

WHAT IF THE UNIVERSAL INJURY-IN-FACT TEST ALREADY IS NORMATIVE?

Jonathan R. Siegel*

ABSTRACT

William Fletcher's The Structure of Standing criticized current law for purporting to make a plaintiff's standing to sue turn on a universal, non-normative, "factual" inquiry. However, at least one prominent proponent of standing doctrine, Justice Scalia, asserts a normative theory that claims to account for the universal "injury-in-fact" component of standing, and particularly for its requirement that the plaintiff be differentiated from the public at large. Scalia asserts that courts should redress only injuries that fall differentially on particular plaintiffs because the political process will adequately redress widespread injuries. In order to complete Fletcher's theory, it is necessary to refute Scalia's argument. The refutation is that Scalia overlooks the collective action problems that may make majoritarian remedies impossible if a violation of law works a small injury to the populace at large while benefitting a concentrated group. Justice Scalia's asserted normative reasons for standing doctrine's universal requirement of differentiation therefore fail, and Fletcher's call for a normative, claim-by-claim approach to standing doctrine is therefore strengthened.

INTRODUCTION	404
I. A NORMATIVE CONTENT FOR STANDING DOCTRINE?	406
II. CAN THE SCALIA AND FLETCHER POSITIONS BE HARMONIZED?	408
III. RESPONDING TO SCALIA'S NORMATIVE CLAIMS	409
A. <i>Collective Action Problems in Obtaining Redress for Widely Shared Injuries</i>	409
B. <i>The Role of the Judiciary Reconciled with That of the Executive</i>	412
C. <i>Democratic Determinations of Standing</i>	413
CONCLUSION.....	415

* Professor of Law and Davis Research Professor, George Washington University Law School.

INTRODUCTION

In the article that we celebrate today,¹ Professor (now Judge) William Fletcher attacked the official doctrine that standing to sue is a preliminary jurisdictional requirement, to be determined by a universal, non-normative, factual test that is independent of the nature of a plaintiff's legal claim.² Challenging this view, Fletcher maintained that standing is a question on the merits of a plaintiff's case.³ The law of standing, Fletcher argued, must derive its content from a normative determination of who should be allowed to seek judicial enforcement of the particular statutory or constitutional provision involved in a given case.⁴

Twenty-five years later, the official test of standing is little changed from the one Fletcher attacked—unless, perhaps, it has become even more insistent on those characteristics that Fletcher deplored. The Supreme Court still regards standing as a generalized Article III requirement through which a plaintiff must pass to reach the merits of a case, rather than as a part of those merits,⁵ and it still defines standing by terms that Fletcher suggested “impede[] rather than assist[] analysis,”⁶ such that the plaintiff must have suffered an “injury in fact,”⁷ which must be “distinct and palpable.”⁸ The Court's insistence on punctilious compliance with these requirements is exemplified by recent cases such as *Summers v. Earth Island Institute*, in which the Court held that an organization cannot achieve standing merely on the basis that some of its members will likely suffer from challenged government action; rather, it must produce at least one *identified* member who has suffered or will suffer harm.⁹

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

2. *Id.* at 223, 230.

3. *Id.* at 223.

4. *Id.* at 229, 231.

5. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011) (“To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution.”).

6. Fletcher, *supra* note 1, at 233.

7. *E.g.*, *Winn*, 131 S. Ct. at 1442 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

8. *E.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 225 (2003) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)), *overruled on other grounds by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *see also, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (injury must be “concrete and particularized”).

9. *Summers*, 555 U.S. at 498. *But see* *Public Citizen v. FTC*, 869 F.2d 1541, 1551 (D.C. Cir. 1989) (allowing organizational standing on the basis that some unidentified members of an organization have likely suffered injury). There are, however, occasional, surprising counterexamples, in which the Court takes a more relaxed view of standing. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000) (allowing standing on the ground that members of the plaintiff organization perceived a danger to their health from the defendant's conduct, even though there was apparently no such danger in fact).

The case that perhaps most clearly rejects Fletcher's theory of standing is *Lujan v. Defenders of Wildlife*.¹⁰ In his article, Fletcher indicated that one implication of his theory was that Congress should have plenary control over standing in statutory cases: it should have "essentially unlimited power" to specify who is entitled to bring suit to enforce statutory requirements.¹¹ In *Lujan*, however, the Supreme Court, for the first time, declined to give effect to a statutory provision that permitted "any person" to bring suit for a violation of the statute.¹² There are limits, the Court held, to Congress's power to confer standing on private parties; in particular, Congress cannot "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts."¹³

Lujan brings out a possible rebuttal to Fletcher's argument: what if the universal injury-in-fact test already *is* normative? What if normative analysis of who should be allowed to sue suggests some universal restriction, independent of the nature of a plaintiff's claim, that tracks the current injury-in-fact test? *Lujan* suggests this possibility by holding, for normative reasons, that a plaintiff's standing must always be based on some characteristic that differentiates the plaintiff from the public at large. The case thereby rejects the possibility (which Fletcher would allow) that normative analysis of the statutory or constitutional provision upon which the plaintiff's claim is based might indicate that any person should be entitled to seek enforcement of it.

This Essay considers the possibility that there is a normative basis behind the universal requirement of differentiation. It first describes the purported normative basis: that the distinctive role of courts in our governmental system is to protect individuals and minorities against wrongful action by the majority and not to protect the majority from itself. This justification was put forward by Justice (then Judge) Scalia,¹⁴ who, not coincidentally, was the author of the Court's opinion in *Lujan*. The Essay then answers Justice Scalia's normative suggestion by showing that a requirement of plaintiff differentiation does not properly demarcate those cases that we should wish to be part of the judicial function. Sometimes, we should indeed wish the judiciary to enforce restrictions that the majority

10. 504 U.S. 555 (1992).

11. Fletcher, *supra* note 1, at 223–24, 253–54.

12. *Lujan*, 504 U.S. at 571–78. *But see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) ("[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." (citations omitted) (internal quotation marks omitted)).

13. *Lujan*, 504 U.S. at 577.

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

has imposed on itself because collective action problems may prevent the political process from fulfilling that function. Justice Scalia's normative explanation for the requirement of differentiation therefore fails, and Fletcher's suggestion that standing must depend on an individualized, normative analysis of the statutory or constitutional provision at issue in a particular case is thereby strengthened.

I. A NORMATIVE CONTENT FOR STANDING DOCTRINE?

Fletcher asserts that the standing requirement is "ostensibly non-normative."¹⁵ Justice Scalia, however, provides an openly normative account of at least one aspect of standing doctrine: the requirement that a plaintiff have suffered in some way that differentiates the plaintiff from the public at large. This requirement, Scalia argues, serves to confine the judiciary to its proper role in our system of government.¹⁶ Moreover, Scalia regards this requirement as universal.¹⁷ To Fletcher, a plaintiff's standing cannot be unrelated to the merits of the plaintiff's case but rather "must be seen as part of the question of the nature and scope of the substantive legal right on which plaintiff relies."¹⁸ In Justice Scalia's eyes, by contrast, the requirement of differentiation is independent of a plaintiff's substantive claim. It applies to all cases, and not even Congress has the authority to dispense with it.¹⁹

Justice Scalia has explained his theory in two ways. In a law review article written when he was on the D.C. Circuit, Scalia explained that the doctrine of standing serves to confine courts "to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*."²⁰ That is, a plaintiff should be entitled to seek judicial enforcement of a law only if the law's alleged violation distinctively affects the plaintiff and sets the plaintiff off from the public at large.

The reason, Justice Scalia explains, is that if an alleged legal violation equally harms everyone, or nearly everyone, in society, then democratic processes should adequately take care of it.²¹ The undemocratic courts, he argues, should not interfere with the majority's desire that a law go

15. Fletcher, *supra* note 1, at 230.

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

17. *Id.* at 895-96.

18. Fletcher, *supra* note 1, at 233.

19. Scalia, *supra* note 14, at 895-96.

20. *Id.* at 894.

21. *Id.* at 896-97.

unenforced (a desire that may be inferred from the majority's choice to do nothing about the law's violation), as long as no individual's or minority's rights are violated. The majority should be entitled to select not only the content of the law, but the degree of enforcement of the law that it desires. If the harm caused by a law's violation falls equally on everyone, and nothing is done about it, Scalia concludes, it must be because the majority is rejoicing that "important legislative purposes, heralded in the halls of Congress, [got] lost or misdirected in the vast hallways of the federal bureaucracy."²²

Later elevated to the Supreme Court, Justice Scalia wrote his position into law, albeit in slightly different form, in *Lujan*.²³ As noted above, that case concerned a federal statute that authorized "any person" to enforce its provisions.²⁴ Writing for the Court, Scalia explained that not even Congress can authorize a party who has suffered no distinctive injury to bring suit for an alleged violation of law.²⁵ The opinion did not assert, as Scalia's law review article had, that the political process can be counted upon to redress widespread injuries, but it did assert that redressing such injuries is a political rather than a judicial function. Quoting *Marbury v. Madison*, Scalia explained that the function of the courts is solely to protect "the rights of individuals"²⁶ and that "[v]indicating the *public* interest" is the province of the political branches.²⁷ Indeed, Scalia added, even Congress cannot authorize courts to hear a suit that seeks to vindicate the mere, undifferentiated interest in seeing that the law is properly followed. For courts to do so would violate not only Article III, but also Article II of the Constitution because the Constitution vests the President, not the courts, with the power to "take Care that the Laws be faithfully executed."²⁸

Thus, in Justice Scalia's eyes, the doctrine of standing is not "ostensibly non-normative."²⁹ The requirement that the plaintiff be distinctively injured has a normative basis—a basis, moreover, that is independent of the nature of a plaintiff's claim. "[T]here is absolutely no basis," Scalia wrote in *Lujan*, "for making the Article III inquiry turn on the source of the asserted right."³⁰ To Justice Scalia, the universal requirement of distinctive injury is what separates the judicial function from that of the executive.

22. *Id.* at 897.

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

24. *Id.* at 571–72.

25. *Id.* at 575–76.

26. *Id.* at 576 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

27. *Id.*

28. *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

29. Fletcher, *supra* note 1, at 230.

30. 504 U.S. at 576.

II. CAN THE SCALIA AND FLETCHER POSITIONS BE HARMONIZED?

How would Fletcher respond to Scalia's arguments? Fletcher might observe first that he is not concerned with the ultimate outcome of any particular standing question and that his real point is not about the justification for standing doctrine itself but about the use of normative analysis in applying standing doctrine in particular cases. Fletcher notes that it is not necessary, for example, that a reader should agree with him that any taxpayer should have standing to enforce the Establishment Clause. Rather, his central point is that the determination of standing under the Establishment Clause must be made by reference to the meaning and purposes of that clause.³¹

Thus, Fletcher could answer Scalia by pointing out that, even if one agreed that any plaintiff must demonstrate that he is somehow differentiated from the public at large, particularized normative analysis is still necessary in determining what counts as differentiation, and this analysis must depend on the nature of the plaintiff's legal claim. Fletcher's example of two people kept awake at night, one by a neighbor's barking dog and one by concern about homelessness,³² makes the point. Scalia would doubtless regard the first person as having standing to sue, but the second person as lacking it for want of having suffered any differentiated injury. In making this distinction, however, Scalia would, Fletcher might observe, necessarily be making a normative judgment about the nature of the second person's claim in determining that that person's concern about homelessness does not count as differentiated.

Indeed, Scalia recognizes that the standing decision requires a normative judgment of the kind contemplated by Fletcher:

The plaintiff must establish not merely minority status, but minority status relevant to the particular governmental transgression that he seeks to correct. If the concrete harm that he will suffer as a consequence of the government's failure to observe the law is purely fortuitous—in the sense that the law was not specifically designed to avoid that harm, but rather for some other (usually more general) purpose—then the majority's failure to require observance of the law cannot be said to be directed *against him*, and his entitlement to the special protection of the courts disappears.³³

31. Fletcher, *supra* note 1, at 270.

32. *Id.* at 232.

33. Scalia, *supra* note 14, at 895.

Thus, one might try to harmonize the Scalia and Fletcher positions as being directed at different aspects of the problem of standing. Moreover, to the extent that Scalia has identified a normative reason why certain claims cannot count as injuries for standing purposes, one might argue that that is consistent with Fletcher's theory. For again, Fletcher does not demand agreement on the result of any particular standing question, but rather that the results be normatively justified.

Still, the Fletcher and Scalia positions are on such a collision course that further answer to Scalia is required. Scalia does not merely assert that normative analysis of the Establishment Clause shows that Fletcher is wrong to think that the entire populace (or the slightly smaller subset of taxpayers) can enforce it; to Scalia, the requirement of differentiation is a universal requirement that is independent of the nature of a plaintiff's legal claim. Although normatively justified, it is precisely the kind of universal requirement that Fletcher attacks as inappropriate. The normative justification for it comes not from an analysis of the nature of a plaintiff's claim, but from the alleged nature of the overall system of government. Scalia's position denies the possibility, available under the Fletcher view, that normative analysis of the nature of a plaintiff's claim could lead to the conclusion that the claim may be brought by any person.

III. RESPONDING TO SCALIA'S NORMATIVE CLAIMS

Scalia's normative justifications for standing doctrine must therefore be answered on their own terms. Scalia's suggestion that a plaintiff must have suffered a differentiated injury because the political process can adequately address widespread injuries is wrong because it overlooks the collective action problem. It also fails to account for cases in which plaintiffs suffering widely shared injuries would undoubtedly have standing. The argument that allowing standing for undifferentiated injuries would violate Article II of the Constitution, on the other hand, is wrong because it proves too much: if it were true, courts would be equally disabled from acting on behalf of plaintiffs with differentiated injuries.

A. Collective Action Problems in Obtaining Redress for Widely Shared Injuries

Justice Scalia justifies limiting standing to plaintiffs who have suffered differentiated injuries on the ground that the political process can adequately provide redress for plaintiffs who have suffered widely shared injuries.³⁴ Individuals and minorities need protection from the majority, he

34. *Id.* at 894–97.

says, but the majority needs no protection from itself. Indeed, he argues, for the courts to require the majority to follow its own rules when violation of the rules harms no individual distinctively would undemocratically deny the majority the right to decide, through the political process, that previously enacted rules should not now be followed. If the majority wishes to leave an ill-considered statute on the books but allow it to lapse into a state of desuetude, it should be permitted to do so, Scalia suggests, so long as no individual or minority is distinctively harmed thereby.³⁵ Again, the reason is that, if the majority really desires enforcement of the requirement, the political process will ensure that it gets enforcement.³⁶

Scalia's view, however, overlooks a crucial aspect of the political process: it is beset by collective action problems.³⁷ The political process may not adequately redress a widely shared injury because the injured may not have the right incentives to take political action. In particular, if the injury inflicted on the many by illegal action is slight, but the action provides concentrated benefits to a few, the many may have great difficulty asserting their political strength. Most of the injured may rationally choose to do nothing rather than expend their resources fighting a small injury, whereas those who benefit from the illegal action may have strong incentive to act politically to protect their ill-gotten gains.

The very example chosen by Justice Scalia proves this point: Scalia suggests that Congress should not have been thought to confer standing on "all consumers of milk" to challenge milk market orders because "[i]t is hard to believe that the democratic process, if it works at all, could not and should not have been relied upon to protect the interests of that almost all-inclusive group."³⁸ But in fact it is easy to see why the democratic process might not correct an illegal action harming the widespread group of milk consumers. If U.S. milk prices were illegally raised by as little as a penny per quart, milk consumers would collectively pay hundreds of millions of dollars extra each year, but the annual excess cost to any average individual would be only about one dollar.³⁹ The sting of paying an extra dollar per

35. *Id.*

36. *Id.* at 895–96.

37. See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 386 n.225 (1989); John D. Echeverria, *Critiquing Laidlaw: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 DUKE ENVTL. L. & POL'Y F. 287, 291 (2001); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 101–02 (2007); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 219–20 (1992).

38. Scalia, *supra* note 14, at 896 (citing *Cmty. Nutrition Inst. v. Block*, 698 F.2d 1239 (D.C. Cir. 1983)). Justice Scalia's view of the case was vindicated when the Supreme Court reversed the D.C. Circuit. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984).

39. Average Americans drink 1.1 cups (0.275 quarts) of milk per day. ANNETTA J. COOK & JAMES E. FRIDAY, PYRAMID SERVINGS INTAKES IN THE UNITED STATES 1999–2002, 1 DAY 10 (2005), available at www.ars.usda.gov/sp2UserFiles/Place/12355000/foodlink/ts_3-0.pdf. The collective U.S.

year would hardly cause injured individuals to march upon Washington en masse, whereas the much smaller group of milk producers and distributors that divided the excess millions among them would fight hard if anyone tried to take them away.

Similar problems could befall attempts to correct many kinds of similar, widespread injuries. The Establishment Clause, for example, is designed in part to prevent just such an injury: the forced payment of even a small amount from the many (three pence is the figure traditionally mentioned)⁴⁰ to provide support for religion. Again, such a small injury might not provide sufficient incentive for the many to do the hard work necessary to take collective political action. The great majority might well make the rational decision to suffer the injury rather than expend the resources necessary to fight it, particularly knowing that if they did fight, they could face strong resistance from the small group that enjoyed the benefit of the wrongful action.

The judicial process, by contrast, is much better suited to curing this kind of widely shared injury. Although it might still require some particular plaintiff to make an “irrational” decision to spend more to fight an injury than it would cost to bear the injury, the plaintiff would at least not have to undertake the enormous task of convincing the public at large to make the same choice. If the plaintiff, spurred on by some ideological motivation, could present her case in court, she could win on legal grounds in a forum that levels the playing field as between the few and the many.⁴¹

Moreover, there are some cases in which universally shared injury surely *would* give rise to standing under current law. For example, the Constitution forbids the imposition of a capitation tax (a tax of a fixed amount per person), except in proportion to the census.⁴² If such a tax were nonetheless imposed, surely any person subject to it would have standing to

population of about 300 million therefore drinks about 30 billion quarts of milk per year (0.275×300 million \times 365). If each of those quarts cost an extra penny, milk consumers would collectively pay about \$300 million extra. But any one average person would pay only $0.275 \times 365 \times \$0.01 = \$1.00$ extra.

40. *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (citing James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901)).

41. Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1176 (2012). As that article explains, the political process is also generally ill-suited to resolving claims of right because it is unfocused. A party who claims in court that the government is violating a legal requirement can invoke a process that focuses on that particular claim and that produces a ruling on that claim. There is no similar way to guarantee a ruling on a claim of right in the political process. The political process, and particularly the electoral process, is unfocused and entangles issues together with other, unrelated issues. A group trying to oust politicians from office for allegedly failing to enforce some law must not only convince the electorate of the validity of their legal claim, but must also convince the electorate that this evil outweighs whatever good things the politicians are doing. *Id.* at 1169–71, 1178–80. This is another reason why the political process cannot necessarily be counted upon to redress widespread injuries.

42. U.S. CONST. art. I, § 9, cl. 4.

challenge it: even Justice Scalia would recognize standing based on “a claim that the plaintiff’s tax liability is higher than it would be, but for the allegedly unlawful government action.”⁴³ Even current law, therefore, does not really embody the principle that the judiciary cannot act to remedy widely shared injuries.

The requirement of differentiation therefore does not serve to identify those cases in which the judiciary either should be allowed to, or under current law actually is allowed to, play a useful role in redressing wrongs. Far better, as Fletcher suggests, to examine the nature of the legal constraint at issue to determine whether it is the kind of constraint that should be judicially enforceable at the demand of any citizen, or whether only a more limited group should be able to enforce it.⁴⁴ Justice Scalia provided a normative explanation that might have justified a restriction on standing that was independent of the nature of the plaintiff’s cause of action, but on closer examination it failed to do so.

B. The Role of the Judiciary Reconciled with That of the Executive

In delivering the opinion of the Court in *Lujan*, Justice Scalia explained the restriction on judicial consideration of widely shared injuries somewhat differently than he had in his law review article. Rather than say that the political process can be expected to redress such injuries adequately, he suggested that the Take Care Clause of the Constitution assigns redress of such injuries to the executive rather than the judiciary.⁴⁵ Even Congress, Justice Scalia stated, cannot transfer this duty from the executive to the courts.⁴⁶

The difficulty with this argument, however, is that the Take Care Clause makes no distinction based on whether a law protects individuals, minorities, or the populace in general. The Take Care Clause simply provides that the President shall take care that the laws—all of them—be faithfully executed.⁴⁷ The President must faithfully execute laws prohibiting wrongful acts against individuals; he must also faithfully execute laws that, if violated, would result in no harm to any particular individual.

43. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring); *see also* *Flast v. Cohen*, 392 U.S. 83, 117 (1968) (Harlan, J., dissenting) (“It could hardly be disputed that federal taxpayers may, as taxpayers, contest the constitutionality of tax obligations imposed severally upon them by federal statute.”).

44. Fletcher, *supra* note 1, at 232–33.

45. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

46. *Id.*

47. U.S. CONST. art. II, § 3.

Thus, Justice Scalia's argument in *Lujan* proves too much. If it were correct that the judiciary, in hearing a case in which the plaintiff has suffered no distinctive injury, violates not only Article III of the Constitution, but also Article II's Take Care Clause, such a violation would equally occur when the judiciary provides redress to a plaintiff who *has* suffered a distinctive injury because the Take Care Clause makes no distinction between the two kinds of cases. Even if the understanding of the Take Care Clause were limited to those matters as to which the President should have seen that the right action was taken in the first instance (and so would not cover, for example, judicial action to resolve a diversity case about a car accident), virtually every case in which a court provides redress against wrongful government action at the behest of an injured individual would violate Article II.⁴⁸

Perhaps for this reason, Justice Scalia, again writing for the Court, more recently observed that "standing jurisprudence, . . . though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II."⁴⁹ Something more than the Take Care Clause is needed to explain why courts should not address widely shared injuries. Justice Scalia's argument that judicial action is unnecessary because the political process will handle such injuries fairly was, at least, directed at the set of cases involved, but it failed for the reason stated in the previous Subpart.

C. Democratic Determinations of Standing

Finally, Justice Scalia's suggestion that judicial action to redress widely shared injuries is undemocratic is also ironic for a reason that Fletcher does address: it takes away the power of the democratically elected Congress to determine who should be entitled to enforce statutory requirements.⁵⁰ Justice Scalia celebrates the possibility that "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy."⁵¹ Certainly it makes sense that Congress should have the *option* of enacting essentially hortatory legislation. If Congress wants to enact guidelines for executive behavior and leave it to the political process to determine how strongly those guidelines are enforced, it should be free to do so. But what if Congress wants to enact mandatory requirements for how the executive is to act with regard to a matter that might not create distinctive injury to any

48. Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 316–17 (2002); Siegel, *supra* note 37, at 100–01.

49. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998).

50. Fletcher, *supra* note 1, at 233.

51. Scalia, *supra* note 14, at 897 (alteration in original).

individual but that affects the public at large? Congress should be free to do that as well.

The Supreme Court's decision in *Lujan* means that Congress cannot create truly mandatory requirements for such matters because it cannot create a regime in which the power of the courts can be invoked to enforce duties of government officials that affect the general public but that do not give rise to injuries falling on particular individuals.⁵² Congress can create the duties but cannot create an effective regime to enforce them. Congress can only use political pressure to enforce such duties; it cannot create a regime where the public can invoke the law. Hence, to the extent that the executive and Congress have a disagreement about the desirable degree of enforcement of such a duty, the duty may well go unenforced.

Ironically, Justice Scalia would impose this restriction on judicial power in the name of democracy. Justice Scalia says that the people should have the ability to determine the degree of enforcement of laws that affect only the general public and do not fall differentially upon particular individuals.⁵³ But in fact, as Fletcher points out, the Supreme Court is taking away a choice the people might wish to make.⁵⁴ The people certainly should, and do, have the option of creating laws (whether distinctively affecting individuals or not) that are essentially hortatory and that have only such enforcement as good faith and popular political pressure cause them to have.⁵⁵ But the people should also have the option to decide that they want laws, including laws that do not affect individuals distinctively, to be truly enforceable. Congress is the arena in which the people might democratically make this choice. In the name of democracy, the Supreme Court's decision in *Lujan* cuts off this democratic option.

Fletcher regards the Supreme Court's doctrine as "a way for the Court to enlarge its powers at the expense of Congress."⁵⁶ However, while it is true that the Court's doctrine limits the powers of Congress and expands the Court's own power to decline to hear cases it would prefer not to hear,

52. Actually, even under the Supreme Court's restrictive view of standing, Congress has weapons at its disposal that it can use to create an enforceable regime; it just has to resort to various tricks and subterfuges. Congress can, for example, permit public enforcement by imposing an informational requirement, as the failure to provide information counts as a particularized injury. *F.E.C. v. Akins*, 524 U.S. 11 (1998). Congress can also use the device of a qui tam action to provide anyone with standing to enforce a legal requirement. *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000). In light of these kinds of indirect methods by which Congress can create a public enforcement scheme, it is all the more puzzling why the Supreme Court would prevent Congress from creating such a scheme in a more direct and straightforward way.

53. Scalia, *supra* note 14, at 896–97.

54. Fletcher, *supra* note 1, at 233.

55. *E.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981) (holding that certain provisions of the Developmentally Disabled Assistance and Bill and Rights Act were "hortatory, not mandatory").

56. Fletcher, *supra* note 1, at 233.

the even greater beneficiary is the President. By taking away Congress's power to create a regime in which individuals can demand enforcement of laws that protect the general public, the Court greatly expands the President's power to determine the degree of enforcement that such laws shall have. And while the President, like Congress, has a democratic pedigree, our system regards Congress as the ultimate exponent of democratic desires. The President's task is faithfully to execute the laws that Congress passes.⁵⁷ Thus, to limit, in the name of promoting democracy, Congress's power to create a regime in which its democratically created laws are truly enforceable is ironic.

CONCLUSION

Fletcher asserted that standing could not be a universal, non-normative requirement and that its determination must be made as part of the merits of a plaintiff's particular legal claim. Scalia, by contrast, proposed a normative analysis that purported to justify at least part of standing's universally applicable requirements. This Essay has suggested reasons why Scalia's analysis fails.

Rejecting Scalia's proposed normative basis for standing doctrine's universal requirement of differentiation does not prove that there is no such basis. But casting down the leading proposal on this point strengthens Fletcher's argument that standing should turn on the nature of a plaintiff's particular legal claim. It strengthens Fletcher's conclusion that normative analysis of the constitutional or statutory provision at issue in a case might lead to the conclusion that any person should have standing to enforce it.

57. U.S. CONST. art. II, § 3.