. at 1329. Technically, this is the intransitivity in preferences known as the Condorcet Paradox. Assume three decisionmakers, A, B, and C, and three options, 1, 2 and 3. Assume further than A ranks the options in the order 1, 2, 3; B ranks them 2, 3, 1; and C ranks them 3, 1, 2. Two decisionmakers thus prefer 1 to 2; two prefer 2 to 3; and two prefer 3 to 1. There is a majority for each ordering, and yet, depending on the order in which the options are presented, one ordering may win. This outcome is unstable—a different order would produce a different outcome.

64 Id.

65 Id. 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. Of course, as Professor Siegel has discussed, the factual bases of standing are more within the litigants’ control than Professor Stearns acknowledges. See Siegel, supra note 54, 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.). Moreover, as discussed below, see infra notes 66-70 and accompanying text, the standing doctrine skews the playing field toward regulated entities, which gives the benefits of stare decisis to one category of plaintiffs. See Elliott, supra note 4, at 491-92.

66 Supra notes 52-53 and accompanying text. See also Elliott, supra note 4, at 491-92; Pierce, supra note 21, at 1194; Sunstein, supra note 14, at 186-87.

67 This, of course, is not always true. See Am. Chemistry Council v. Dep’t of Transp., 468 F.3d 810 (D.C. Cir. 2006) (a regulated entity sought further regulation from the Department of Transportation because of a troublesome lacuna in the existing regulations; the court inexplicably found that they lacked standing).

68 Cass Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U. Chi. L. REV. 653, 666 (1985). Professor Sunstein’s article focuses on the asymmetry created by the Court’s assumption that review is usually available for suits challenging regulatory actions (like rules or adjudicatory decisions) but is usually unavailable for suits challenging regulatory failures to act. Id. Thus agencies can be brought to task for over-regulating but not for under-regulating. Id. Standing’s asymmetry has the same effect.
traction: the regulated industry. This, in turn, will facilitate the “capture” of agencies by regulated industry; such “capture” is a version of the phenomenon the Framers called ‘factionalism.’ [Standing doctrine thus may] maximiz[e] the potential growth of the political pathology the Framers most feared and strived to minimize."

Of course, if one’s premise is that government power is generally bad, the limitations imposed by standing doctrine are essential, the asymmetry in access properly gives a stronger voice to regulated entities, and the resulting asymmetry in doctrine is appropriate.

c. Battle between Congress and the President

Many critics have argued that standing doctrine has improperly “reduce[d] the permissible role of Congress in government policymaking.” The courts, by taking it upon themselves to decide when suits may go forward, interfere with Congress’s power.

Professor Pierce marks *Lujan* as the beginning of this interference with “legislative supremacy.” Cases prior to *Lujan* had treated nonstatutory standing cases—those in which Congress had said nothing about standing—differently from statutory standing cases. In the former cases, the Court frequently imposed demanding tests to avoid reaching constitutional

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69 Pierce, *supra* note 21, at 1194-95. See also Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27, 45 (2003) (comparing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) which rejected the plaintiffs’ standing and which “rests on a narrow, grudging, indeed hostile, reading of Congress’s citizen suit provisions,” with *Bennett v. Spear*, 520 U.S. 154 (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 to decisions, not just about standing, but also about the availability of judicial review. See Sunstein, *supra* note 67, at 660 (“The Court’s decisions reflect skepticism about the appropriateness of judicial supervision of the regulatory process at the behest of statutory beneficiaries.”). But see A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen Suit Provisions of Environmental Legislation*, 12 DUKE ENVTL. L. & POL’Y FOR. 1 (2001) (contending that it is environmental groups that have the advantage, given generous citizen suit provisions and broad availability of standing).

70 Pierce, *supra* note 21, at 1195.

71 See generally Scalia, *supra* note 18.

72 *Id.* at 1197; see also Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 305 (2002) (contending that the injury-in-fact standard “should neither be used to restrict the powers of Congress to authorize jurisdiction, nor to [give scope to] the Justices’ own unexamined and unexplained preferences”); Krinsky, *supra* note 16, at 304 (standing doctrine “poses a general constraint on Congress’s power to craft enforcement schemes for its regulatory programs”).

73 Pierce, *supra* note 21, at 1199.

74 But see Magill, *supra* note 43, at 1168-69 (arguing that the Court, by implication, started treating statutory standing cases differently starting in the early 1970s).
questions.\footnote{Id. at 1191-92 (citing \textit{Warth v. Seldin}, 422 U.S. 490 (1975), as a case in which the Court sought to avoid a case that otherwise would “[a]uthorize (or, more realistically, require), the federal judiciary to determine which of hundreds of thousands of zoning and land-use rules [we]re consistent with some … test enforcing the Equal Protection Clause”).} In the latter, however, the Court had “consistently resolved the standing issue in accordance with its interpretation of congressional intent.”\footnote{Pierce, \textit{supra} note 21, at 1192.} Moreover, those pre-\textit{Lujan} decisions were consistent with other doctrines that limited the ability of the courts to interfere with Congress:

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

But \textit{Lujan} “transpose[d] a doctrine of judicial restraint into a judicially enforced doctrine of congressional restraint.”\footnote{Id. at 1198-99.} Thus, Pierce says, while a standing doctrine that reduces court involvement in national policymaking is a useful one, paralleling \textit{Chevron}\footnote{Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (requiring courts to defer to agency interpretations of statutes, when statute is ambiguous and Congress has given agency the authority to interpret and fill gaps in statute).} and \textit{Vermont Yankee}\footnote{Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (holding that courts lack authority to impose procedures on agencies greater than those imposed by Congress in the Administrative Procedure Act, 5 U.S.C. §§ 551 \textit{et seq.}).} in leaving such decisions to Congress and its agents, \textit{Lujan} is a “departure in kind” because it is “an evisceration of the principle of legislative supremacy.”\footnote{Pierce, \textit{supra} note 21, at 1201.}\footnote{Sunstein, \textit{supra} note 14, at 210.} Professor Sunstein has made a similar point: “There 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.”

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”
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clause of Article II.  

Then-Judge Scalia argued in 1983 that broad standing “will inevitably produce...an overjudicialization of the processes of self-
governance.” A federal court is “solely, to decide on the rights of
individuals,” reining in democratic excesses. Federal courts are not to
help the majority impose its will, for the majority has recourse to the
political branches. To put it a different way, “for parties who already have
lost the battle in the political process, litigation provides a second bite at the
apple.” If that means that laws are not strictly enforced, that is the
majority’s will: laws may well lapse into desuetude, and that is a “good
thing.”

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 “is a power and a duty.”

For similar reasons, Sunstein rejects Justice Scalia’s desuetude

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83 U.S. CONST., art. II, § 3, cl. 4 (the President “shall take Care that the Laws be faithfully executed”).
85 Id. at 884, quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).
86 Id. at 894.
87 Bressman, supra note 18, at 1705. See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (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 question, 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 instance of private plaintiffs.
88 Scalia, supra note 84, at 897 (“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 in 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.” (internal quotation marks and citation omitted)).
89 Sunstein, supra note 14, at 212. 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: “courts committed to combating such improper influences should do so however they are manifested, whether as action or inaction.” Bressman, supra note 18, at 1686.
argument. If a law has survived the gantlet of Congress, it is not for the executive branch to decide to ignore that law: “the take Care clause does not authorize the Executive to fail to enforce those laws of which it disapproves.” For this reason, the “second bite at the apple” argument has it backward: citizen suits do not attempt to get the courts to do what Congress would not do, but to have the courts to enforce that law.

To be sure, there is a difference between 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.” But, he says, any such problem does not rise to “constitutional status,” because “[p]arallel public and private remedies are familiar to American law; they do not violate the Constitution.”

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.” 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

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90 Sunstein, supra note 14, at 217-18.
91 Sunstein, supra note 14, at 217-18.
92 Sunstein, supra note 68, at 670 (discussing presumption of unreviewability of agency inaction under *Heckler v. Chaney*).
93 Supra note 87 and accompanying text.
94 Sunstein, supra note 14, at 231 n.300.
95 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 (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.* at 402. *Cf.* Sunstein, supra note 68, at 670 (“The ‘take Care’ clause is a duty, not a license.”).
96 Pierce, supra note 57, at 1776.
analysis of whether a court should exercise its power.\footnote{Elliot, supra note 4, at 510-11; Siegel, supra note 54, at 129-38; Tushnet, supra note 42, at 663.} Still others suggest alterations in the way the Court approaches the three prongs of the standing inquiry (injury-in-fact, causation, and redress)\footnote{E.g., 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, 152, 158 (2007) (arguing that “a reinvigorated public health perspective on environmental regulation” is necessary and that “federal courts should … hold … that violations of regulatory requirements that implement health-related environmental goals qualify as per se injuries-in-fact for standing purposes for any plaintiff falling within the zone of exposure to the relevant public health risk”).} or in the factors that should influence standing decisions.\footnote{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 suits that ameliorate failures of agency enforcement and those that disrupt productive cooperation”). See also Bressman, supra note 18, at 1710-11 (suggesting that courts, in deciding which citizen suits to permit, should consider what kinds of arguments are being raised).}

Some contend that standing doctrine cannot be fixed and should instead be abandoned altogether. Professor (now Judge) Fletcher suggests that the courts instead ask simply whether the plaintiff states a claim: “we should ask, as a question of law on the merits, whether the plaintiff has the right to enforce the particular legal duty in question.”\footnote{Fletcher, supra note 84, at 290-91.} At least in the federal courts, Congress would be the entity conferring the right to sue, and this approach to the problem thus counsels much greater deference to Congress.\footnote{Id. at 243-44; see also Sunstein, supra note 14, at 235 (“Congress can create standing as it chooses and, in general, can deny standing when it likes.”); Sunstein, supra note 54, at 1481 (“For the most part, the question of standing is for legislative resolution.”); Nichol, supra note 72, at 336-37; Pierce, supra note 57, at 1776 (arguing that the courts “should at least be reluctant to refuse to resolve a dispute when the plaintiff has an explicit statutory cause of action”). 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 4, at 509.}

\textit{C. What’s at Stake}

Despite decades of criticism, the Court has resisted calls to overhaul the doctrine, and it seems unlikely to heed that call anytime soon.\footnote{See supra notes 6-7 and accompanying text; see also note 24.} The question, then, is whether some other solution is needed.

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 standing problem is largely illusory, since it is usually possible to find a plaintiff who satisfies the Article III standing requirements. Many circuits, for example, had permitted suit when the risk that someone will become sick in the future is increased by a particular action; the courts have accepted a risk of death as small as 1 in 200,000 as sufficient for Article III purposes. But the Supreme Court has recently rejected that logic at least in some contexts, thus making it much more difficult for beneficiaries of regulatory action to gain standing to sue. Given this change—and the possibility that the Court might impose further limitations—standing is constraining who can sue.

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 no longer do so. Second, the Court’s willingness to ignore common-sense chains of causation suggests that plaintiffs may be harder to find than expected. Finally, there are certain kinds of cases where the doctrine may be impossible to satisfy and yet we believe access to the courts is desirable. Professor 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.

Whether we need a solution to standing problems also depends in part on whether one finds citizen-driven litigation valuable. Congress has

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103 Natural Res. Def. Council v. EPA, 464 F.3d 1, 6 (D.C. Cir. 2006).
105 See, e.g., Summers, 129 S. Ct. at 1151-52 (describing as “hitherto unheard-of” a test for standing that had been fairly widely accepted in the lower courts, e.g., Natural Res. Def. Council v. EPA, 464 F.3d 1 (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).
108 Some have criticized citizen suits. See generally, e.g., Barnett & Terrell, supra note 69 (arguing, inter alia, that laws tend to result in inefficiency, which can be solved by underenforcing the laws; citizen suits make such underenforcement impossible). Others have described them as essential tools for Congress. See Lazarus, supra note 15, at 1230-1231 (“[C]itizen-suit provisions are already one of modern environmental law’s hallmark achievements.”); Robert V. Percival, Massachusetts v EPA: Escaping the Common Law’s Growing Shadow, 2007 Sup. Ct. Rev. 111, 158 (2007) (describing citizen suits as “[a] key element” of environmental laws); Van Cleve, supra note 39, at 10,028 (describing citizen suits as the “essential backbone” of environmental enforcement). But see Sunstein, supra note 14, at 221 (stating that “[t]here is no reason to think that the citizen suit is a
authorized citizen suits under many statutes,\textsuperscript{109} so the answer to this question affects a wide range of interests.

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 pleading with the Supreme Court, for changing the doctrine. Scholars have suggested that Congress may have 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).

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, and/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.\textsuperscript{110} Such findings, it is argued, would overcome the cramped view the Court has taken 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.

\begin{footnotesize}

In addition, the Administrative Procedure Act (APA) allows those “suffering a 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 (1988).

\textsuperscript{110}I treat separately, see infra Part III, suggestions that Congress enact legislation providing bounties or other economic stakes to citizen suitors.
\end{footnotesize}
A. The Suggestions

A number of scholars have suggested that Congress might achieve its goal of opening the courts to a broader class of citizens by enacting statutes that include findings supporting standing. 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 possible interpretation of interests. That approach asks Congress to make clear that a statute imposes no limits to standing other than those contained in Article III itself.

This minimal approach, of course, does nothing to solve the problem that critics identify with the Court’s standing doctrine, although such


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., conc.) (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 1350. My concern here is not with statutes creating causes of action for entities who clearly fall within the existing standing paradigm, but with statutes that purport to overturn the Court’s own decisions regarding who has standing to sue.


113 June, supra note 112, at 793-95; see also Dumont, supra note 16, at 678-681 (proposing statutory language).

114 It is clear that Congress can successfully take this tack. See, e.g., Bennett v. Spear, 520 U.S. 154, 163 (“Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated,” (emphasis added)); see also Warth v. Seldin, 422 U.S. 490, 501 (1975).
language would make clear that Congress intends to force the constitutional question. The Supreme Court’s current standing doctrine locates in Article III the required injury-in-fact, causation, and redress. 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—the problems caused by 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.

Professor Pierce thus suggests that Congress could overcome the Court’s decision in Lujan by explicitly adopting one or more of the standing theories argued by the plaintiffs in that case; Congress would explain in statutory text how particular events would cause harm to particular classes of citizens. Congress could, for example, adopt by statute one of the “nexus” theories described and rejected by the Court in Lujan, thus finding that zookeepers or wildlife biologists are injured when distant members of the species they work with are threatened with extinction. 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

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115 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 (2000).
116 See supra notes 37-53 and accompanying text.
117 See, e.g., Envirocare of Utah, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999) (agreeing with agency in interpreting Atomic Energy Act to exclude those suffering solely economic injury from agency licensing procedures and suits in federal court).
118 Pierce, supra note 21, at 1181-82.
119 Lujan v. Defenders of Wildlife, 504 U.S. 555 (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 a “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 565-567. Pierce thus suggests that Congress could adopt these theories by statute even though the Court expressly rejected them.
deploying its factfinding power, where courts would not do so.”

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.”

This recent proposal – abandoned in later versions of the bill – 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. To be sure, the Court has long accepted certain risks as sufficient for injury-in-fact, but the risk of harm must be “imminent” – the draft bill quoted here imposes no such limitation. Moreover, the circuit courts are divided on whether any incremental

120 Sunstein, supra note 14, at 230-31. See also ECHEVERRIA & ZEIDLER, supra note 112, at 20 (suggesting “more detailed legislative definition of the injury and chains of causation Congress is seeking to address”).
121 ACES Discussion Draft, § 336.
122 See ACES House Bill, § 336 (omitting language quoted above).
123 See, e.g., Summers v. Earth Island Inst., 129 S.Ct. 1142, 1148 (2009) (“Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law”); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (injury-in-fact must be “actual or imminent, not conjectural or hypothetical” (internal quotation marks and citation omitted)); Los Angeles v. Lyons, 461 U.S. 95, 108 (1983) (where Lyons had previously been subjected to a chokehold by the LAPD and sought to enjoin future use of the chokehold, holding that Lyons lacked standing because it was “no more than conjecture” that he would suffer a chokehold again in the future).
increase in risk is sufficient to meet the injury-in-fact standard.\textsuperscript{124}

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 \textit{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.”\textsuperscript{125} 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.

\textbf{B. The Genesis}

The idea that Congress can create standing by statute arises from the standing cases themselves. So, for example, the Court in \textit{Sierra Club v. Morton} said that “where a dispute is \textit{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.”\textsuperscript{126} The \textit{Warth} Court stated the proposition more broadly: “\[t\]he actual or threatened injury required by Art. III may exist \textit{solely} by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”\textsuperscript{127} But the Court no longer takes such an expansive view. By the time the Court decided \textit{Lujan}, it was decidedly more cautious about Congress’s power to define injuries: “Individual rights…do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public….\[O\]ur prior cases] involved Congress’ elevating to the status of legally cognizable injuries \textit{concrete, de facto injuries that were previously inadequate in law}.”\textsuperscript{128} The Court seems to be saying that,

\begin{itemize}
\item \textsuperscript{126} \textit{ACES Discussion Draft, § 336} (emphasis added).
\item \textsuperscript{128} \textit{Lujan}, 504 U.S. at 578 (emphasis added).
\end{itemize}
whatever causes of action Congress creates, the Court will evaluate whether
the underlying injuries truly exist out there in the world.

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.”
But the majority in Lujan appears not to agree:

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.

Chief Justice Rehnquist put it plainly: “It 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.”

C. The Upshot

As discussed above, the suggestion that Congress solve standing
problems using legislative findings has some basis in the cases, albeit a
basis that has become narrower over the years. What can we expect the
Court to do in response to a specific effort by Congress to expand the
category of plaintiffs qualified to sue under Article III?

The Court has traditionally reviewed legislative factual findings
differentially. In the context of a challenge to the Controlled Substance 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.” Thus, in general, a
law will be found constitutional if it has a “rational basis.”

129 Id. at 579 (Kennedy, J., concurring). See also Steel Co. v. Citizens for a Better
Environment, 523 U.S. 83, 126 n.22 (1997) (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 14, at 231.

130 Id. at 576.

appears in the recent case, Summers v. Earth Island Institute, 129 S.Ct. 1142, where Justice
Kennedy emphasizes that “[t]his case would present different considerations if Congress
had sought to provide redress for a concrete injury giving rise to a case or controversy
where none existed before.” id. at 1153 (internal quotation marks and citation omitted),
while the majority states that “the requirement of injury in fact is a hard floor of Article III
jurisdiction that cannot be removed by statute.” id. at 1151.

132 Gonzales v. Raich, 545 U.S. 1, 21 (citing United States v. Lopez, 514 U.S. 549, 562
(1995), Perez v. United States, 402 U.S. 146, 156 (1971), and Turner Broadcasting System,
Inc. v. FCC, 512 U.S. 622, 664-668, (1994) (plurality opinion)).

133 Id. at 23.
Congress is not even required to make findings, in most circumstances. True, the Court has said that findings can be helpful: 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 effect was visible to the naked eye.”\footnote{United States v. Lopez, 514 U.S. 549, 563 (1995); see also, e.g., FCC v. Beach Comm., 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.”).} But, in general, “Congress need [not] make particularized findings in order to legislate.”\footnote{Perez, 402 U.S. at 156. 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: “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.” Mark Tushnet, \textit{Some Notes on Congressional Capacity to Interpret the Constitution}, 89 B.U. L. REV. 499, 504 (2009).}

Applying this test, Professor Pierce concludes that, were Congress to make findings adopting the various \textit{Lujan} nexuses, the Court would be hard pressed to find Congress’s action irrational.\footnote{Pierce, \textit{supra} note 21, at 1181-82.} Similarly, Professor Sunstein writes that “[p]erhaps courts will review…findings [of injury-in-fact and causation] under a deferential standard.”\footnote{Sunstein, \textit{supra} note 14, at 230.} On this view, the findings approach should be successful.

But this is exactly the point. 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 where Congress is trying to overcome Court-imposed limitations on standing:

\begin{quote}
[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.\footnote{District of Columbia v. Heller, 128 S.Ct. 2783, 2818 n.27 (2008) (citing Engquist v. Oregon Dept. of Agriculture, 553 U.S. ___ (2008) and United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.”).}
\end{quote}

Article III standing is a matter of structural constitutional law rather than
individual rights, but the Court would almost certainly reject a mere irrationality test in the structural context as well.

The case that most clearly supports this proposition is City of Boerne v. Flores. In Boerne, the Court struck down a statute in which Congress had purported to overrule First Amendment precedent by statute. The Court found that the statute “contradict[ed] vital principles necessary to maintain separation of powers.” Even though Congress was acting under Section 5 of the 14th Amendment, which gives Congress “the power to enforce, by appropriate legislation, the provisions of” that amendment, 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.”

Notably, this strong assertion of the Court’s power comes in an analysis of an amendment under which Congress’s powers are among its strongest. For example, Congress can decide that the Equal Protection

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139 Individual rights are usually waivable. See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.14 (1985) (”[T]he personal jurisdiction requirement is a waivable right.”); Peretz v. U.S., 501 U.S. 923, 936 (1991) (“The most basic rights of criminal defendants are...subject to waiver.”). But parties are not free to waive a failure of standing. See Arizonans for Official English v. Arizona, 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.”) (internal quotation marks and citations omitted, emphasis added)).


141 The statute was the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb et seq. (2000), 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 the Native American Church. The Court, refusing to apply strict scrutiny to the statute, ruled in favor of the government. Id. at 877-879. Strict scrutiny would have required the government to show a compelling justification for burdening the plaintiff’s religious practices. E.g., Sherbert v. Verner, 374 U.S. 398, 403 (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.” 42 U.S.C. §§ 2000bb (2000).

142 Boerne, 521 U.S. at 536.

143 U.S. CONST., am. 14, § 5.

144 Boerne, 521 U.S. at 508.

145 Samuel Estreicher & Margaret H. Lemos, The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law, 2000 Sup. Ct. Rev. 109, 116-117 (“[T]he potential sweep of congressional authority under the Fourteenth Amendment is nothing short of breathtaking.”). See also Ex parte Virginia, 100 U.S. 339, 345-346 (1879) (“Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.”).
Clause is best enforced by enacting legislation that prohibits a broader range of activity than does the Clause itself (as interpreted by the Court).\footnote{146} The Court thus tries in \textit{Boerne} to distinguish between statutes that merely enforce the 14th Amendment substance already identified by the Court—permissible—and statutes that purport to “decree the substance of the [14th] Amendment’s restrictions”\footnote{147}—impermissible. That approach has led the Court to strike down other congressional enactments under Section 5.\footnote{148}

The Section 5 jurisprudence is of a piece with recent doctrinal trends that upset settled aspects of constitutional law in aid of keeping Congress to the narrower role the Court believes it should have.\footnote{149} 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.”\footnote{150} “The decisions emphasize that it is the Court’s special responsibility to mark where Congress has exceeded its constitutional bounds.”\footnote{151}

It is almost inconceivable, then, that the Court would accept congressional efforts to redefine standing. If the \textit{Boerne} Court is 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.\footnote{152}

\footnote{146} Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 727 (2003) (“Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. Congress’ power to enforce the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.”).

\footnote{147} \textit{Boerne}, 521 U.S. at 508.


\footnote{150} Post & Siegel, supra note 148, at 1. \textit{See also} Neil Devins & Keith E. Whittington, \textit{Introduction}, in \textit{CONGRESS & THE CONSTITUTION} 1, 3 (Neil Devins & Keith E. Whittington eds. 2005) (discussing “the Rehnquist Court[’s] sustained assault on congressional power”); Timothy Zick, \textit{Marbury Ascendant: The Rehnquist Court and the Power to “Say What the Law Is.”}, 59 WASH. & LEE L. REV. 839, 843 (2002) (“[t]he 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.”).

\footnote{151} Post & Siegel, supra note 148, at 1. \textit{See also} Zick, supra note 150, 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.”).

\footnote{152} The Court has frequently given Congress wide latitude under Section 5. \textit{See, e.g.,}
invocations of the “necessary and proper” Clause or other Article I powers would not suffice to permit Congress to alter the Article III standing requirements.

*Boerne*’s emphasis on the constitutional separation of powers reinforces this conclusion. 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.” If Congress were to enact statutes that purport to alter outcomes under the tripartite test, it would be rewriting Article III, something the Court has made clear that it cannot do by statute. Congress would not always lose: it could enact a statute conferring standing, and the Court could uphold it. But the Court would decide.

That the findings approach fails has as much to do with the oddities of standing doctrine as the Court’s recent “juricentric” jurisprudence. 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. If Congress deems by statute that injury-in-fact

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Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) (departing from series of cases strongly supporting state sovereign immunity because the statute at issue was enacted under Section 5 rather than under Article I).

153 U.S. CONST., art. I, § 8, cl. 18.

154 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 16, at 678-681 (arguing that Congress has more power under the post-Civil-War amendments to define injury and causation in civil rights cases). *Cf.* Zick, *supra* note 150, at 892 (“Commerce Clause enactments say something about Congress's view of its own power (with which courts may or may not disagree), but unlike Section 5 enactments, which the Court has acknowledged may expand rights beyond judicial precedent, they do not purport to construe the substance of rights contained elsewhere in the Constitution.”).

155 *City of Boerne v. Flores*, 521 U.S. 507, 536 (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 (1803))).


157 *See supra* notes 1 and accompanying text.

exists where the Court itself would not find it, that looks very much like Congress changing the content of the constitutional guarantee, something that *Boerne* prohibits.

Thus, while “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,”159 the *Lujan* Court established the limits of that power: Congress may “elevat[e] to the status of legally cognizable injuries *concrete, de facto injuries that were previously inadequate in law.*”160 Even though this is a factual question, in this context the facts are the law and the Court has the power to declare what the law is.

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.161 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 previously been legally unactionable. 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.162 Nor can Congress force the cases into the courts, as the Court is the ultimate supervisor of the Article III courts—Congress cannot keep the doors to the courthouse open if the Court wants them closed.163

And all of the foregoing is simply as a matter of Article III and the Court’s power to interpret it. None of the findings arguments addresses the

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160 *Lujan*, 504 U.S. at 578 (emphasis added).

161 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 150, at 859 (emphasis added).

162 Cf. *id.* 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.”).

Article II aspects of the Court’s standing doctrine. Allowing expansive citizen suits under a statute that makes specific findings of injury, causation, and redressability, still raises the specter of interfering with the Executive Branch’s powers to “take Care that the Laws be faithfully executed,” just as citizen suits do now. This is true whether the Court uses an Article-II-inflected interpretation of Article III, or finally decides to address the Article II issue directly.

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. The Court has held that the qui tam relator has Article III standing, 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. 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 recover attorney’s fees if successful). When a statute provides

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164 See supra Part I.A.2.d.
165 U.S. CONST., art. II, § 3, cl. 4.
166 See supra note 18.
167 See infra notes 174–195 and accompanying text.
169 See, e.g., Endangered Species Act § 11(g)(4), 16 U.S.C. § 1540(g)(4) (1994) (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 § 520, 30 U.S.C. § 1270(a), (d) (1994) (authorizing citizen suit against government actors only and authorizing payment of attorney’s fees and other costs); Clean Water Act § 505, 33 U.S.C. § 1365(a) (1994) (authorizing citizen suit for injunctive relief and civil penalties payable to the U.S. Treasury); id. § 1365(d) (authorizing payment of attorney’s fees and other costs to “any prevailing or substantially prevailing party”).

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) (“[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.”)
monetary penalties, they are payable only to the United States Treasury. A few statutes authorize rewards to those who give information leading to criminal prosecutions, and one statute offers a reward for information leading to the imposition of civil penalties. But plaintiffs suing under citizen suit provisions usually receive no share of any penalties paid. 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.

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”), first enacted just after the Civil War, is the federal qui tam statute. It creates liability for anyone

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170 See, e.g., Friends of the Earth v. Laidlaw Envtl. Servs. TOC, 528 U.S. 167 (2000) (holding that civil penalties, although paid to the government, nevertheless provided redress to private plaintiffs because of their deterrent value); Steel Company, 523 U.S. at 107 (holding that civil penalties provided no redress for wholly past violations of the Emergency Protection and Community Right-to-Know Act).


172 Clean Air Act, 42 U.S.C. § 7413(f).

173 As adumbrated above, see supra notes 169-170, 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 Company, 523 U.S. at 107. Moreover, because the defendant had admitted to violations, the plaintiffs could not benefit from declaratory relief.

174 31 U.S.C. §§ 3729-3730. Congress substantially beefed up the False Claims Act with the Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, 123 Stat. 1617, which was enacted 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,” id.


176 “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
who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” to the United States. 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]…, plus 3 times the amount of damages which the Government sustains because of the act of that person.”

If the FCA merely authorized, e.g., the Department of Justice to go after those who defrauded 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. A relator who wins his lawsuit is rewarded by payment of a bounty: a substantial fraction of any amount recovered in the action.

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. And it certainly looks like the relator sues to vindicate the public interest in preventing fraud on the government, just as a taxpayer.

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177 Id. § 3729(a)(1)(A). 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. Id. § 3729(a)(1)(B)-(G).
178 Id. § 3729(a)(1).
179 Id. § 3730(b)(1).
180 Id. § 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; requiring the losing defendant to pay the relator’s attorney’s fees and costs; and requiring a losing plaintiff to pay the defendant such fees and costs if the action was “clearly frivolous, clearly vexatious, or brought primarily for…harassment”).
181 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.”)
might sue over misspent funds. That taxpayer lacks standing.\textsuperscript{182}

But when the Court was asked whether \textit{relators} have Article III standing, it found they did.\textsuperscript{183} It first noted that “the Article III judicial power exists only to redress or otherwise to protect against injury to the \textit{complaining party},” 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.”\textsuperscript{184} The relator still has standing, the Court held, because he is an assignee of the \textit{Government’s} claim for damages.\textsuperscript{185} The United States suffers injury when it is defrauded; the FCA “can reasonably be regarded as effecting a partial assignment.”\textsuperscript{186}

This conclusion, the Court said, was reinforced by “the long tradition of \textit{qui tam} actions in England and the American Colonies.”\textsuperscript{187} The Court found this history “well nigh conclusive”: “\textit{qui tam} actions were cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.”\textsuperscript{188} The partial-assignment analysis and the historical confirmation “leave[,] no room for doubt that a \textit{qui tam} relator under the FCA has Article III standing.” Importantly, however, the Court did not address the Article II problem.\textsuperscript{189} Moreover, four members of the Court recently dissented in a case that found Article III standing for \textit{assignees} who sued under a statute other than the FCA, because the assignees were required to turn all funds recovered over to the assignor.\textsuperscript{190}

2. **Informers’ actions**

Informers’ actions essentially create private prosecutors who can

\textsuperscript{184} Id. at 771-772.
\textsuperscript{185} Id. at 773.
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 774. 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 \textit{qui tam} that would clearly fail the current tripartite test. \textit{See}, e.g., Winter, supra note 54, at 1396 (“Prior to the Revolution, other writs as well as equity practices brought before the courts cases in which the plaintiff had no personal interest or ‘injury-in-fact.’ Under the English practice, ‘standingless’ suits against illegal governmental action could be brought via the prerogative writs of mandamus, prohibition, and certiorari issued by the King’s Bench.”).
\textsuperscript{188} 529 U.S. at 777.
\textsuperscript{189} Id. at 778 n.8 (“[W]e express no view on the question whether \textit{qui tam} suits violate Article II, in particular the Appointments Clause of § 2 and the ‘take Care’ Clause of § 3.”).
\textsuperscript{190} Sprint Commc’n Co., L.P. v. APCC Servs., Inc., 128 S.Ct. 2531 (2008) (assignees “receive their compensation based on the number of payphones and telephone lines operated by their clients, not based on the measure of damages ultimately awarded by a court or paid by petitioners as part of a settlement.”) (citation omitted).
proceed against both governmental actors and private defendants for violations of the law; such actions have a long pedigree. Since, by definition, the informer may be empowered to sue under a wider variety of laws than a *qui tam* relator (who suits 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.” The prevailing plaintiff in an informer’s action shares in the bounty of the resulting damages or fines, receiving at least some financial benefit.

The Court has not confronted an informer’s suit since the development of the contemporary standing doctrine. 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. Suggestions range from the extremely broad (Congress could enact “an exceedingly short amendment to existing law, giving a bounty to all successful citizen plaintiffs”) to the more modest (bounties could be

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**Notes**

191 U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 541, n. 4 (1943) (“Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.”) (internal quotation marks and citation omitted); 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 14, at 175 (1992); Winter, *supra* note 54, at 1396-1398.


194 The most recent case the Supreme Court has decided under an informer’s statute appears to be U.S. ex rel. Marcus, 317 U.S. at 537. See, e.g., Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 129-130 (1998) (Stevens, J., dissenting) (citing *U.S. ex rel. Marcus* when presumably a more recent case would have been helpful). A search run in Westlaw, while not definitive, gives supporting evidence (searching for (“informer! action!”)) and (informer & *qui tam*), run February 23, 2010.


offered in certain other contexts\textsuperscript{197}. Whether the bounty option makes sense depends on 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 \textit{qui tam} action\textsuperscript{198}—the United States would essentially be assigning part of its claim to the citizen suitor.\textsuperscript{199}

But adopting the \textit{qui tam} analogy in suits against private defendants (for example, against a company that is allegedly in violation of its Clean Water Act permits\textsuperscript{200}) does not resolve the standing problem. The Court has, in the past decade, made clear that the plaintiff “bears the burden of showing that he has standing for each type of relief sought.”\textsuperscript{201} This requirement has more and more 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.’”\textsuperscript{202} A citizen suitor endowed with a bounty if victorious would therefore have standing to pursue the civil penalties, but would not have standing to seek an injunction or declaratory relief. Because injunctive relief is the key relief sought in many citizen lawsuits, this is a notable flaw.

Of course, civil penalties have deterrent effects, as both Congress\textsuperscript{203} and the Court have recognized.\textsuperscript{204} A suit by a relator, solely for civil penalties,

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  \item \textsuperscript{197} E.g., Jeffrey Manns, \textit{Rating Risk After the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability}, 87 N.C. L. REV. 1011, 1027 (2009) (suggesting extending the \textit{qui tam} approach to permit lawsuits against financial “gatekeepers” such as ratings agencies
  \item \textsuperscript{198} See supra notes 174-189 and accompanying text.
  \item \textsuperscript{199} Sunstein, supra note 14, at 232. See also Joshua D. Rosenberg, \textit{The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane}, 16 VA. TAX REV. 155 (1996) (recommending action modeled on \textit{qui tam} in tax context).
  \item \textsuperscript{200} See, e.g., Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167 (2000).
  \item \textsuperscript{201} Id. at 185; see also Summers v. Earth Island Institute, 129 S.Ct. 1142, 1149 (2009); Lewis v. Casey, 518 U.S. 343, 358, n. 6 (1996) (“[S]tanding is not dispensed in gross.”).
  \item \textsuperscript{202} DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006) (quoting Lewis, 518 U.S. at 357).
  \item \textsuperscript{203} Tull v. U.S., 481 U.S. 412, 422-23 (“The legislative history of the [Clean Water] Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties.”).
  \item \textsuperscript{204} Laidlaw, 528 U.S. at 185; see also Hudson v. U.S., 522 U.S. 93, 102 (1997) (“[A]ll
may therefore achieve some of the results that can be obtained by injunctive relief, by deterring future wrongful conduct by the defendant (and 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, while an injunction “is enforceable by the contempt power. [It] must be obeyed until it is stayed, dissolved, or reversed.” A citizen suit brought by a relator (who lacked separate standing to seek an injunction) would thus be barred from this valuable form of relief.

An informer207 could presumably be empowered to 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.

Sunstein invokes the informer’s action,208 suggesting that Congress could authorize an award of $500 for any successful citizen plaintiff.209 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; if the citizen is right, the agency pays her $500 and (presumably) fixes the problem; the courts are never involved. If the agency disagrees, the citizen has now been deprived of $500 she believes she is rightfully entitled to, and will have standing to bring a suit challenging the agency’s decision.210 As

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205 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) (2000) (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.

206 DAN B. DOBBS, LAW OF REMEDIES, DAMAGES - EQUITY - RESTITUTION § 2.9 (2d ed. 1993).

207 See supra notes - and accompanying text.

208 See supra notes 1 and accompanying text.

209 Sunstein, supra note 14, at 233.

210 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 (1994). As I discuss below, this approach has some elements of the Article I solution. See infra Part IV.
C. Is It Constitutional?

Citizen suitors who have been endowed with bounties present problems under both Article II and Article III. While the Court has answered a narrow version of the Article III question, it has yet to confront the Article II questions. While the Court might be constrained to accept that at least some of these suitors have Article III standing, 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.

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 seemingly takes care of Article III objections: a financial stake parallels the quintessential injury-in-fact. And it cannot matter that a citizen suitor himself possesses no injury that the money is meant to compensate for: as the Court explained at length in *Vermont Agency*, the practice of assigning claims has a venerable history. Indeed, the Court itself pointed out in *Lujan* that the *qui tam* action (long accepted in the federal courts) was a stark contrast to the citizen suit (of recent vintage, with plaintiffs of dubious standing).

For all this, 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* by 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*

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211 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. … In my view these matters are best reserved for a later case.”); *Vt. Agency of Nat’l Res. v. U.S. 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.”).

212 See *supra* notes 1 and accompanying text.

213 *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 291 (3rd Cir. 2005) (“While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms.”).


informs a 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.\(^{216}\) 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 in this country ever since the foundation of our government.”\(^{217}\) 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, is hard to describe as an assignee of the United States without some strain. 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 those who violate the law accountable using the coercive power that is reserved to the government. 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 leaves the Article II problem largely unaddressed. 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.”\(^{218}\) Sunstein argues that any such problem does not rise to “constitutional status,” because “[p]arallel public and private remedies are familiar to American law; they do not violate the Constitution.”\(^{219}\)

But when private remedies are sought, they are typically sought by someone who has an individuated injury 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.\textsuperscript{220} The farmer is suing for his injury. Under the \textit{qui tam} approach, however, the Government is assigning some of its claim to the private party, so that the private party sues to vindicate the rights of the United States. That \textit{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,\textsuperscript{221} any statute that purported to create millions of private enforcers, even using bounties, seems doomed to fail under Article II.\textsuperscript{222}

\subsection*{D. Practicalities}

Finally, even though we have long experience with \textit{qui tam} actions, no one seems to have thought through how to implement the informer approach—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. What if multiple parties challenge the action? Does each plaintiff get a bounty? Or only one?\textsuperscript{223} 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 where plaintiffs are not entitled to any bounty when they win.\textsuperscript{224}

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

\begin{itemize}
\item\textsuperscript{220} Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005).
\item\textsuperscript{221} See supra notes \textsuperscript{84-95} and accompanying text.
\item\textsuperscript{222} See supra notes \textsuperscript{84-95} and accompanying text.
\item\textsuperscript{223} I note 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) (“It is clear … that the Federal Election Commission … has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC’s.”).
\item\textsuperscript{224} 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, e.g., 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 ENVT. L. 229, 251 (2001) Steven M. Dunne, Attorney’s Fees for Citizen Enforcement of Environmental Statutes: The Obstacles for Public Interest Law Firms, 9 STAN. ENVT. 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 to be offered to victorious plaintiffs, many would be tempted to sue simply for the funds, which would change the citizen-suit landscape considerably.
\end{itemize}
the private enrichment of profit-motivated bounty hunters.”225 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 by those who are now attracted
by the money. If the bounty draws additional suits motivated by the money,
there may be an unwelcome increase in the number of frivolous lawsuits
filed in the federal courts.

One possible solution to this issue is to balance the provision of
bounties by the inclusion of stiffer punishments for frivolous lawsuits. Rule
11 of the Federal Rules of Civil Procedure could be amplified, for example,
by removing or amending the safe-harbor provision.226 But the history of
Rule 11 shows that stiff penalties for “frivolous” lawsuits deter creative
right-doers as well as mercenaries.227

Congress could also alter the attorney’s fee structure—just as it often
provides for victorious citizen plaintiffs to recover attorney’s fees, Congress
could encourage courts to require frivolous suitors to pay the fees of those
they have subjected to their suits. Of course, as we see in Great Britain, this
may also deter too many warranted suits.228

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.229 One can imagine a
statute that calibrates the available bounty in a way that permits standing for

225 Beck, supra note 175, at 549; see also Bressman, supra note 18, at 1705
(contending that private attorneys general “pursue narrow interests at public expense”);
Johnson, supra note 95, at 407 (“if Congress can, by merely creating a bounty provision,
create an ‘individuated interest’ for a private party that legitimates the private party’s
enforcement of the law under Article II, what is left of Article II’s command that the
President ‘take Care that the Laws be faithfully executed’?”).
226 Fed. R. Civ. Pro. 11 (allowing a party to seek sanctions when another party files a
pleading or paper that is not colorably justified by the facts or the law, but requiring a 30-
day safe harbor for the offending party to withdraw or amend the pleading or paper; note,
however, that the court may impose such sanctions without giving the offending party safe
harbor).
227 See, e.g., Carl Tobias, The 1993 Revision To Federal Rule 11, 70 IND. L.J. 171
unwarranted satellite litigation over its phrasing and the magnitude of sanctions that courts
imposed while increasing incivility among lawyers. Rule 11 motions were filed and
granted against civil rights plaintiffs more frequently than any other class of litigant.”).
228 See generally, e.g., Mark S. Stein, The English Rule with Client-To-Lawyer Risk
229 See, e.g., Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286 (3d Cir. 2005)
(“While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of
its paradigmatic forms.”); Joint Stock Society v. UDV North America, Inc., 266 F.3d 164,
177 (3d Cir. 2001) (noting that standing would have existed “[i]f the plaintiffs had shipped
even a small amount of Russian vodka to this country for sale”).
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[24-Jul-10]

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.

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 intriguing 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 tribunal230 (“Tribunal”) that has broad powers to review government action and, possibly, to hear suits by private citizens against violators of the law.231

Because Article III standing restrictions have no application in 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 rendered inapplicable to claims brought before the Tribunal. This means that the Tribunal could potentially hear all cases raising issues falling within its subject-matter jurisdiction, whether unripe, moot, or brought by a plaintiff lacking standing, unless some other constitutional provision (for example, the Due Process Clause) prevented it.232,233 Because one central worry about standing doctrine is that cases are

230 An Article I tribunal, as the name makes clear, are those created by Congress under its Article I powers; such tribunals have also been created under Article IV (territorial courts). See infra Part IV.A.

231 Different issues are presented by suits against the government and suits against private defendants. See infra Part IV.C.

232 See, e.g., Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (“If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal District Courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.”) (emphasis added)); see also Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568 (1985).

233 As I discuss below, 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). See infra notes 4, and accompanying text. But because those doctrines serve valuable functions, see infra notes 4, and accompanying text, an Article I tribunal certainly might adopt, or Congress might impose by statute, at least some of the
not decided on their merits but rather on (sometimes abstruse) justiciability grounds, the Tribunal is tempting.

After giving some background on existing Article I 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 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 craft 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 Article I judges, bankruptcy judges and magistrates, and administrative law judges—far outnumber the Article III judges. Some of those courts have been created under articles other than Article I; for example, territorial courts are created under Congress’s Article IV power. But Congress has invoked

justiciability doctrines as a matter of prudence.

234 See supra notes - and accompanying text.

235 Judith Resnik, The Mythic Meaning of Article III Courts, 56 U. COLO. L. REV. 581 (1985); see also Judith Resnik, Of Courts, Agencies, and the Court of Federal Claims, 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. See generally Resnik, supra, 56 U. COLO. L. REV. at 581.

236 U.S. CONST., art. IV, § 3, cl. 2. 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). E.g., Eugene Kontorovich, The Constitutionality Of International Courts: The Forgotten Precedent Of Slave-Trade Tribunals, 158 U. PA. L. REV. 39, 50 (2009).

its Article I powers for the vast majority of them.

These courts take varying forms. Some look very much like the Article III courts, with judges who, though not life-tenured, serve lengthy terms and may have salary protections; with procedures similar to the rules used in the Article III courts; and with review going to one of a variety of Article III appellate courts, at least for proceedings that qualify as “Cases” or “Controversies.”

237 E.g., U.S. Const., art. I, § 8, cl. 8 (giving Congress power over patent and copyright); 35 U.S.C. § 6 (creating Board of Patent Appeals and Interferences); see also John F. Duffy, Are Administrative Patent Judges Unconstitutional?, 2007 PATENTLY-O PATENT L.J. 21 (arguing that administrative patent judges have been appointed without the Senate’s consent in violation of the Appointments Clause, U.S. Const., art. II, § 2, cl. 2).

238 Apart from the territorial courts, supra note 236, 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 (2001) (invoking presidential powers to detain al-Qaeda terrorists and ordering the Secretary of Defense to create military commissions to try such individuals), the non-Article-III courts have been created by Congress using an enumerated Article I power or the more general Necessary and Proper Clause, U.S. Const., art. II, § 2, cl. 18.

239 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, e.g., infra note 325 (discussing confusing terms used to discuss bankruptcy courts). 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.

240 See, e.g., 26 U.S.C. § 7443 (“The term of office of any judge of the Tax Court shall expire 15 years after he takes office.”); 28 U.S.C. § 152 (“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 Claims Court and the Tax Court also receive the same salary as the federal district court judges, and thus are presumably protected from diminutions in salary. Id. § 172(b); 26 U.S.C. § 7443(c). Many of these judges may be removed only for cause, id. § 7443(d); 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 may retire at full salary, and may be recalled for duties akin to those of senior Article III judges); 26 U.S.C. § 7447 (virtually identical retirement provisions for Tax Court).

241 See, e.g., Fed. Bankr. R. 1011 (“Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F. R. Civ. P.”); Fed. Ct. Cl. R. Preface (“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.”).


243 For example, the U.S. Court of Federal Claims has been given the power to issue advisory opinions, something that the Article III courts cannot do. 28 U.S.C. § 1492
Other non-Article-III tribunals look much less like Article III courts. The vast cadre of administrative judges and administrative law judges ("ALJs")\(^{245}\) that adjudicate issues under various organic statutes are employees of the federal government, not appointed for terms of years, and have certain employment protections.\(^{246}\) Their procedures may be quite distant from those used in a courtroom. For example, the administrative law judges who decide Social Security Disability\(^{247}\) claims meet fairly informally with the applicant for disability, that person’s representative (who may or may not be a lawyer), and (sometimes) a vocational expert who testifies regarding what jobs, if any, might be performed by the applicant; the goal is to arrive at a correct determination of the applicant’s claim, rather than to see which side can litigate better.\(^{248}\) The Merit Systems Protection Board, while more formal than the Social Security Disability adjudication system, similarly seeks correct answers rather than refereeing a dispute between two legal gladiators.\(^{249}\)

As a result of this variety, the behavior of the various tribunals does not

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\(^{240}\) "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."); id. § 2509 (giving procedures for "Congressional reference cases"). See also Craig Stern, Article III and Expanding the Power of the United States Court of Federal Claims, 71 GEO. WASH. L. REV. 818 (2003) (that court "may decide questions of law … that have nothing to do with ‘cases’ or ‘controversies.’").

\(^{244}\) The local courts of the District of Columbia operate largely like state courts and are thus indistinguishable from the typical court. 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). The territorial courts may or may not be allowed to behave like ordinary courts. Compare, e.g., 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 Nicol, 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.")


\(^{246}\) See id. § 8212 (describing difference in civil service protections between administrative judges and ALJs).

\(^{247}\) 42 U.S.C. §§ 201-234.


\(^{249}\) Telephone interview with Bryan Schwartz, Managing Partner, Bryan Schwartz Law, Oakland, Cal. (Feb. 22, 2010).
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clearly show why Article I courts are different from Article III courts. Instead, the key difference between these courts and Article III courts is that the Article III courts are courts of relatively general jurisdiction.\textsuperscript{250} In contrast, the Article I courts tend to have narrow jurisdiction: the Court of Federal Claims resolves claims for money against the United States;\textsuperscript{251} the Tax Court resolves certain tax issues;\textsuperscript{252} the bankruptcy courts may issue final decisions only in core bankruptcy proceedings;\textsuperscript{253} administrative law judges hear only those issues that their agency’s organic statute allows them to hear.\textsuperscript{254}

B. The Suggestions

One who sets out to craft an Article I tribunal thus has a wide variety of models to chose from. Nevertheless, the Tribunals suggested by critics of standing doctrine recommend institutions that look very much like the Article III courts that reject cases based on standing. To my knowledge, there have been three suggestions for an Article I tribunal to solve existing standing problems.\textsuperscript{255}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{250} Of course, the 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 Services, Inc., 545 U.S. 546, 552 (2005) (internal quotation marks and citation omitted). But within those limits, the Article III courts hear almost every variety of dispute: 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.

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. \textit{E.g.}, 7 U.S.C. § 2 (appeal of certain decisions from Commodities Futures Trading Commission); 10 U.S.C. § 950g (appeal from military commissions trying enemy combatants); 12 U.S.C. § 2266 (appeal of Farm Credit Administration Decisions); 21 U.S.C. § 457 (appeal of decisions by the FDA); 42 U.S.C.A. § 300j-7 (establishing D.C. Circuit as sole venue for appeal of national primary drinking water regulations). It also, however, has general jurisdiction over federal cases arising from the District Court for the District of Columbia, 28 U.S.C. § 41, and thus hears non-administrative law cases frequently. The Federal Court of Appeals for the Federal Circuit is the most specialized, hearing appeals in a wide variety of disputes ranging from, \textit{e.g.}, patent and copyright cases to contract claims against the United States to cases arising from the Court of International Trade and the Merit Systems Protection Board. 28 U.S.C. §§1295-96.

\textsuperscript{251} That jurisdiction is partially concurrent with the Article III district courts. See 28 U.S.C. § 1346; \textit{id.} § 1491(b)(1).


\textsuperscript{254} \textit{E.g.}, Social Security Disability Claims. \textit{See supra} notes 1 and accompanying text.

\textsuperscript{255} As I noted above, \textit{see supra} note 235, Professor Resnik has hypothesized an Article I tribunal with broad powers for discussion’s sake. A fourth scholar suggests an Article I
\end{itemize}
\end{footnotesize}
One option is “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.” Congress could also provide an Article I appellate court to review the decisions of this tribunal. The proposed statute creating this Article I court “would not divest Article III courts of their present authority to entertain these matters. Jurisdiction would be in the alternative, at the option of the plaintiff.” 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.

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

The third option is the most ambitious: an Article I tribunal to hear all cases where the plaintiffs would lack standing to sue in the federal courts. The jurisdiction of this tribunal would presumably approach the scope of the federal courts themselves. How does one know whether standing will be denied in the Article III courts? While the author gives little attention to tribunal but rejects it as insufficiently independent. Carter, supra note 12, at 2218-2222.

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 generally Feld, supra note 210. I have already discussed his proposal in Part III, see supra notes 119 and accompanying text.

256 See supra notes 118 and accompanying text.
258 Id. (noting “uncertainty” over “whether the Supreme Court or other article III court could entertain an appeal from an article I court in which there were no article III case or controversy”).
259 Id. at 688. As I discuss below, see infra notes __-__ and accompanying text, concurrent jurisdiction raises a number of practical and constitutional problems.
260 Id. at 689 (suggesting statutory language for implementing this suggestion).
261 Hodits, supra note 16.
262 See supra notes 118 and accompanying text.
263 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 16, at 2222-2236.
264 Hodits, supra note 16 at 1933-1940.
265 Krinsky, supra note 16.
266 See supra notes 118 and accompanying text.
this issue, he does suggest that Congress might simply make suit in an Article I court “available at a stage of agency action during which injuries are still hypothetical.” He notes that precedent exists for a Tribunal that hears proceedings that are not cases or controversies, in the advisory opinions rendered by the Court of Federal Claims. Like the others, however, he provides few details regarding the actual structure and operation of the Tribunal.

Comparing all three options, they range from a Tribunal that reviews decisions under a narrow jurisdiction (which I will henceforth call “the Limited Tribunal”) to a Tribunal that has broad jurisdiction over, conceivably, the entire administrative state (which I will call “the Expansive Tribunal”). The choice of a Limited Tribunal, 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. The Expansive Tribunal, however, is the only one that truly solves the standing problem: important non-environmental cases have foundered under the Court’s standing doctrine.

In sum, the choice between Limited and Expansive affects not only how well the standing problem is solved, but also has consequences for the practical choices that must be made in creating a workable institution, and for the constitutionality of the Tribunal overall.

C. Problems in the Details

None of the suggestions described above thoroughly engage the details. In order to evaluate the constitutionality of the Tribunal, whether Limited or Expansive, as well as its chances of ever being adopted, it is necessary to supply at least some of those details, including 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. They lack the life tenure and salary protections that the

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267 Krinsky, supra note 16, at 305.
268 See supra notes 1 and accompanying text.
Constitution accords to Article III judges; they are subject to pressure from Congress, the President, and agency heads; and they may even be removed from office for political reasons. This problem would exist for both the Limited and Expansive Tribunals.

The life-tenure and salary problems cannot be solved by giving the Tribunal’s adjudicators life tenure and salary protection. After all, it may be true that, if an adjudicator were given life tenure and salary protection by Congress, he would 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. What does it mean to be a life-tenured judge if the tenure is guaranteed by statute and not the Constitution? Presumably he could not rely on that tenure or salary protection: Congress could always change its mind.

But it is a good question how much life tenure and salary protection are essential (despite what the Founders thought). Most obviously, state judges are elected, and while that practice has been widely condemned, we apparently do not think such judges are incapable of independent decisionmaking except in extreme circumstances. Moreover, as already

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272 U.S. CONST., art. III, § 1.
273 E.g., John L. Gedid, ALJ Ethics: Conundrums, Dilemmas, And Paradoxes, 11 WIDENER J. PUB. L. 33 (“[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)).
274 See McLaughlin, supra note at 380 (“[T]erritorial judges have been removed for nothing more than deciding cases contrary to government wishes.”).
275 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 first United States Court of Claims had judges with life tenure but also had features incompatible with Article III).
276 The Constitution bars only states from legislative interference with contracts, U.S. CONST., art. I, § 10, cl. 1, if one can even describe a law conferring life tenure as a contract.
278 Adam Liptak, Former Justice O’Connor Sees Ill in Election Finance Ruling, in N.Y. TIMES at A16 (Jan. 27, 2010) (quoting Justice O’Connor as saying “Judicial elections are just difficult to justify in a constitutional democracy in which even the majority is bound by the law’s restraints”).
279 Pamela S. Karlan, Two Concepts of Judicial Independence, 72 S. CAL. L. REV. 535 (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.”).
discussed above, some non-Article-III adjudicators are appointed for lengthy terms, which may make them sufficiently independent.\textsuperscript{280} Moreover, at least one study has found little difference in the decisionmaking of Article I and Article III adjudicators.\textsuperscript{281} Professors Pardo and Nash suggest thinking about independence, not as a binary, “all-or-nothing” category, but instead as a continuum.\textsuperscript{282} On that logic, the adjudicators on a number of Article I tribunals have a “fair amount” of independence: they serve long terms and are removable only for cause,\textsuperscript{283} and the Tribunal’s adjudicators could receive the same protections.

More troubling is the worry of political pressure. Precisely because it is subject to Congressional control, an overarching 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.”\textsuperscript{284} The other Article I courts are often considered less independent than the Article III courts, despite long tenure and other protections. The tax court, for example, is viewed by the tax bar as biased in favor of the government. This seems a serious problem for the Limited Tribunal.

But, as discussed above,\textsuperscript{285} current Article I courts are characterized by narrow purviews. The relative breadth of the Expansive Tribunal’s jurisdiction might accordingly protect it from some of those political

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\textit{see, e.g., Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (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 (2008).}

\textsuperscript{280} Richard B. Hoffman & Frank P. Cihlar, Judicial Independence: Can It Be Without Article III?, 46 MERCER L. REV. 863, 865-68 (1995) (concluding that at least some non-Article-III judges are “imbued with the essential elements of judicial independence”).


\textsuperscript{283} Id. at 1765-1766.

\textsuperscript{284} Meltzer, \textit{supra} note 271, at 292. \textit{Cf.} Sunstein, \textit{supra} note 67, at 656 (noting importance of independent judiciary in “guard[ing] against the undue influence of powerful private groups over the regulatory process”).

\textsuperscript{285} See \textit{supra} notes - and accompanying text.
pressures. A fairly generalist reviewing tribunal would not be subject to capture by any particular bar, although it might fall victim to, e.g., the U.S. Chamber of Commerce. Nor would the Expansive Tribunal likely be subject to the 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. Thus the choice between the Limited and the Expansive Tribunal may well be key in assessing its 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 many Article I adjudicators, since they are located in executive branch agencies under his ultimate authority; he appoints a number of the Article I adjudicators. Congress is the creator of Article I structures and the giver of resources.

The concern regarding the President may have a relatively easy solution: the Tribunal could be constituted as an independent commission, like the SEC. The president would then lack the ability to fire members of the tribunal if he disapproved of their actions. The concern regarding Congress, though, seems insuperable: Congress must be the one who creates the Tribunal, and could presumably decide to do away with it as well.

2. Concurrent jurisdiction?

A problem that none of the Tribunal advocates confront is the relationship between decisions of the Tribunal (again, whether Limited or Expansive) and decisions of the Article III courts. After all, none of the

286 The proper scope of the Tribunal’s jurisdiction is discussed infra notes and accompanying text.
287 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, in N.Y. TIMES, at ___ (Oct. 6, 2009).
288 See, e.g., Zinn, supra note 99, at 83-84, 107-11 (noting “regulatory agencies’ tendency to be seduced or ‘captured’ by regulated interests”).
289 See, e.g., Marshall J. Breger, Established By Practice: The Theory And Operation Of Independent Federal Agencies, 52 ADMIN. L. REV. 1111 (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.”).
290 Id. at 1114 (members of independent agencies can be removed only for cause). If this structure is adopted, however, the Tribunal may not be able to avoid the Article II problem. See infra notes and accompanying text.
advocates suggest making the jurisdiction of the Tribunal exclusive of the Article III courts (and it is not clear Congress could even do so\textsuperscript{292}). If, instead, the Article I tribunal has concurrent jurisdiction with the Article III courts, the problems are numerous.

First, if parties are given a choice whether to proceed before this Tribunal or 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)\textsuperscript{293} brings its complaint to the Article III courts? This seems an 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\textsuperscript{294}—merely replicates one of the central problems created by standing problem in the first place. Since the Article III courts presumably have the power to stay the action in the 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,\textsuperscript{295} 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,\textsuperscript{296} the best possible outcome from concurrent jurisdiction

\textsuperscript{292} See infra notes - and accompanying text.
\textsuperscript{293} See supra notes - and accompanying text.
\textsuperscript{294} [Get cite.]
\textsuperscript{295} 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) (“Some courts recognize that, pragmatically, the interests required for standing and intervention are usually equivalent. In certain cases, however, the interests do not overlap [and then] a majority of courts argue that…once an Article III case or controversy has been established between the original parties, jurisdiction cannot be destroyed by an intervening party who does not possess a standing interest in the dispute. In contrast, a minority of courts asserts that…Article III requirements are not met unless the intervenor has an interest that would be sufficient to bring an independent claim in federal court.”). Because the D.C. Circuit has jurisdiction over many administrative appeals and follows the more restrictive test, see Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (1984), the problem I describe in the text is real.
\textsuperscript{296} An automatic stay issues when a bankruptcy petition is filed, preventing any courts (federal or state) from proceeding with cases involving collections, etc., against the debtor. 11 U.S.C. § 362. But Congress has mandated that stay to make bankruptcy possible at all: if it did not issue, the resources that would constitute the bankruptcy estate (and that should be distributed to creditors according to the terms of the bankruptcy decree) would be
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, a different sort of jurisdictional squabbling emerges. As discussed below, it seems clear that, whatever the ability of Congress to place review of governmental action in an Article I entity—so, for example, such an entity can review agency action for lawfulness under the APA, the Clean Air Act, or the like—it is more problematic to require that citizen suits against private parties go into the Tribunal, and Congress almost certainly cannot take constitutional questions away from the Article III courts. Would parties who preferred the Article III courts therefore frame some of their dispute as, e.g., a due process claim? 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 the interpretation made by an Article III court?

This may look like a circuit split, and thus something that the Supreme Court could resolve, but remember that 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. To be sure, the Court would have jurisdiction over the

depleted randomly by whatever actions happened to be pending at the bankruptcy filing.

297 See infra notes - and accompanying text.

298 S. 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:...[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.”

299 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 Inc. v. Kadish, 490 U.S. 605, 618 (1989) (“Petitioners insist that, as a result of the state-court judgment, the case has taken on such definite shape that they are under a defined and specific legal obligation, one which causes them direct injury. We agree.”). It is far from clear that the Court would accept a similar argument from the private citizens who lose before the Tribunal, given its repeated admonitions against bootstrapping in the standing context. See supra notes 200-206 and accompanying text; see also supra note 169. 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
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 fact might bias the way the Court saw 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 created by the Court’s standing jurisprudence.

The possibility of divergent interpretations also raises serious long-term problems for the development of doctrine. Would the Article III courts defer to the Tribunal’s decisions the way it defers to agency decisions? If the Tribunal has a broad jurisdiction, probably not: one of the justifications for agency deference is the expertise of the agency. Nor could this impasse be resolved 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 (not applicable to the Tribunal) and the Supremacy Clause (not relevant, as the Tribunal would hear only federal law cases). 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 that would have to be addressed—and which may be insoluble. I turn now to potential constitutional problems.

D. Problems: Constitutionality

Would 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 Article III “control” as posited in

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300 E.g., Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (requiring courts to defer to the agency’s statutory interpretation, when the statute is ambiguous and when Congress has given the agency the authority to interpret and fill gaps in the statute).

301 Id. at 685 (“Judges are not experts in the field, and are not part of either political 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.”).

302 U.S. CONST., art. VI, cl. 2.

When Professor Bator wrote these words nearly twenty years ago, he believed that the question need not be answered because “[n]o institutional necessity has even been felt to transfer judicial review of administrative agencies from the Article III to an Article I court.”\footnote{Id.} 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 the Article III courts in favor of the Tribunal, that action would raise at least Article III and Due Process problems.\footnote{Sunstein, supra note 14, at 235 n. 311. I discuss due process issues infra, Part IV.D.3.} The central problem is whether the power given to the Tribunal would constitute an unconstitutional delegation of judicial power, in violation 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.

\section{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.”\footnote{U.S. CONST. art. III, § 1.} Those who read Article III literally would 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.”\footnote{Richard H. Fallon, \textit{Of Legislative Courts, Administrative Agencies, and Article III}, 101 Harv. L. Rev. 915 (1988). Professor Resnik has suggested that Congress’s power to create Article I tribunals is limited only by Article I itself; but, as she notes, the Court long ago imposed greater limits. Resnik, \textit{Mythic Meaning}, supra note 235, at 587.}

defies literal application.” 309 “Our institutional history essentially forecloses a literal reading of the text.” 310 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, e.g., 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. 311

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. 312 The public rights category embraces the vast majority of non-Article-III tribunals and comes from Murray’s Lessee, 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.” 313

Murray’s Lessee was, of course, decided at a point in our nation’s history where the federal government was a small fraction of its current size. 314

A more meaningful test of the constitutionality of non-Article-III tribunals came in Crowell v. Benson, 315 at a time when administrative agencies were thoroughly established and about to expand rapidly. 316

310 Id. at 660.
311 So, 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; this is not an Article III function. Even when it exercises the injunctive power, it is essentially the United States deciding what action it will take in response to a claim of debt. Stern, supra note 243, at 819.
315 285 U.S. 22 (1932).
316 SKOWRONEK, supra note 314, at 289.
There, rather than public rights, the dispute involved what the Court called “private rights”—the rights of a company found by the Employees’ Compensation Commission to owe injury compensation to someone who may or may not have been an employee at the time of his injury.\textsuperscript{317} According to the Court, the facts giving rise to the company’s obligation could be determined by the Commission (an Article I court) so long as certain limits were observed. The key was which facts could be determined conclusively by Article I tribunals, and which had to be reserved 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.”\textsuperscript{318} “Jurisdictional facts” are those that determine whether the agency is acting “within the scope of the authority validly conferred.”\textsuperscript{319} 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 extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.”\textsuperscript{320}

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.”\textsuperscript{321} 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 Constitution, and to establish a government of a bureaucratic character alien to our system.”\textsuperscript{322} The Court quoted the Murray’s Lessee language, however, reiterating that public rights cases could be reserved for non-Article-III tribunals.\textsuperscript{323}

Despite the venerable history of the public-rights category, the Court came close to reviving a version of Article III literalism in Northern

\textsuperscript{317} 285 U.S. at 37.
\textsuperscript{318} Id. at 58.
\textsuperscript{319} Id. at 55 n.17.
\textsuperscript{320} Id. at 60 (emphasis added).
\textsuperscript{321} 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, a conclusion with which 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).
\textsuperscript{322} Id. at 57.
\textsuperscript{323} Id. at 50.
Pipeline Construction Co. v. Marathon Pipe Line Co. 324 In that case, the Court invalidated portions of the Bankruptcy Act of 1978, which had given extensive adjudicatory powers to the bankruptcy courts.325 The plurality (Justice Brennan writing) suggested that, while certain exceptions had been made to 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.326

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.’”327 Instead, Justice O’Connor wrote for the Court, “practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”328 The Court reached a similar result in CFTC v. Schor, where it again rejected a literalist approach.

325 The 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, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 n.13 (1982), even though Congress’s power to regulate bankruptcy comes from Article I, U.S. CONST., art. I, § 8, cl. 4. Nor are they Article III courts with life-tenured judges. See 28 U.S.C. § 152(a)(1) (providing that bankruptcy court judges are appointed for 14-year terms). Instead, the bankruptcy courts are conceived as “units” of the District Courts. 28 U.S.C. § 151. Complicated issues of jurisdiction arise from Congress’s division of authority between the district courts and the bankruptcy courts. 28 U.S.C. § 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. Pub. L. 95-598, 92 Stat. 2549 (1978). The Northern Pipeline Court held that the bankruptcy judges, as non-Article-III judges, could not issue final judgments regarding the non-bankruptcy issues. 458 U.S. at 87. The statute now distinguishes between “core proceedings” and “non-core proceedings;” 28 U.S.C. § 157(b), and authorizes the bankruptcy judges to issue final judgment as to the former, id. § 157(b)(1), and proposed findings of fact and conclusions of law in the latter, id. § 157(c)(1). Appeal, depending on the circumstances, is to the District Courts, the Bankruptcy Appellate Panels (which consist of bankruptcy judges), or the federal Circuit Courts of Appeal. Id. § 158.
326 458 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 the 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—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). Resnik, supra note 230, at 585-601.
328 Id. at 587 (finding consistent with Article III a requirement for binding arbitration under a federal statute).
interpretation of Article III: “the resolution of claims such as Schor’s cannot turn on conclusory reference to the language of Article III.”

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. 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.” That safeguard cannot be waived.

Given the confusing history of the judicial delegation doctrine, how are we to decide whether Article III is being emasculated? 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.

Critics of the Court’s doctrine in this area have suggested that the balancing test verges on the 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. And Professor Fallon thinks that the central question is whether meaningful review of a

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330 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.”).
331 Id. at 850 (quoting National Insurance 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).
332 Id. at 851.
333 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.”).
tribunal’s decision can be had in an Article III court.  

2. Applying non-delegation doctrine to the Tribunal

As should become clear in what follows, the question whether the power given to the Tribunal is an unconstitutional delegation of Article III judicial power depends on 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-and-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.” Indeed, the Limited Tribunal looks 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, claims for Social Security disability, and the like.

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.” As Professor Fallon has argued, judicial power is not unconstitutionally delegated so long as review is available at least in the Supreme Court.

Third, the Limited Tribunal 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. 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.

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334 Fallon, supra note 307, at __-__ (laying out “appellate review theory”).
335 478 U.S. at 851 (emphasis added).
336 See supra notes ___ and accompanying text.
337 478 U.S. at 851.
338 Fallon, supra note 307, at __-__ (laying out “appellate review theory”).
339 See supra notes ___ and accompanying text.
340 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 __. If the Limited Tribunal hears claims for civil penalties against private parties, it goes nowhere near the common law.
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. 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 the requirements of Article III” 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 jurisdiction: it “does not obviously tip the balance of power among the branches in any particular direction.” But, on his 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.” As discussed above, only the Article III courts have such broad jurisdiction across a range of subject areas. 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 on a narrow subject matter, providing what is essentially another separation of powers. The Expansive Tribunal violates this separation of powers.

Second, and for the same reasons, the Expansive Tribunal would likely

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341 Krinsky, supra note 16, at 323.
342 478 U.S. at 851 (emphasis added).
343 See supra notes and accompanying text.
344 [Get cite.]
violate the requirement that “the ‘essential attributes of judicial power’ [be] reserved to Article III courts.” Even if review is available in the Article III courts, the Tribunal looks like a version of a nation-wide appellate court, along the lines of the D.C. Circuit.

Thus, so far, the scales tip quite strongly against the Expansive Tribunal: 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. Again, this conclusion stands even if the Expansive Tribunal is empowered to hear claims brought by citizen complainants against private parties.

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.

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). 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

345 478 U.S. at 851.
346 Fallon, supra note 307, at __-__ (laying out “appellate review theory”).
347 See supra notes ___ and accompanying text.
348 See supra notes ___ and accompanying text.
349 See supra notes ___ and accompanying text.
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 executive branch or independent. In either case, the practical problems that arise in trying to create the Tribunal (its relationship to the Article III courts, in particular) 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 the 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: 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 flaws. Legislative findings are likely to be rejected by the Court under *City of Boerne v. Flores* and other cases. Bounties, in turn, are likely to be expensive and to create perverse incentives. The Article I tribunal raises a number of constitutional problems and practical difficulties, in particular for the hierarchies on which courts rely for precedent.

The Article I tribunal is, in the end, the most promising of these options, in particular because Congress, in addition to alleviating standing problems, need not replicate the Article III courts and their inefficiencies in setting up the tribunal. Yet even these benefits are unlikely to outweigh the seemingly insoluble practical problems that would be created by having such tribunals working in parallel with the Article III courts.

In the end, whatever power Congress has is unlikely to solve the problems with standing doctrine—not because Congress is powerless, but because Congress is no more likely that the Court to take the actions needed.