

# A Theory of Justiciability

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I. Introduction

If ever one man made Article III justiciability doctrines look good, it was Michael Newdow. Everyone hated his case.<sup>1</sup> Conservatives hated the Ninth Circuit’s decision in *Newdow v. United States Congress*<sup>2</sup> that the Establishment Clause of the First Amendment bars schoolteachers from leading students in the Pledge of Allegiance.<sup>3</sup> Liberals did not like the case either. On the one hand, they shuddered at the thought that the Supreme Court might affirm, thereby handing the Republicans a magnificent campaign issue just months before the 2004 presidential election.<sup>4</sup> On the other hand, a reversal would take one more chip out of the “wall of separation” between church and state.<sup>5</sup>

A great sigh of relief greeted the Supreme Court’s actual decision—Newdow lacked standing to sue.<sup>6</sup> Traditional opponents of constraints on justiciability suddenly recognized their virtues. The liberal *Washington Post*, while conceding that dismissing a case on standing grounds “always has the feel of a cop-out,” opined that standing doctrine “serves a vital function in the U.S. judicial system, particularly in constitutional challenges to laws and government policies.”<sup>7</sup> The paper said that “[i]nsisting that the courts refrain

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1. See, e.g., H.R. Res. 459, 107th Cong. (2002) (enacted) (condemning the Ninth Circuit’s decision as “constitutionally infirm and historically incorrect” on the same day as the decision was issued, by a vote of 416 to 3); S. Res. 292, 107th Cong. (2002) (enacted) (resolving that “the Senate strongly disapproves of the Ninth Circuit Decision” on the same day as the decision was issued, by a vote of 99 to 0).

2. 328 F.3d 466 (9th Cir. 2003), *rev’d on other grounds sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

3. E.g., Stephen Dinan, *Nation Rallies Around Pledge: Court Puts Ruling on Hold in Face of Justice Appeal, Bipartisan Anger*, WASH. TIMES, June 28, 2002, at A1.

4. See John Nichols, *Karl Rove’s Legal Tricks: Packing the Judiciary with Right-Wingers*, NATION, July 22, 2002, at 11, 13 (suggesting that Republican spinning of *Newdow* made the Supreme Court’s possible affirmance of the decision a potentially significant campaign issue). Affirmance was a real possibility. Even Justice Thomas agreed that the Ninth Circuit’s decision, wildly unpopular though it was, represented a “persuasive reading” of Supreme Court precedent. *Newdow*, 542 U.S. at 45 (Thomas, J., concurring).

5. The words “under God” in the Pledge of Allegiance would have joined other Supreme Court-approved chips in the wall, such as public displays of creche scenes in the context of Christmas celebrations, see *Lynch v. Donnelly*, 465 U.S. 668 (1984), and the opening of legislative sessions with a prayer, see *Marsh v. Chambers*, 463 U.S. 783 (1983).

6. *Newdow*, 542 U.S. at 17–18.

7. Editorial, *Never Mind the Pledge*, WASH. POST, June 15, 2004, at A22.

from considering such matters unless someone with a clear stake in them objects is one of the central checks against overly broad judicial power.”<sup>8</sup>

This Article examines these assertions. Do standing doctrine and justiciability constraints more generally really serve a *vital function* in the U.S. judicial system? Are they among the *central checks* against overly broad judicial power?

In fact, this Article suggests, justiciability doctrines—particularly standing doctrine—pose a riddle. Most constitutional constraints on the power of government have a readily discernible *purpose*. It is difficult, however, to state the purpose of many justiciability constraints; certainly there is not general agreement on their purposes. In many cases, justiciability rules do no more than act as an apparently pointless constraint on courts. They throw a few grains of sand into the workings of the judicial branch but do not prevent it from grinding out a judgment.

This Article suggests that the apparent purposelessness of justiciability doctrines, as they exist today, indicates that the doctrines are fundamentally misconceived. The courts should not interpret the sparse text of Article III of the Constitution as imposing purposeless constraints on judicial power. Rather, the courts should discern such purposes as justiciability doctrines can properly serve and reconceive them in light of those purposes.

Part II of this Article poses the riddle of justiciability. This Part observes that most constitutional provisions serve a reasonably discernible purpose. The justiciability provisions, however, are not so easily pigeonholed. Certainly there is not general agreement as to their purpose, as there is with regard to many constitutional provisions.<sup>9</sup> Therefore, this Part suggests, it is essential to determine whether the justiciability constraints serve any plausible purpose.

Part III therefore conducts a detailed inquiry into the purposes of justiciability doctrines. This Part reviews the numerous suggestions that courts and scholars have proposed for the purposes underlying the justiciability doctrines and argues that most of them are implausible. Part III rejects suggestions that justiciability doctrines serve to improve the performance of courts by giving litigants a stake in the outcome of cases,<sup>10</sup> to protect the autonomy of groups affected by judicial rulings,<sup>11</sup> to restrain courts and preserve the prerogatives of the other branches of government,<sup>12</sup> or to grant courts discretion to avoid socially difficult rulings.<sup>13</sup> It also rejects the possibility that the purpose of justiciability doctrines is irrelevant because

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8. *Id.*

9. *See infra* Part II.

10. *See infra* subpart III(A).

11. *See infra* subpart III(B).

12. *See infra* subpart III(C).

13. *See infra* subpart III(D).

courts must limit themselves to cases the Framers would have *intended* them to hear, regardless of whether doing so would serve any purpose.<sup>14</sup>

The analysis of Part III does not, however, lead to the conclusion that justiciability doctrines are entirely purposeless. Part III concludes that the doctrines, properly applied, can play some useful role in improving the performance of the judicial function. Part IV therefore attempts to describe what a reconstructed doctrine of justiciability would look like if courts used purpose as the guiding principle in the application of justiciability doctrines. The doctrines would be retained where they serve useful social purposes but reformed or discarded otherwise.<sup>15</sup>

Part IV concludes that such a reconstructed doctrine of justiciability is consistent with the “proper—and properly limited—role of the courts in a democratic society.”<sup>16</sup> The “properly limited” role of the courts in a democratic society is to rule only on the legality, and not on the wisdom, of the decisions of political officials. The stringency of the justiciability doctrines results from a confusion between the necessary limits on the *substance* of judicial action and the imagined need for limits on its *form*. So long as courts confine themselves to ruling on legality and do not meddle with the wisdom of the actions of the political branches, they should be able to apply relaxed rules of justiciability—rules that are guided by the purposes that justiciability can usefully serve—without exceeding their appropriate role in a democratic society.<sup>17</sup>

## II. The Riddle of Justiciability

Article III of the Constitution vests the “judicial Power” of the United States in the Supreme Court and in such inferior federal courts as Congress chooses to establish.<sup>18</sup> It also provides that this judicial power shall extend to nine specified categories of “cases” and “controversies.”<sup>19</sup> The courts have long understood these provisions not only as empowering them to act but also as limiting their power. Although the Constitution does not define the terms “cases” and “controversies,” the courts have understood these words to impose a constellation of constraints known collectively as doctrines of justiciability.<sup>20</sup> These constraints—some very familiar, some relatively obscure—include the principles that courts will not issue advisory opinions;<sup>21</sup>

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14. See *infra* subpart III(G).

15. See *infra* subpart IV(B).

16. Warth v. Seldin, 422 U.S. 490, 498 (1975).

17. See *infra* section IV(A)(3).

18. U.S. CONST. art. III, § 1.

19. *Id.* § 2.

20. E.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 754 (1976); Flast v. Cohen, 392 U.S. 83, 95 (1968).

21. The prohibition on advisory opinions was first recognized in correspondence between the Justices and President Washington. See David P. Currie, *The Constitution in the Supreme Court:*

courts will act only on a matter involving adverse parties;<sup>22</sup> courts will not act unless their decision is final and not revisable by another branch of government;<sup>23</sup> courts will reject a feigned or collusive case;<sup>24</sup> courts will decide only the issues actually presented by the matter before them;<sup>25</sup> courts will not consider political questions;<sup>26</sup> courts will not act until a matter is ripe for decision,<sup>27</sup> nor on a matter that has become moot,<sup>28</sup> and courts will not act on a matter brought to them by a plaintiff who lacks standing to bring it.<sup>29</sup>

The justiciability doctrines implement a vision of the role of the federal courts in our system of government, a vision often called the “private rights” view.<sup>30</sup> On this view, the role of the federal courts is simply to resolve disputes. The courts do not exist for the purpose of articulating legal norms, enforcing the laws and the Constitution, or ensuring that the other branches of government behave lawfully. The courts do all these things but only as an *incident* of their real case-deciding function.<sup>31</sup> The private rights view of the federal courts competes with the “public rights”<sup>32</sup> or “special function”<sup>33</sup> view, which regards articulating and enforcing legal norms, and policing the other branches of government, not as mere incidents of the judicial case-

1789–1801, 48 U. CHI. L. REV. 819, 828–29 (1981) (describing the request for an advisory opinion and including excerpts of the response).

22. *See, e.g.*, *S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892) (dismissing a case between corporations that subsequent to the commencement of the case came under common control); *Cleveland v. Chamberlain*, 66 U.S. (1 Black) 419, 425–26 (1862) (dismissing a case where, by purchasing a debt, a single party came to be both appellant and appellee).

23. *See, e.g.*, *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 411, 411–12 (1792) (noting the circuit court’s suggestion that revision and control of judicial judgments by the legislature is “radically inconsistent with the independence of that judicial power which is vested in the courts”).

24. *E.g.*, *United States v. Johnson*, 319 U.S. 302, 305 (1943). *But see, e.g.*, *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 33–34 (1804) (resolving “a feigned issue” designed to try a legal question).

25. *E.g.*, *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885).

26. *E.g.*, *Nixon v. United States*, 506 U.S. 224, 228–29 (1993); *Luther v. Borden*, 48 U.S. (7 How.) 1, 46–47 (1849).

27. *E.g.*, *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–90 (1947).

28. *E.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

29. *E.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972); *Frothingham v. Mellon*, 262 U.S. 447, 488–89 (1923).

30. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 67 (5th ed. 2003); Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 12–13 (2003); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365 (1973).

31. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (citing *Stark v. Wickard*, 321 U.S. 288, 309–10 (1944)); *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970); Martin H. Redish, *The Passive Virtues, the Counter-Majoritarian Principle, and the “Judicial-Political” Model of Constitutional Adjudication*, 22 CONN. L. REV. 647, 648 (1990); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965).

32. FALLON ET AL., *supra* note 30, at 68–69.

33. Monaghan, *supra* note 30, at 1368–71.

deciding function but as primary roles of the courts.<sup>34</sup> The battle between these two views serves as a proxy for a larger debate over the judicial role in our society.

The public rights view is popular in the scholarly literature, which often takes the special role of the courts as a starting premise. From this premise, scholars argue, it follows that justiciability doctrines are flawed because they prevents courts from fulfilling their role.<sup>35</sup> This Article attempts a different approach. Its goal is to arrive at the public rights view not as a premise but as a deduction. The argument is by *reductio ad absurdum*. The Article will attempt to show that the justiciability requirements, and the private rights view that they implement, entail a fundamental paradox that should lead to their rejection. With the private rights view rejected, the public rights view should emerge as correct.

The flaw in the justiciability doctrines does not follow from textual constitutional analysis. To be sure, Article III does not itself lay out the numerous and detailed rules of justiciability, and these rules are rather a lot for the two words “cases” and “controversies” to mean.<sup>36</sup> The Supreme Court treats the words as having an “iceberg quality,” in that they contain “submerged complexities” beneath their “surface simplicity.”<sup>37</sup> But it is not that surprising that the Court should develop a wealth of rules based on spare constitutional text. After all, the Court has derived uncountable volumes of principles from terse constitutional phrases such as “equal protection,” “due process,” and “freedom of speech.”<sup>38</sup>

The puzzling point—the point that this Article calls the riddle of justiciability—is that the constraints the Supreme Court has read into Article III do not seem to match the usual variety of constitutional constraints. It seems almost too obvious to say so, but most constitutional provisions—particularly those that constrain the behavior of government—serve a *purpose*.<sup>39</sup> By contrast, this Article suggests, the intricate set of constraints that the Supreme Court has found to be implicit in the terse language of Article III do not serve any apparent purpose. Certainly no one has yet proposed a theory of the purpose behind the justiciability constraints that has achieved general acceptance.<sup>40</sup> This lack of purpose makes the justiciability

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34. *Id.*; Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 283–85 (1990).

35. *See, e.g.*, Bandes, *supra* note 34, at 230, 281–84; Monaghan, *supra* note 30, at 1369–71; Redish, *supra* note 31, at 648, 650, 656, 669; *see also* AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 193 (2006) (stating that the role of a judge is “to bridge the gap between law and society and to protect democracy,” and that expanded rules of standing *follow* from this view).

36. Two additional words may be relevant: sometimes it is suggested that the justiciability constraints are inherent in the nature of “judicial Power.” *E.g.*, Honig v. Doe, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting). Still, the constraints are also a lot for four words to mean.

37. *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

38. U.S. CONST. amends. I, V, XIV.

39. *See infra* subpart II(A).

40. *See infra* Part III.

constraints so startlingly different from the other constitutional constraints on government that we should strongly doubt that the Constitution really mandates them.

### A. *Our Purposeful Constitution*

Most constitutional provisions—particularly those that constrain the government—serve some readily discernible purpose. Although these purposes are not expressly stated (the Preamble provides some purposes for the Constitution as a whole,<sup>41</sup> and the Second Amendment contains its own mini-preamble,<sup>42</sup> but these are exceptions), it is typically apparent that a constitutional provision falls into one of three categories: it either promotes some group or interest, protects against some governmental evil, or contributes to a governmental structure that promotes democracy or good government generally. Of course, the Constitution is a complex document. The purpose of a provision may be disputed, and it will often be a simplification to identify *the* purpose of a particular provision, but it is nonetheless possible, for most provisions, to identify the provision’s animating purpose. This point will hardly surprise readers, but because it is so central to the theme of this Article, let us take a moment to review it.

1. *“Group-Promoting” Provisions.*—Some constitutional provisions serve to protect some group or interest. For example, several constitutional provisions evidently exist to protect the interests of creditors (and thereby to promote the interest of society as a whole that credit should be made available).<sup>43</sup> Another group specially favored in the Constitution are the small states, which receive disproportionate power by virtue of their equal representation in the Senate.<sup>44</sup>

Some notorious provisions of the original Constitution promoted the interests of slave owners.<sup>45</sup> Thus, like many statutes, the Constitution shows the impact of “special interest” influence, which resulted in particular group-promoting provisions.

41. U.S. CONST. pmbl.

42. *Id.* amend. II.

43. *See id.* art. I, § 10 (requiring states not to coin money, emit bills of credit, make anything but gold or silver coin legal tender for payment of debts, or impair the obligations of contracts). In the preconstitutional period, states had engaged in debt-relief measures to such excess as to threaten the existence of credit. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 427–28 (1934); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 354–55 (1827); *see* CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 179–81 (1935) (discussing the public sentiment and economic history of the preratification years).

44. *See* U.S. CONST. art. I, § 3. This rule has the distinction of being the only provision in the Constitution that cannot be amended by the Article V amendment process, *id.* art. V, which further favors small states by entrenching their favored position.

45. *See id.* art. IV, § 2, cl. 3 (Fugitive Slave Clause); *id.* art. I, § 9, cl. 1 (prohibiting interference with the slave trade prior to 1808).

2. *“Specific Evil Avoidance” Provisions.*—Other constitutional provisions, rather than favoring some particular group, protect everyone against some specified governmental evil. Numerous provisions take this form, such as the Bill of Attainder and Ex Post Facto Clauses,<sup>46</sup> the Suspension Clause,<sup>47</sup> the Jury Trial Clause,<sup>48</sup> and the Vicinage Clause.<sup>49</sup> Each of these clauses has the evident purpose of prohibiting some governmental practice that the Framers considered unfair or oppressive: legislatively singling out an individual for punishment without trial, declaring behavior to be criminal after the fact, permitting persons to be incarcerated without review by a neutral judge, convicting people of crimes based solely on the decisions of government officials, rather than a lay jury, or conducting criminal trials in places far removed from the place of the alleged crimes. Many of the Constitution’s amendments also take this form, including the First Amendment’s protection of freedom of speech and religion, the Fourth Amendment’s protection against unreasonable searches and seizures, the Fifth Amendment’s protections against the taking of property without due process of law and against the taking of property for public use without just compensation, and the several criminal procedure protections of the Fifth and Sixth Amendments.<sup>50</sup>

3. *Structural Provisions.*—Finally, many constitutional provisions, without obviously favoring any particular group, create a governmental structure that promotes democracy and good government generally. Obvious examples include the provisions for popular election of Representatives and Senators,<sup>51</sup> which provide the most fundamental requisite of democracy, a popularly elected legislature, and the provision for proportional representation in the House of Representatives,<sup>52</sup> which promotes fairness and democracy by securing equality among voters. Other examples include the Census Clause,<sup>53</sup> which helps to implement the principle of proportional representation; the qualification requirements for Senators and Representatives,<sup>54</sup> which attempt to promote maturity in legislators and to guarantee their loyalty to this country and to their constituencies;<sup>55</sup> and the provisions requiring publication of the national budget and the journals of the

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46. *Id.* art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

47. *Id.* art. I, § 9, cl. 2.

48. *Id.* art. III, § 2, cl. 3.

49. *Id.*

50. *See id.* amends. I, IV, V, VI.

51. *Id.* art. I, § 2, cl. 1; *id.* amend. XVII.

52. *Id.* art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

53. *Id.* art. I, § 2, cl. 3.

54. *Id.* art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

55. *See* THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 1961) (discussing the value of these qualifications).

houses of Congress,<sup>56</sup> which help keep citizens informed of the doings of the national government so that they can vote intelligently.<sup>57</sup>

Numerous structural constitutional provisions promote separation of powers, which the Framers thought essential to good government. These provisions include, of course, the Constitution's placement of the legislative, executive, and judicial powers in separate hands.<sup>58</sup> Other provisions further protect each branch from incursions by the others and prevent harmful conflicts of interest, including the Compensation Clauses,<sup>59</sup> which protect the President and judges from congressional reprisals; the Incompatibility Clause,<sup>60</sup> which prevents conflicts of interest by forbidding members of Congress from simultaneously holding another federal office; the clause forbidding federal officials from accepting gifts from foreign governments,<sup>61</sup> which protects against corrupting foreign influence; the Emoluments Clause,<sup>62</sup> which avoids corruption by making members of Congress ineligible for appointment to a federal office if the salary for that office was increased during the member's term; the recently adopted Twenty-Seventh Amendment,<sup>63</sup> which prevents Congress from raising its own members' salaries until at least one election cycle has intervened; the clause requiring Congress to assemble at least once each year (as opposed to leaving it up to the Executive to convene Congress);<sup>64</sup> and the Speech and Debate Clause,<sup>65</sup> which protects members of Congress from reprisals by the other branches.

Finally, some constitutional provisions importantly contribute to good governmental structure by limiting the federal government's power and by making that power difficult to exercise. These provisions include the limitation of Congress's powers to a specified list<sup>66</sup> and the Bicameralism and Presentment Clauses,<sup>67</sup> which require that legislation receive the approval of both houses of Congress and either the approval of the President or reapproval by supermajorities of both houses of Congress. These provisions protect against the creation of an all-powerful central government and particularly against a too-powerful legislature. The listing of congressional

56. U.S. CONST. art. I, § 5, cl. 3; *id.* art. I, § 9, cl. 7.

57. The Debates in the Convention of the State of New York, on the Adoption of the Federal Constitution (June 27, 1788), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 345 (Jonathan Elliot ed., 1836) (remarks of Robert Livingston).

58. U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

59. *See id.* art. II, § 1, cl. 7 (protecting the salary of the President); *id.* art. III, § 1 (protecting the salaries of judges).

60. *Id.* art. I, § 6, cl. 2.

61. *Id.* art. I, § 9, cl. 8.

62. *Id.* art. I, § 6, cl. 2.

63. *Id.* amend. XXVII.

64. *Id.* art. I, § 4, cl. 2; *id.* amend. XX, § 2.

65. *Id.* art. I, § 6, cl. 1.

66. *Id.* art. I, § 8.

67. *Id.* art. I, § 7, cls. 2, 3.

powers in Article I, Section 8 limits the realms that the federal government can regulate, although broad construction of the listed powers has considerably reduced this protection in practice.<sup>68</sup>

Still potent, however, are the protections of the Bicameralism and Presentment Clauses. The presidential veto provides a check on the powers of Congress,<sup>69</sup> and the rigorous process of Bicameralism and Presentment ensures that the central government cannot engage its potent legislative power unless proposed legislation has considerable societal support, as measured by three distinct representatives of the people's will. As the Supreme Court has observed, the Bicameralism and Presentment Clauses may make the legislative process seem "clumsy, inefficient, [and] even unworkable," but the Framers deliberately chose this cumbersome process as a "way to preserve freedom . . . by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."<sup>70</sup>

### *B. Does Justiciability Fit?*

This tour of constitutional provisions has been rapid and somewhat facile, but it reinforces what should be the noncontroversial point that constitutional provisions generally serve a purpose. Do the justiciability constraints share this characteristic? The question is particularly salient with regard to the kinds of cases that most frequently raise justiciability issues—suits in which a party complains that the government is acting unlawfully in a way that affects a widespread group. As is discussed later, cases between private parties and cases where government action affects only a single person raise somewhat different concerns.<sup>71</sup> But where a plaintiff complains of unlawful government action affecting a widespread group, perhaps even all of society, does it serve any purpose to require the case to satisfy current justiciability requirements? Part II explores this question in detail. The point of this section is only to observe that the answer is far from obvious.

We may rule out the first two purpose categories. The justiciability constraints do not obviously serve the interest of any particular interest group; any group might, on a given occasion, find itself frustrated or benefited by the constraints. Similarly, although the desire to adhere to justiciability requirements is, these days, usually associated with conservative Justices, and it is usually the liberals who would relax them, justiciability is not inherently liberal or conservative; plaintiffs of either stripe might find justiciability requirements getting in the way of the raising of a desired

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68. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (allowing broad regulation through the use of the Commerce Clause).

69. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 55, at 443.

70. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

71. *See infra* subpart IV(B)(3).

issue.<sup>72</sup> Nor do the constraints bar some specified government evil in a manner similar to the Ex Post Facto or Jury Trial clauses.

It seems at first that the justiciability constraints would most likely fall into the third category, that of structural provisions. Perhaps, one might think, they serve to constrain the judicial power from becoming too potent. Just as the Bicameralism and Presentment Clauses constrain the potency of the legislative power, the justiciability provisions might seem to accomplish this goal with respect to the judicial branch. By limiting the occasions on which the judicial power can be exercised, perhaps they serve to keep it within proper bounds.<sup>73</sup>

This claim has a surface plausibility. The justiciability constraints result in the dismissal of cases, thereby limiting the circumstances under which the judicial power may be exercised. As was just noted, constraining the power of the federal government is an important purpose of the Constitution.<sup>74</sup> So one might think that justiciability serves a purpose simply by constraining the exercise of the federal government's judicial power.

In fact, however, this conclusion is too facile. One must take care before claiming that a constitutional provision's purpose is simply to limit, in any way whatever, the circumstances under which a federal power can be exercised. Limiting the power of the federal government, or making it difficult to exercise, is not always a plausible constitutional purpose.

A somewhat far-fetched analogy demonstrates this point. Suppose someone claimed that the Constitution prohibits the President from signing bills into law on Sundays. Before dismissing the claim as absurd, consider that it does have some basis in the constitutional text: In fixing the time during which the President may sign or return a bill passed by the Congress, the Constitution gives the President ten days but parenthetically notes "(Sundays excepted)."<sup>75</sup> So Sundays are obviously special in the bill-signing process. Consider also the historic, preconstitutional practice: Just as advocates of justiciability constraints argue that the Framers must have intended the judicial power to apply to cases and controversies of the kind familiar to eighteenth-century lawyers, with the courts at Westminster being a particular referent, so too the Framers, one might argue, must have contemplated that the President would carry out his bill-signing duties in a manner familiar to

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72. For example, just as a liberal might be frustrated when standing problems make it difficult to challenge the allegedly religious character of the Pledge of Allegiance, as in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), a conservative might be frustrated when mootness scuttles a challenge to racial affirmative action programs, as in *DeFumis v. Odegaard*, 416 U.S. 312 (1974). Note also that it was mostly the more liberal Justices who voted to dismiss *Newdow* on standing grounds; the more conservative Justices would have reached the merits of the case. See 542 U.S. at 18 (Rehnquist, C.J., concurring). So the doctrines can cut either way.

73. See *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government.").

74. See *supra* section II(A)(3).

75. U.S. CONST. art. I, § 7, cl. 2.

those living at the time, with the most important referent being the practice of the English King in giving the Royal Assent to bills passed by the Parliament.<sup>76</sup> The King did not give the Royal Assent on Sundays,<sup>77</sup> and it can hardly be an accident that the Constitution singles out this one day; the Framers must have expected this practice to continue. Finally, consider early practice under the Constitution: in his eight years as President, George Washington *never* signed a bill on Sunday, although he signed bills on every other day of the week.<sup>78</sup>

Nevertheless, the claim that the Constitution prohibits the President from signing bills on Sunday would still be absurd for the simple reason that there could be no plausible *purpose* to such a constitutional rule. The putative rule would not serve the structural purpose of making the federal government's power difficult to exercise. It would not take away one-seventh of the national government's legislative capability. The rule would create one final difficulty in the process of passing bills into law—and yes, the Framers deliberately designed that process to be somewhat difficult and cumbersome. But the difficulty would be so easily overcome as to amount to no difficulty at all: instead of signing a bill on any given Sunday, the President could just sign it on the very next day, a Monday. The rule would, therefore, provide no real protection whatsoever, and this lack of purpose makes it clear that there is no such constitutional rule.<sup>79</sup>

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76. In eighteenth-century Britain the concurrence of the Commons, the Lords, and the Crown was necessary to make a new law. 1 WILLIAM BLACKSTONE, COMMENTARIES \*154–55. This remains true today, although the Crown has not withheld the Royal Assent from any bill passed by Parliament since 1707. HOUSE OF COMMONS INFORMATION OFFICE, PARLIAMENTARY STAGES OF A GOVERNMENT BILL 7 (2007). The Framers expressly considered Royal Assent in the ratification debates and compared the President's bill-signing power to it. *See, e.g.*, THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 55, at 416; THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 55, at 444.

77. The Royal Assent was given while either the King personally or Commissioners appointed by the King appeared in the House of Lords. *See, e.g.*, 33 H.L. JOUR. 17–18, 30 (1770); 1 BLACKSTONE, *supra* note 76, at \*177–78 (describing these two practices). A painstaking examination of the House of Lords Journals for the years from 1770–1790 reveals that the Royal Assent was never given on Sunday. *See generally* 33–39 H.L. JOUR. *passim* (1770–1790). Indeed, it was very rare for the Lords to meet at all on a Sunday. THOMAS ERSKINE MAY, A PRACTICAL TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS, AND USAGE OF PARLIAMENT 215–16 (London, Butterworths 4th ed. 1859); *see* 3 BLACKSTONE, *supra* note 76, at \*276 (noting that a law required “the peace of God and of holy church” to be kept from 3 p.m. Saturday until Monday morning).

78. For bills signed every day of the week other than Sunday, *see*, for example, Act of June 1, 1789, ch. 1, 1 Stat. 23 (current version at 2 U.S.C.S. § 21 (2000)) (signed on a Monday); Act of Sept. 1, 1789, ch. 11, 1 Stat. 55 (repealed 1792) (Tuesday); Act of Aug. 5, 1789, ch. 6, 1 Stat. 49 (amended 1790) (Wednesday); Act of Aug. 20, 1789, ch. 10, 1 Stat. 54 (Thursday); Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed 1790) (Friday); Act of July 4, 1789, ch. 2, 1 Stat. 24 (repealed 1790) (Saturday). There is, of course, no page to cite for the proposition that Washington did *not* sign any bill on a Sunday. The reader is referred to 1 Stat. 23–519 and to calendars for the 1790s, a painstaking search of which will confirm this statement.

79. This discussion assumes that in searching for a potential purpose for the putative rule against signing bills on Sundays we limit ourselves to purposes related to the protection of the people against the power of the central government. It is not unimaginable that the Framers would

This analogy has been rather fanciful, but it does bring out some important points about constitutional argumentation. The analogy shows that one cannot conclude that a practice is constitutionally required just because:

- it has an arguable (if slim) textual constitutional basis,
- it comports with historic preconstitutional practice,
- the Framers would likely have expected it to continue,
- it *was* continued in early practice under the Constitution, and
- it would act as a constraint on the powers of the federal government.

The evident absurdity of the putative rule against signing bills on Sundays shows that even if all these things are true, a traditional practice must, at a minimum, serve some *purpose* if one wishes to argue that the Constitution implicitly requires its continuation. Moreover, it shows that the fact that a rule would pose some constraint on the exercise of federal power is not always a sufficient purpose. Procedural constraints on the exercise of federal power are vital to our constitutional structure, but the constraints must provide real protection, not protection that is merely cosmetic or illusory.<sup>80</sup> The Bicameralism and Presentment Clauses really protect us: they

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have created a rule against signing bills on Sundays for the purpose of respecting the religious sensibilities of the majority of the nation's people. However, the generally secular nature of the Constitution, and particularly the provision that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," U.S. CONST. art. VI, cut against such an attribution of purpose.

80. In fairness, one must note that at least one provision of the Constitution imposes an apparently purposeless procedural constraint: namely, the Origination Clause, which requires bills for raising revenue to originate in the House of Representatives. U.S. CONST. art. 1, § 7, cl. 1. Because the Senate's concurrence is as necessary to a revenue bill as to any other, the Senate's practical power over revenue bills should be the same as for any other bill. Empirical research suggests that the house that acts first on a bill, as a practical matter, has more influence in shaping the final result. See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 425 & n.205 (2004) (discussing the "first-mover advantage" in the context of Congress). Nevertheless, the Senate can easily avoid even this disadvantage: while the Senate cannot originate revenue bills, nothing can stop it from adopting a resolution suggesting that the House adopt a specified revenue bill. Indeed, it sometimes happens that the Senate originates a bill that the House rejects on the ground that it is a revenue bill; but then the House passes an identical or nearly identical bill. See, e.g., H.R. 1278, 101st Cong. (1989), 135 CONG. REC. 12,165-67 (1989) (declining to act on the Senate-originated Financial Institution Reform, Recovery, and Enforcement Act of 1989 but passing a similar bill); H.R. 8219, 93rd Cong. (1973), 119 CONG. REC. 34,818, 36,006 (1973) (declining to act on a Senate bill (S. 1526) that was regarded as a revenue bill but passing an identical bill); H.R. 3157, H.R. 10,874, 89th Cong. (1965), 111 CONG. REC. 12,631, 22,583-92, 23,630-32, 23,894-904 (1965) (showing that the House passed what it regarded as a nonrevenue bill amending the Railroad Retirement Act; the Senate amended the bill in a way that arguably turned it into a revenue bill; the House objected to the amendment and returned it to the Senate on the ground of unconstitutionality; but the House passed a new bill incorporating much of the substance of the Senate's amendment; and the Senate then passed the new bill). Thus, the Origination Clause accomplishes no real purpose. Still, it seems safe to conclude that the clause is exceptional in this regard. It grew out of special circumstances: in the Constitutional Convention, the large states objected to the principle of equal representation in the Senate, which gave the small states disproportionate power. See David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOK. L. REV. 1083, 1153-54 (1992) (describing the

ensure that no bill becomes law without support from the people's representatives. The Jury Trial Clause imposes a real constraint with which the government must comply before taking away a person's liberty. Neither of these constraints is a cosmetic hurdle that could be satisfied by something trivial, such as taking the desired governmental action one day later. Cosmetic constraints, like the hypothetical constraint of prohibiting the President from signing bills on Sundays, are so purposeless that they have no place in our purposeful Constitution.

The hypothetical brings out the heart of this Article's inquiry: What is the purpose of the justiciability constraints as they have been implemented by the courts? Do they fit into the purposeful Constitution? Or are they more like a rule that the courts not decide cases on Sundays? To the extent that the requirements of justiciability serve no purpose, or only an illusory or cosmetic purpose, it would seem likely that they have been misinterpreted. They would seem out of place in the generally purposeful Constitution. It would be particularly strange for the Judiciary to derive, by implication, a set of cosmetic, purposeless constraints from a constitutional text that does not expressly impose them. Thus, it is vital to inquire whether the justiciability constraints serve any purpose.

### III. Exploring the Riddle

As noted earlier, the Constitution does not expressly state the purposes of its provisions. In considering whether the rules of justiciability have a purpose, one is left to prospect in an almost limitless territory. There is no way to be sure that one has considered every possible purpose. Moreover, there are numerous different aspects to justiciability, and different justiciability rules might serve different purposes.

Still, the territory has, at least, been marked out by previous prospectors. In considering possible purposes for the rules of justiciability, this Part focuses on rules that have previously been put forward by courts and scholars. Scholars have suggested that the justiciability requirements serve to improve the courts' carrying out of the judicial function,<sup>81</sup> to restrain the courts so as to protect parties with properly justiciable claims,<sup>82</sup> to restrain the courts so as to preserve the powers of the other branches of government,<sup>83</sup> and to allow the courts subtle methods of evading socially difficult cases.<sup>84</sup> This Part discusses and criticizes all of these theories of justiciability. The most

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Origination Clause as a "sweetener" for the benefit of the larger states for agreeing to the Great Compromise). The Origination Clause was a salve that permitted the Great Compromise to take effect. Moreover, the Origination Clause is specific in its requirements. The courts did not create the origination requirement out of a murky and ambiguous constitutional text that did not, on its face, provide for it.

81. See *infra* subpart III(A).

82. See *infra* subpart III(B).

83. See *infra* subpart III(C).

84. See *infra* subpart III(D).

controversial justiciability requirement, the requirement of standing, will be the main focus of the inquiry, but numerous justiciability requirements will come under scrutiny.

A. *Litigation-Enhancing Functions of Justiciability Requirements*

Courts and scholars frequently assert that justiciability requirements enhance litigation: they help courts perform the judicial function well. According to this argument, justiciability doctrines ensure that parties will pursue their cases “with the necessary vigor” for judicial resolution.<sup>85</sup> In our adversarial system of justice, courts rely on parties to do the work of researching issues and making the best possible arguments for each side so that the court can reach a sound decision. Therefore, according to this argument, it is essential that each party have a *stake* in the litigation that gives it the incentive to do the necessary work.

This theory has implications for several justiciability doctrines but goes most directly to standing and mootness. The theory posits that if a plaintiff lacked an injury that would confer standing, or if the plaintiff had standing originally but the case became moot, then the plaintiff (or with regard to moot cases, both parties) would lack the incentive to do the costly work necessary to illuminate the issues for the court. Thus, the courts have frequently concluded, with regard to the standing requirement in particular:

The “gist of the question of standing” is whether the party seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”<sup>86</sup>

Of all the arguments concerning the purposes of the justiciability requirements, this one is perhaps the most obviously wrong. Indeed, we could hardly take the argument seriously if repetition had not benumbed us to its flaws. The argument rests on a kernel of truth but draws unjustifiable conclusions from that kernel.

The kernel of truth is that courts do rely on parties to illuminate issues. Simple numbers prove the point. Judges are busy with a multitude of cases. The Supreme Court, for example, traditionally decided about 150 cases a year by full opinion.<sup>87</sup> Even assuming the Justices did nothing but decide

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85. *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

86. *Id.* at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Cases using this quotation to support the “litigation-enhancing” theory of justiciability are legion. *See, e.g.*, *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 335 (1990); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978).

87. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100 (1987). Today, that number has shrunk to about eighty. *See* David R. Stras, *The Supreme Court's*

those cases (which is certainly not true) and worked every day of the year (which is probably not true), they had only about 2.4 days to work on each case. That would be enough time (one hopes) to reach a sound decision based on choosing between adversely presented arguments, but surely not enough time to do exhaustive research and to imagine every possible argument.

So the litigation-enhancement theory of justiciability is correct to note the importance of adverse presentation of issues to sound judicial decision making, and this point provides a real purpose for some of the principles of justiciability—most particularly the principle that courts should decide only cases between adverse parties. This purpose justifies, for example, the prohibition against collusive suits<sup>88</sup> or the dismissal of suits between corporations that following the commencement of suit come under common control.<sup>89</sup>

The weakness in the theory, however, lies in its assumption that other justiciability doctrines, particularly standing and mootness, actually enhance adverse presentation. Even accepting the notion that the standing and mootness requirements guarantee that parties will have a “stake” in litigation, there is no necessary link between having such a stake and litigating with the vigor to illuminate issues properly for the court. A litigant with a significant stake in litigation may present poor arguments (perhaps because the litigant has inferior counsel); a non-Hohfeldian litigant may have all the resources of a national advocacy group behind her.<sup>90</sup> For example, criminal defendants facing the prospect of years in prison or the death penalty would, one imagines, have the greatest possible stake in litigation, and yet their counsel, so far from litigating vigorously, sometimes fail to take such elementary steps as staying awake during court proceedings or filing a notice of appeal on time.<sup>91</sup> It seems highly unlikely that such counsel do a good job of illuminating issues for courts. By contrast, it is hard to doubt that the Sierra Club or Americans United for Separation of Church and State would have

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*Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEXAS L. REV. 947, 965 (2007) (book review) (noting that since 1993, the Supreme Court docket has oscillated between seventy-four and ninety-two cases).

88. *E.g.*, *United States v. Johnson*, 319 U.S. 302, 305 (1943); *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 344–45 (1892).

89. *E.g.*, *S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892).

90. Ken Davis made this point as early as 1970. *See* Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 470 (1970) (noting that standing does not ensure that cases will be presented with specificity, adverseness, or vigor); *see also* Redish, *supra* note 31, at 667 (arguing that no empirical evidence supports the assumption that an individual with something to gain will litigate more seriously).

91. *See, e.g.*, *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001) (affirming a district court holding that the criminal defendant had ineffective assistance of counsel because the attorney slept during the trial); Editorial, *Courts of No Appeal*, WASH. POST, July 4, 2004, at B6 (describing a case where the defense attorney repeatedly failed to file a timely appeal).

sufficiently illuminated the merits of issues presented in the landmark cases in which they were held to lack standing.<sup>92</sup>

Moreover, the stake that provides the alleged incentive for good advocacy may be something quite trivial. An “identifiable trifle” suffices for standing.<sup>93</sup> No one doubts the power of courts to hear cases concerning injuries as small as a \$5 fine or a \$1.50 poll tax.<sup>94</sup> This point casts further doubt on the relationship between a party’s stake in litigation and the likelihood that the party will litigate vigorously. If a party with a \$5 injury litigates a matter all the way to the Supreme Court, as is allowed, perhaps spending \$50,000 in the process, what motivates that party is obviously not the few dollars of injury (no one would spend \$50,000 solely to avoid losing \$5), but the fact that the party cares about the issue involved. The “caring,” which does not count for standing purposes, not the \$5, which does, provides the incentive for good advocacy, and the caring may easily be present in a case in which the trivial injury is absent.

So standing doctrine does not bear any necessary relationship to vigorous advocacy. Nor does it even serve as a suitable, if rough, proxy for the practical likelihood that a plaintiff will do a good job of illuminating issues for the courts, particularly because standing doctrine recognizes trivial injuries. If, as standing doctrine posits, a dollar’s worth of injury sufficiently motivates plaintiffs to litigate vigorously, it would seem equally likely that courts would receive vigorous litigation from any party who takes the trouble to sue and who cares enough to pay the litigation costs.<sup>95</sup>

Mootness doctrine, similarly, bears only a tenuous relationship to the goal of producing good advocacy that will aid judicial decision making. To the extent that mootness is simply “standing set in a time frame,”<sup>96</sup> the argument that a party’s loss of standing will deprive that party of the incentive to litigate vigorously suffers from the same defect as the argument that standing is necessary to that end in the first place. A party to a live case may or may not do a good job of illuminating the issues for the court; the same is true of a party whose case has become moot. There is no necessary relationship between the two things.

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92. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982); *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972); see Monaghan, *supra* note 30, at 1385 (noting that standing will not make litigants present cases any more ably than the Sierra Club or ACLU).

93. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973). *SCRAP* is not the most robust precedent these days, but this particular aspect of it appears uncontroversial. See, e.g., *Belitskus v. Pizzingrilli*, 343 F.3d 632, 640 (3d Cir. 2003) (citing *SCRAP* for the proposition that an identifiable trifle of an injury is sufficient for standing); *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 326 (2d Cir. 2003) (noting that an identifiable trifle of an injury is sufficient for standing).

94. *SCRAP*, 412 U.S. at 690 n.14.

95. Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 673–74 (1973); Redish, *supra* note 31, at 668.

96. Monaghan, *supra* note 30, at 1384.

Thus, apart from the requirement that litigation be adversarial in nature, the argument that justiciability doctrines promote vigorous and effective advocacy deserves the “quiet burial” that Professor Davis decreed for it over thirty years ago.<sup>97</sup> Even Justice Scalia, perhaps the most prominent advocate of restraints on justiciability, has recognized that “if the purpose of standing is ‘to assure that concrete adverseness which sharpens the presentation of issues,’ the doctrine is remarkably ill designed for its end.”<sup>98</sup> Because the standing and mootness doctrines do so little to enhance litigation by promoting vigorous advocacy, that purpose cannot justify reading those constraints into the Constitution.

### B. *Representational Theories*

Professor Lea Brilmayer has suggested that the purpose of justiciability requirements is to ensure that the judicial process is appropriately representative.<sup>99</sup> The requirements of standing, ripeness, and mootness, she suggests, serve to put control over the raising of issues in the judicial process into the hands of those most affected by those issues and to protect such parties from having their rights adversely affected by ideological plaintiffs.<sup>100</sup> Brilmayer points out that a lawsuit brought by one plaintiff has the potential to affect others through the mechanism of *stare decisis*.<sup>101</sup> A non-Hohfeldian, ideological plaintiff could generate a bad result that might later affect the rights of a “genuinely interested” party.<sup>102</sup> This danger is particularly severe, Brilmayer suggests, because an ideological plaintiff would be particularly likely to frame a case in a broad, controversial way, whereas a traditional plaintiff (who, Brilmayer apparently assumes, would just want to win a particular case) would likely be more careful.<sup>103</sup> The justiciability requirements, she concludes, “guarantee[] that the individuals most affected by the challenged activity will have a role in the challenge.”<sup>104</sup> The Supreme Court has echoed this thought: it has observed that the standing requirement “reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.”<sup>105</sup>

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97. See Davis, *supra* note 90, at 470 (“[The notion that] the law of standing can be used to assure the competent presentation of cases . . . deserves a quiet burial.”).

98. Scalia, *supra* note 31, at 891. For a discussion of a related point, see David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004) (arguing that standing doctrine fails to fulfill its purported function of providing concrete context for adjudication of questions of public law).

99. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 306–10 (1979).

100. *Id.*

101. *Id.* at 307–08.

102. *Id.*

103. *Id.* at 309.

104. *Id.* at 310.

105. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982); see also *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (asserting that the

The problem that Brilmayer notes is real. The justiciability requirements, however, do little to avoid it. In fact, they do such a poor job of allowing the “most affected individuals” to control litigation that this putative purpose cannot justify regarding the justiciability rules as constitutional requirements.

There are two reasons for this. First, the justiciability constraints simply do not prevent lawsuits from affecting the rights of nonparties. Brilmayer’s concern—that a lawsuit by an ideological plaintiff might impact the rights of a subsequent, more traditional plaintiff—applies to a first lawsuit by a traditional plaintiff. Brilmayer claims that the justiciability requirements ensure that litigation will serve “the wishes of the affected group,”<sup>106</sup> but the affected group may not be a uniform bloc with identifiable “wishes.” Even if the justiciability requirements did a good job of restricting plaintiffs to members of the affected group, those in the group may have different ideas about how to proceed. Some may want to forego lawsuits entirely, some may wish to wait until a more propitious time before suing, and some may want their issues litigated in a particular way or in a particular forum. Internal rifts among a class of interested parties do not prevent any one of them from bringing litigation that might affect the others. Brilmayer suggests that a lawyer’s ethical duties to an affected client will reduce the risk of ideological litigation that generates bad results,<sup>107</sup> but a traditional plaintiff, like a nontraditional one, might choose an aggressive, ideological litigation strategy that generates bad results for others, and the justiciability constraints would offer no protection.

Early litigation over the issue of same-sex marriage provides a good example. In 1991, two gay men in the District of Columbia brought suit to challenge the denial of their request for a marriage license.<sup>108</sup> Organized gay rights groups, far from being happy to see the issue pressed, were distressed by the suit. The executive director of the Lambda Legal Defense Fund, although supporting the plaintiffs’ goals, believed that their tactics were “shortsighted” because the District, in his view, was an unfavorable forum in which to try to create precedent on the marriage issue.<sup>109</sup> Echoing Brilmayer’s concerns, he pointed out that “[w]hat happens to these two men will affect every other gay man and lesbian in the United States” and claimed that “[t]hey therefore have a responsibility to confer with their colleagues.”<sup>110</sup> But whether or not they had any such moral responsibility, they had no legal

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doctrine of standing serves “as at least a rough attempt” to restrict decisions to seek review to those with a direct stake in the outcome).

106. Brilmayer, *supra* note 99, at 314.

107. *Id.* at 309–10.

108. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

109. Elizabeth Kastor, *The Marriage Proposal: Two Men and Their Crusade for the Right to a Legal Union*, WASH. POST, Jan. 28, 1991, at B1.

110. *Id.*

duty to confer, and their case (which they lost<sup>111</sup>) affected other gay men and lesbians through the mechanism of stare decisis.<sup>112</sup> There was even some hint that the pair did just what Professor Brilmayer feared ideological plaintiffs would do: they viewed the litigation more as an edifying battle than a simple attempt to win and took greater litigation risks for ideological purposes.<sup>113</sup> Yet obviously the case satisfied all justiciability requirements.

Thus, the problem of interested parties who find their rights affected by litigation brought by others is simply intrinsic to our legal system. The justiciability requirements do little to avoid it.<sup>114</sup> Even with those requirements enforced, our rights are affected by suits brought by strangers over whom we have no control.

Indeed, the situation is even worse than the above example suggests. In that example, the lawsuit was at least brought by persons whom everyone would recognize as highly concerned parties, even if they failed to follow the preferred strategy of national interest groups. That will not always be true. Whatever the justiciability requirements do, they do not guarantee that “the individuals *most affected*” by a challenged activity have a role in challenging it, as Professor Brilmayer contends.<sup>115</sup> Even taking the standing requirement for all it is worth, it requires only that a plaintiff challenging governmental activity show some injury, perhaps a trifling injury, from the challenged activity. It does not require that a suit be brought by the most affected plaintiff. Therefore, justiciability requirements do not guarantee that litigation by one party will not affect the rights of some more interested party. At most, the doctrines may change the remote parties whose litigation will bind the rights of the individuals most affected. If a possibly unlawful governmental action highly impacts individual A, has a trifling impact on B, and has no impact whatsoever on C, a justiciability doctrine might protect A from waking up to discover that her rights have been affected by a suit brought by C, but she may wake up to discover that her rights have been affected by a suit brought by B. If this is a protection for A, it is not much of a protection.

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111. *Dean*, 653 A.2d at 308.

112. In addition to the precedent-setting effect the decision had in the District of Columbia itself, courts from other jurisdictions cited the case in support of decisions denying a right of same-sex marriage. *E.g.*, *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 460 n.14 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, No. 49D13-0211-PL-001946, 2003 WL 2311998, at \*6 (Ind. Super. Ct. May 7, 2003); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at \*7 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

113. *See Kastor*, *supra* note 109 (“For [the plaintiffs], the fight is almost more important than the result. They claim they expect to win . . . , but if they lose at the highest level the men will still have the satisfaction of having stood up for themselves and their lives.”).

114. Professor Tushnet makes a related point in his response to Professor Brilmayer. He observes that because a single, Hohfeldian plaintiff cannot capture all the benefits of establishing a legal rule for the future, individual plaintiffs will tend to underinvest in litigation and may therefore create poor law that binds future litigants. Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1711 (1980).

115. Brilmayer, *supra* note 99, at 310 (emphasis added).

The other reason why the justiciability requirements do little to protect the “most affected” individuals is that ideological plaintiffs may take steps to join the affected group. Brilmayer assumes that the set of individuals affected by some allegedly unlawful action is fixed, or at least exogenously determined. She neglects the possibility that someone whom standing doctrine would regard as a noninterested party may, in many cases, be able to become an interested party.

Consider a hypothetical with which Professor Brilmayer begins her article: She posits that a town enacts an ordinance prohibiting the posting of campaign signs on residential property.<sup>116</sup> A resident resents the ordinance and believes it to be unconstitutional but, Brilmayer hypothesizes, has posted no campaign signs himself and has no present interest in putting up a sign.<sup>117</sup> Brilmayer contends that a justiciability doctrine would prevent this citizen from challenging the ordinance.<sup>118</sup> She regards this bar favorably because it means that this hypothetical busybody could not, through unwise litigation, create bad law that would prejudice the rights of truly interested parties.

In fact, Brilmayer’s hypothetical is absurdly unrealistic. Her hypothetical plaintiff would not say that he has no desire to post a sign. The would-be busybody could empower himself to challenge the ordinance by simply asserting that he had such a desire. He would not even have to lie. Desires can change. His desire to post a sign would create a justiciable case even if it arose only after passage of the ordinance and even if it derived solely from his desire to challenge the ordinance—which it might because people often desire to do something precisely because it is forbidden.

Thus, Brilmayer’s own hypothetical shows that the rules of justiciability do not operate on parties whose interests are determined exogenously. Potential plaintiffs do not live their lives in ignorance of the justiciability principles, thereby permitting courts to sort them into traditional plaintiffs and annoying busybodies. People take steps for the specific purpose of creating lawsuits.

In many cases it is very easy to do this. Where standing turns on one’s own desires (e.g., the desire to post a sign), all that is necessary is to change one’s desires. Of course, deliberately suffering injury may not be as easy as changing one’s desires. But often it is. A party who desires to challenge segregation on buses need only step onto a bus once and may do so for the specific purpose of creating a test case.<sup>119</sup> One desirous of challenging environmental degradation need only visit the area where the degradation is occurring—and possibly buy tickets to go there again.<sup>120</sup> A heterosexual who cared about gay rights could apply for a license to marry someone of the

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116. *Id.* at 298.

117. *Id.*

118. *Id.* at 298–99.

119. *Evers v. Dwyer*, 358 U.S. 202, 203–04 (1958).

120. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring).

same sex, the denial of which would create a justiciable issue. Litigation brought by plaintiffs who create their own standing in this way may impact the rights of individuals who are more directly affected—those who use the buses every day, those who live in or near the affected area, or gay or lesbian couples who desire to marry.

Professor Brilmayer's theory thus exposes what might be called the Great Myth that lies behind the private rights view of justiciability. It is commonplace for courts and scholars to remark that courts do not exist to enforce the laws and the Constitution, and to make sure the government behaves lawfully; courts do these things but only as a mere *incident* of their proper function of deciding cases.<sup>121</sup> In the mythical world posited by this private rights view of litigation, constitutional adjudication is something that just happens sometimes, almost against the will of courts. Plaintiffs are fortuitously injured by circumstances beyond their control,<sup>122</sup> they go to court seeking simple redress for their injuries, and constitutional adjudication occurs only because the courts are sometimes compelled to resolve constitutional issues in order to decide the resulting cases as they happen to come along.

In the real world, however, as this section has shown, cases do not just come along. Individuals and interest groups create cases for the specific purpose of getting courts to resolve legal issues and to compel the government to obey the laws. A single plaintiff's contrived case can create law (good or bad) that affects the rights of everyone in society. Plaintiffs, even working within a system ostensibly confined by the private rights view, can make courts perform the public rights function of enforcing the Constitution and making the other branches of government behave lawfully.

So if the purpose of justiciability doctrines is to protect the rights of absent, interested parties from the effect of *stare decisis*, they do a poor job. Exposure to bad law created by prior litigants is part of the common law system. Even enforced to the hilt, justiciability doctrines leave highly interested parties exposed to bad law created by strangers who may be only trivially interested, or who may be no more than busybodies who deliberately got themselves injured for the purposes of litigation. A strict insistence on maintaining the myth of the private rights view, while structuring the system so as to permit the public rights view to flourish in fact, serves no useful purpose.<sup>123</sup>

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121. See, e.g., sources cited *supra* note 31.

122. MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS 159 (2000); see also *infra* section III(F)(2).

123. Of course, one might turn this argument around and say that if the easy avoidability of justiciability requirements shows that they serve little purpose, it equally shows that they do little harm. So why not keep them? Let them be easily avoided in the cases where that is possible, but keep them for the cases in which they are not avoidable.

The answer is that the trend of the law for centuries has been to eliminate purposeless procedural encumbrances that permit a goal to be reached, but only clumsily. For example, property law once

### C. Separation-of-Powers Theories

In its more recent opinions, the Supreme Court has given less attention to the instrumental view that the justiciability requirements, by ensuring vigorous litigation, serve to *help* courts in their quest to reach sound decisions. Rather, the Court has emphasized the role of justiciability in *restraining* courts. Nowadays, the Court most frequently states that justiciability is a vital aspect of the constitutional separation of powers.

1. *The Pure Assertion.*—The Court settled on the separation-of-powers theory in *Allen v. Wright*.<sup>124</sup> In that case, parents of black schoolchildren challenged Internal Revenue Service policies that allegedly allowed racially discriminatory private schools to maintain tax-exempt status.<sup>125</sup> The parents did not, however, allege that their children had applied, or would ever apply, for admission to any private school.<sup>126</sup> In dismissing the challenge for want of standing, the Court made these well-known remarks about the function of justiciability doctrines:

[T]he “case or controversy” requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are “founded in concern about the proper—and properly limited—role of the courts in a democratic society.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

“All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—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.” *Vander Jagt v. O’Neill*, 226 U.S. App.

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permitted landowners to entail their estates by leaving their heirs the estate in “fee tail,” but in the fifteenth century, courts permitted the owners of entailed estates to engage in a collusive lawsuit known as a “common recovery” that would “bar the entail” and produce a fee simple. A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 129–32 (2d ed. 1986). This clumsy device survived for hundreds of years, partly out of the belief that “it was dangerous or even beyond the wit of man to meddle with . . . [the elaborate] structure, upon which the sacred property rights of the people were based” and that it would not be possible to abolish the device while preserving its effect. *Id.* at 272 & n.12. Eventually, however, with the procedure being so pointless, the common recovery was abolished and the tenant in tail was permitted to convey a fee simple by deed. *Id.* at 276–77; Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 *UCLA L. REV.* 1303, 1320 (2003). Similar remarks would apply to the fictional pleadings once required of plaintiffs in trover and ejectment. *See infra* note 270. These examples suggest the pointlessness of retaining rules that permit ideological plaintiffs to engage the judicial power, but only clumsily. The rules may seem “sacred,” but they must serve a purpose to be worth retaining.

124. 468 U.S. 737 (1984).

125. *Id.* at 739.

126. *Id.* at 746.

D.C. 14, 26–27, 699 F.2d 1166, 1178–79 (1983) (Bork, J., concurring).

The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government.<sup>127</sup>

Notably, this paragraph asserts that the justiciability requirements are fundamental to separation of powers but gives no reason why. The Court observes that the judicial branch of government is unelected and unrepresentative, and that it should therefore play a limited role in a democratic society. Of course that is true, but allusions to the countermajoritarian difficulty do not automatically justify the justiciability requirements any more than allusions to the war on terrorism automatically justified the invasion of Iraq. The countermajoritarian difficulty and the justiciability requirements *could* be connected, but some reasoning is needed to explain why enforcement of the latter serves to ameliorate the former.

*Allen v. Wright* is therefore representative of what might be called the *ipse dixit* version of the separation-of-powers theory of justiciability. The Court appeals to an intuitive, incompletely articulated sense that because courts should play a limited role in a democratic society, whatever limits courts must be good and must protect us from excessive judicial power. As explained earlier, however, not every conceivable limitation on judicial proceedings can qualify as a constitutional purpose.<sup>128</sup> We need some explanation of *why* justiciability constraints are so critical to maintaining the proper limits on the judicial role.

Cutting against the Court's pure assertion is the fact that the justiciability constraints seem unrelated to the goal of protecting society from excessive judicial power—and indeed, if that is their goal, they do a poor job. As the previous subpart discussed, the justiciability doctrines, even if stringently enforced, still leave individuals empowered to litigate lawsuits—perhaps based on contrived circumstances—that affect all of society.<sup>129</sup> Indeed, consider the cases that people have most in mind when they complain about judicial power—cases in which the Court has been at its most adventurist in discovering constitutional constraints that are not textually obvious, in striking down the work of political actors, in reforming long-standing social practices, or in doing all of these at once. These cases have stirred up the most bitter claims that judges are usurping the roles of elected officials, and yet in many of them there was not a ghost of a justiciability problem. *Lochner v. New York*,<sup>130</sup> which iconically represents the Court's failed experiment with invalidating economic regulatory legislation, was a

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127. *Id.* at 750.

128. *See supra* subpart II(B).

129. *See supra* subpart III(B).

130. 198 U.S. 45 (1905).

straightforward review of a criminal conviction—clearly justiciable.<sup>131</sup> The same undoubtedly justiciable posture produced *Lawrence v. Texas*,<sup>132</sup> which struck down laws criminalizing homosexual sex;<sup>133</sup> *United States v. Lopez*,<sup>134</sup> which revitalized restrictions on Congress’s commerce power;<sup>135</sup> *Texas v. Johnson*,<sup>136</sup> which struck down flag-burning statutes;<sup>137</sup> and *Miranda v. Arizona*,<sup>138</sup> which created the *Miranda* warnings.<sup>139</sup> *Engel v. Vitale*,<sup>140</sup> which banned prayer in public schools, was a garden-variety civil challenge to an allegedly unconstitutional practice, brought by parties whom everyone would regard as affected.<sup>141</sup> *Dred Scott*<sup>142</sup> was a perfectly justiciable controversy over whether the plaintiff was a slave, and the holding went to the jurisdictional issue of whether the plaintiff was a citizen of Missouri.<sup>143</sup> As these cases show, enforcement of justiciability requirements does little to protect society from aggressive judicial power.

Even where there is a justiciability issue in a controversial case, it often seems like a mere detail that is unrelated to the reason the case is controversial. *Roe v. Wade*<sup>144</sup>—the case most prominently associated with charges of judicial activism—was arguably moot when the Supreme Court decided it,<sup>145</sup> and in *Griswold v. Connecticut*<sup>146</sup> there was a question as to the standing of those charged with distributing contraceptives to rely on the rights of the third parties to whom they distributed them.<sup>147</sup> But critics of these cases are not furious about the Court’s assertion of power in inappropriate procedural circumstances; they are furious about the substantive outcomes of the cases. If the Court had dismissed these cases, in all likelihood it could have found other, unquestionably justiciable cases raising the same issues and reached the same results. Indeed, just four years prior to *Griswold*, the Court used justiciability grounds to dismiss a challenge (*Poe v.*

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131. Cf. Redish, *supra* note 31, at 657 (noting that the parties in the economic-due-process cases suffered clear injury in fact).

132. 539 U.S. 558 (2003).

133. *Id.* at 578.

134. 514 U.S. 549 (1995).

135. *Id.* at 551.

136. 491 U.S. 397 (1989).

137. *Id.* at 399.

138. 384 U.S. 436 (1966).

139. *Id.* at 444.

140. 370 U.S. 421 (1962).

141. *See id.* at 423–24 (describing the constitutional challenge brought by the parents of ten public-school students).

142. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

143. *Id.* at 400.

144. 410 U.S. 113 (1973).

145. *See id.* at 124–25 (finding pregnancy to be a “capable of repetition, yet evading review” justification for nonmootness).

146. 381 U.S. 479 (1965).

147. *See id.* at 481 (recognizing standing to assert the rights of third parties “with whom [the appellants] had a professional relationship”).

*Ullman*<sup>148</sup>) to the same statute brought by the same activists.<sup>149</sup> It is hard to see what was gained—in terms of limiting judicial power—by forcing those whose test case was dismissed to contrive another test case presenting the same challenge but with all the *i*'s dotted and *t*'s crossed.<sup>150</sup> In the end, the same judges, at the urging of the same activists, struck down the same statute that was challenged in the first case. It is hard to see why judicial invalidation of the Connecticut statute in *Poe* would have been a dangerous affront to the separation of powers, whereas the same action taken in the only slightly different case of *Griswold* was not.<sup>151</sup>

Thus, the Court's appeal to what it calls "more than an intuition but less than a rigorous and explicit theory" that justiciability doctrines somehow protect society from excessive assertions of power by the unelected Judicial Branch is unsatisfactory. So long as justiciability doctrines leave individual citizens with the power to bring lawsuits that affect all of society,<sup>152</sup> they seem only tangentially related, if related at all, to the goal of limiting the judicial power. Certainly, dismissing cases that can just be reformulated and rebrought to raise the same issues seems like an empty exercise that provides no real protection from judicial activism. Something more than *ipse dixit* is needed to relate justiciability doctrines to the goal of reining in judicial power.

2. *Justice Scalia's Article II and Political Process Arguments.*—Unlike the Court in *Allen v. Wright*, Justice Scalia has a theory explaining why justiciability constraints serve the separation of powers. He developed his arguments in a law review article,<sup>153</sup> in his opinion for the Court in *Lujan v. Defenders of Wildlife*,<sup>154</sup> and in dissenting opinions in later cases.<sup>155</sup> He

148. 367 U.S. 497 (1961).

149. See DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 152–54 (1994) (discussing the role of activists in filing cases challenging Connecticut's contraception ban).

150. *Griswold* was a criminal prosecution, so it was brought by prosecutors, not activists. *Griswold*, 381 U.S. at 480. Still, the case bears strong hallmarks of being a deliberately contrived test case. The defendants and their activist allies encouraged the state to bring a prosecution, recruited patients to receive family-planning services at their clinic and to go directly from there to the police to furnish information, and even supplied an additional witness at the prosecutor's request. GARROW, *supra* note 149, at 201–09.

151. *Sierra Club v. Morton*, 405 U.S. 727 (1972), followed a similar pattern. After the case was dismissed for want of standing, a simple amendment to the complaint permitted the same issues to go forward, see *Sierra Club v. Morton*, 348 F. Supp. 219, 220 (N.D. Cal. 1972), and the Sierra Club ultimately achieved its goal of blocking the planned development of Mineral King Valley. Robert A. Jones, *Controversial Mineral King Resort Plan Dies in Congress*, L.A. TIMES, Oct. 15, 1978, at B1.

152. See *supra* subpart III(B).

153. Scalia, *supra* note 31.

154. 504 U.S. 555 (1992).

155. E.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 198–215 (2000) (Scalia, J., dissenting); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 29–37 (1998) (Scalia, J., dissenting).

offered structural arguments supposedly underpinning standing doctrine; he also introduced the novel concept that standing doctrine implicates not only Article III, but also Article II of the Constitution—specifically the President’s powers under Article II’s “Take Care” Clause.

Justice Scalia claims that standing doctrine serves the essential purpose of limiting the Judiciary to the role of “protecting individuals and minorities against impositions of the majority.”<sup>156</sup> The requirement of injury—specifically, the requirement of distinctively individualized injury—ensures that the plaintiff is differentiated from the general public and has an interest in a case beyond the mere desire that law be enforced.<sup>157</sup> For, Justice Scalia asserts, the Constitution assigns the general law enforcement task to the Executive, not the Judiciary: it requires the President, not the courts, to “take Care that the Laws be faithfully executed.”<sup>158</sup> The courts, he says, must not arrogate this duty to themselves, nor allow Congress to transfer it to them.<sup>159</sup>

Moreover, Justice Scalia argues, there is a deep reason for this restriction: An individual or minority group suffering injury from illegal action of the political branches of government needs the protection of the unelected and not politically accountable Judiciary, but the majority does not need protection from itself. The majority can take care of itself using majoritarian processes, and therefore majoritarian processes should determine not only the content of the laws but the degree of enforcement the laws receive, so long as only the rights of the majority are affected.<sup>160</sup> If the government chooses to let a legal requirement lapse into desuetude, and the populace does not compel compliance through political pressure, that should be fine, so long as no one is distinctively injured.<sup>161</sup> For the Judiciary to step in where the government perhaps acts illegally but injures no one, or where it injures so widespread a group of people that no one is distinctively injured (a “generalized grievance,”<sup>162</sup> in Supreme Court parlance), would, Justice Scalia maintains, put the Judiciary in a role it would probably not execute well. The Judiciary’s insulation from political accountability, he says, renders it an appropriate body to protect individuals from the people but inappropriate to decide what is good for all the people.<sup>163</sup>

Justice Scalia’s arguments have an advantage over the bare assertion of the separation-of-powers argument made by the Court in *Allen v. Wright*. By focusing on cases that by virtue of justiciability doctrines no one could *ever* bring, as opposed to cases (such as *Poe v. Ullman*) that may get dismissed for

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156. Scalia, *supra* note 31, at 894.

157. *Id.* at 895.

158. *Defenders of Wildlife*, 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3).

159. Scalia, *supra* note 31, at 894–96.

160. *Id.*

161. *Id.* at 897.

162. *E.g.*, *United States v. Richardson*, 418 U.S. 166, 174 (1974) (quoting *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J., concurring)).

163. Scalia, *supra* note 31, at 896.

lack of justiciability but can then simply be reformulated and rebrought, Justice Scalia calls attention to an area where justiciability apparently has more than a cosmetic effect. In this area, justiciability at least appears to do something, whether or not it is a good thing. Still, Justice Scalia's arguments suffer from several flaws. Both his reliance on Article II and his political-process arguments miss the mark.

*a. The Article II Argument.*—The suggestion that the Take Care Clause not only empowers the President but limits the role of courts is difficult to accept in light of the commonplace judicial role in ensuring “that the Laws be faithfully executed.” The Judiciary performs this task *every day*; it is constantly taking care that the laws be faithfully executed. Not only does it do this in cases between ordinary parties, but it spends much of its time controlling the manner in which the Executive Branch executes the laws.<sup>164</sup> It was established at an early date that this is a proper judicial function even when an executive official specifically claims to be carrying out direct orders issued by the President under the Take Care power.<sup>165</sup> To be sure, under current justiciability rules the Judiciary does this on behalf of parties with standing, but that does not make it any less true that courts are constantly taking care that laws be faithfully executed.

The Take Care Clause does not make distinctions based upon the nature of the person or group upon whose behalf the laws are to be faithfully executed. The Executive Branch exercises the Take Care power on behalf of *both* the populace at large *and* distinctively injured individuals or groups. The courts play a concurrent role in executing the laws in the latter kind of case, and no one imagines that the Take Care Clause is implicated at all. Because nothing in the clause distinguishes the two kinds of cases, it is hard to see why the courts are trespassing upon executive power under the clause in one kind of case but not the other.

It is particularly difficult to understand this distinction given the trivial differences that may distinguish plaintiffs with standing from those without.<sup>166</sup> If a court's failure to respect the boundaries of standing doctrine implicates not just Article III but Article II of the Constitution so that for example, it would be an unconstitutional interference with the Executive for a court to order executive agencies to ensure that their actions did not

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164. Cases in which the Judiciary performs this task are too numerous to require citation, but here are just a couple of notable examples: *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (ordering the Secretary of Defense to give an alleged enemy combatant a meaningful opportunity to challenge his detention); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (ordering the Secretary of Commerce to return steel mills seized in wartime).

165. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612–13 (1838).

166. See Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 316–17 (2002) [hereinafter Nichol, *Standing for Privilege*] (criticizing the Supreme Court's standing analysis); Gene R. Nichol, *The Impossibility of Lujan's Project*, 11 DUKE ENVTL. L. & POL'Y F. 193, 205 (2001) (disagreeing with the Supreme Court's evaluations of what constitutes an “injury” in standing analyses).

jeopardize endangered species in foreign countries,<sup>167</sup> it is hard to see why the threat to the *Executive* would go away if a plaintiff purchased some airline tickets, as would be implied by *Defenders of Wildlife*.<sup>168</sup> The numerous and detailed arcana of standing doctrine do not appear related to the degree to which a judicial proceeding might interfere with executive power.

Thus, the suggestion that erosion of the justiciability requirements would unconstitutionally trespass on the President's power under the Take Care Clause seems untenable. Justice Scalia's Article II suggestion was a fresh idea, but it ignores the constant, quotidian, accepted role of the courts in the execution of the laws.<sup>169</sup>

*b. The Structural Argument.*—Justice Scalia's structural explanation that courts should not act on Executive Branch lawlessness that affects the populace as a whole because the majority can obtain enforcement through political pressure is also highly suspect. The argument depends on the assertion that political processes will fairly consider widely shared injuries,<sup>170</sup> but social scientists have long exposed the error in this claim. True, political processes sometimes respond well to actions that impact large numbers of citizens—as, for example, when Congress reacted with breathtaking speed to a court decision invalidating the Federal Trade Commission's popular “do not call” regulations.<sup>171</sup> Often, however, widely shared injuries are the *worst* kind of injuries to try to rectify through the political process. If an illegal action injured a large group of people, perhaps nearly everyone in the country, but only slightly, while simultaneously providing a substantial benefit to a small minority, the injured parties might find it impossible to correct the problem through the political process. Injured parties would have little incentive to act, and any attempt to organize them into political action would be beset by “free rider” problems, as most of the injured populace would rationally choose to do nothing. At the same time, the concentrated

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

168. *Id.* at 579 (Kennedy, J., concurring); see Nichol, *Standing for Privilege*, *supra* note 166, at 316–17 (noting how the *Defenders of Wildlife* premise rests on specific tasks that “individual plaintiffs may or may not choose to take”); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 213 (1992) (questioning the premise of *Defenders of Wildlife*).

169. Justice Scalia himself may have given up on this argument. Writing for the Court, he recently noted that “standing jurisprudence, . . . though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II.” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998).

170. Scalia, *supra* note 31, at 896.

171. On September 23, 2003, a district court held that the Federal Trade Commission (FTC) lacked statutory authority to promulgate the regulations, *U.S. Sec. v. FTC*, 282 F. Supp. 2d 1285, 1291 (W.D. Okla. 2003), *rev'd sub nom.* *Mainstream Mktg. Servs., Inc. v. FTC.*, 358 F.3d 1228 (10th Cir. 2004), and it took Congress less than a week to pass a statute expressly giving the FTC the necessary authority, see Pub. L. No. 108-82, 117 Stat. 1006 (2003).

minority that benefits from the illegal action would have strong incentives to act politically to retain its advantage.<sup>172</sup>

Contrariwise, the “generalized grievance” rule might often fail to block challenges to actions that inflict the kind of widespread harms that by the logic of Justice Scalia’s argument, the political process should handle fairly. If, for example, Congress imposed a capitation tax, surely any taxpayer would have standing to challenge the tax as unconstitutional,<sup>173</sup> even though it might fall equally on everyone in the country. If the Department of Homeland Security announced that to combat terrorism it would henceforth listen to all telephone calls and read all e-mails of everyone in America, surely any American would have standing to challenge the intrusion. Justice Scalia might argue that these grievances would be “particularized” and “differentiated” by each taxpayer’s obligation to pay and the interception of each person’s communications,<sup>174</sup> but each person would still be affected in the same way, and in terms of the likelihood that the political process would fairly handle the claim, there is no distinction between this kind of claim and an allegedly “undifferentiated” grievance.<sup>175</sup>

Thus, even though Justice Scalia usefully focuses attention on the area where a justiciability doctrine at least appears to do *something* that is not merely cosmetic, it is still hard to discern the purpose behind the doctrine. Once again, the claimed purpose does not mesh properly with the set of cases upon which the doctrine operates.<sup>176</sup> With regard to the purpose of excluding from judicial consideration those cases that the political process should fairly, and therefore exclusively, handle, the doctrine is so greatly overinclusive and underinclusive that this purpose cannot justify reading the justiciability requirements into the Constitution.

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172. Other scholars have noted this flaw in Justice Scalia’s argument. See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 386 n.225 (1989) (noting that the difficulties surrounding collective action by majorities show weakness in Scalia’s argument); 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) (noting in opposition to Scalia’s argument that “widely shared but diffuse public interests tend to get lost rather than vindicated in the political branches”); Sunstein, *supra* note 168, at 219, 219–20 (calling Scalia’s argument “too simple”).

173. See U.S. CONST. art. I, § 9, cl. 4 (prohibiting such taxes unless they are proportioned to the census).

174. See *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 35 (1998) (Scalia, J., dissenting) (arguing that the majority oversimplified the Court’s generalized-grievance jurisdiction by failing to determine whether the respondents’ injuries were “particularized” and “undifferentiated”).

175. See Redish, *supra* note 31, at 660–61 (noting that individualized injury may give a party standing to enforce structural provisions of the Constitution).

176. Cf. Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1284, 1282–84 (1961) (anticipating and accepting Scalia’s argument that the central function of courts is to protect individuals, but suggesting that where the legality of official action is in question, there is no correspondence between whether a claim is presented by a specific individual and whether it is likely to be within “the traditional compass of the judicial function”).

c. *The Role of Congress.*—Moreover, Justice Scalia’s arguments overlook the ability of Congress to control justiciability. Congress’s powers in this regard further undermine Justice Scalia’s arguments. On the one hand, Congress’s power to limit standing weakens the argument that standing doctrine is *necessary* to achieve any important goal; on the other hand, Congress’s power to expand standing weakens the argument that standing doctrine provides more than cosmetic protection against judicial action.

*Congress’s Power to Limit Standing.* Justice Scalia claims that one of the main virtues of standing doctrine is that it lets majoritarian forces, rather than judicial decisions, decide how much enforcement legal directives shall receive, so long as no individual or minority group is distinctively injured.<sup>177</sup> But standing doctrine is unnecessary to achieve this end, at least insofar as statutory cases are concerned. It adds nothing to Congress’s power to control the set of plaintiffs permitted to bring suit under federal statutes.

When Congress passes a statute, it may specify who is entitled to bring suit under that statute. With regard to statutes that require the Executive Branch to take some action, Congress often says nothing about potential court challenges, and courts therefore determine who may bring such challenges in accordance with the general instructions in § 702 of the Administrative Procedure Act.<sup>178</sup> However, Congress can always choose to be more specific; it may limit the set of plaintiffs who may challenge governmental action.<sup>179</sup>

Therefore, if standing doctrine did not exist to limit the set of plaintiffs who may sue under federal statutes, Congress could achieve the same result by statute. Congress’s ability to limit the set of potential plaintiffs by statute undermines Justice Scalia’s suggestion that standing doctrine serves an essential function by permitting the majoritarian branches to choose how far to go in enforcing the law. Congress does not need standing doctrine to do what it could achieve by statute.

Moreover, Justice Scalia’s argument that courts should respect the majority’s law-enforcement decisions with regard to majoritarian issues<sup>180</sup> seems somewhat ironic, inasmuch as he really desires to deny the majority the right to control the very choice he describes. Justice Scalia applauds the virtue of allowing the majority to decide that “important legislative purposes, heralded in the halls of Congress, [should be] lost or misdirected in the vast hallways of the federal bureaucracy” so long as no distinctive harm to particular individuals or minorities results,<sup>181</sup> but it would be even more majoritarian to let the majority decide this question. If Congress *wants* to

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177. Scalia, *supra* note 31, at 897.

178. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987).

179. *E.g.*, *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 352–53 (1984).

180. Scalia, *supra* note 31, at 896–97.

181. *Id.* at 897 (quoting *Calvert Cliffs’ Coordinating Comm. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971)); *see id.* at 884 (quoting *Calvert Cliffs’* at length).

create a statutory scheme that may lapse into desuetude if the Executive Branch decides not to implement it, Congress is free to specify (as it occasionally does) that there shall be no private right to compel any enforcement of the scheme.<sup>182</sup> If, on the other hand, Congress does not wish a particular program to be lost in vast bureaucratic hallways, Justice Scalia's own preference for majoritarian decision making suggests that courts should respect Congress's desire and permit Congress to enable any citizen to demand implementation of the statutory scheme.

Thus, Justice Scalia's argument is not so much that courts should prefer majoritarianism as that courts should regard the Executive Branch's enforcement decisions as having a better claim to the mantle of majoritarianism than those of the legislative branch. However, Congress, not the Executive, provides the ultimate expression of majoritarian preference with regard to enforcement discretion. Courts recognize that Congress has the power to control executive enforcement discretion and may permit individuals to enlist judicial aid in demanding executive enforcement action when the Executive deviates from Congress's instructions.<sup>183</sup> Under current law, courts permit this only on behalf of injured plaintiffs, but these cases show that with regard to enforcement discretion as much as with any other matter, Congress, not the Executive, is the ultimate mechanism for the expression of majoritarian preference.

As to statutory matters, therefore, Justice Scalia's view of standing seems both largely unnecessary—because it mostly just gives Congress power that Congress would have anyway—and antimajoritarian. The most that Justice Scalia's argument can show is that in matters where government action injures no one distinctively, standing doctrine preserves *executive* enforcement discretion, perhaps *against* the wishes of the majority as expressed in Congress.

In constitutional cases, where Congress's authority to control enforcement is not so clear, standing doctrine might seem to play more of a role. It would at least seem to play the role just described: it would protect the Executive against a congressional decision to permit the general populace to enforce constitutional provisions under circumstances where no individual or minority group is distinctively injured. Moreover, suppose one believed that Congress does not have authority to limit judicial enforcement of constitutional constraints (as opposed to statutory constraints) on executive

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182. *See, e.g.*, 2 U.S.C. § 1571 (2000) (providing, with very limited exceptions, that the failure to comply with the Unfunded Mandates Act shall not be grounds for judicial review); 5 U.S.C. § 805 (2000) (providing that the "Congressional review" provisions of chapter 8 of the Administrative Procedure Act shall not be subject to judicial review).

183. *See* *Heckler v. Chaney*, 470 U.S. 821, 833, 832–35 (1985) (holding that the presumption against judicial review of nonenforcement "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers"); *Dunlop v. Bachowski*, 421 U.S. 560, 566–67 (1975) (approving judicial review of an agency's decision not to bring an enforcement action).

action. Then, in the absence of standing doctrine, any person could demand enforcement of constitutional constraints, even against government action that injures no one distinctively, and even if Congress did not desire such enforcement. So, as to constitutional constraints, standing doctrine would seem to give the majority something it would not otherwise have: namely, the ability to delegate to the Executive, free of judicial interference, the power to determine how much enforcement there should be of constitutional provisions whose violation injures no one distinctively. Of course, standing doctrine would fulfill this function only by taking away the majority's power to make the contrary decision, but at least it would appear to do something. This point is considered further in Part III.

*Congress's Power to Expand Standing.* Justice Scalia claims (and the Supreme Court held in *Defenders of Wildlife*) that even Congress cannot authorize the courts to redress undifferentiated, widely shared injuries.<sup>184</sup> In fact, this is not true. Even within current doctrine, Congress may implement a scheme of decentralized enforcement of legal constraints on executive action, whether or not that action distinctively injures any individuals or minority groups.

There are two reasons for this. First, Congress may, by statute, create rights, the invasion of which creates a justiciable case, even if there would be no such case in the absence of the statute.<sup>185</sup> There is some question whether Congress may *always* authorize private suits by creating such rights, but its powers in this regard are certainly very broad. In *Defenders of Wildlife*, the Court denied that Congress can always authorize "any person" to challenge any allegedly unlawful government action,<sup>186</sup> but Justice Kennedy's concurrence suggested that Congress can usually do so if it acts the right way—expressly creating a new right rather than simply authorizing "any person" to sue without conferring new rights.<sup>187</sup> Congress's great power in this regard was confirmed (over Justice Scalia's objection) in *Federal Election Commission v. Akins*,<sup>188</sup> which showed that only a little creativity (such as creating an informational right in "any person") may be required to create a public right to sue on what would otherwise be a generalized grievance.<sup>189</sup>

Second, even in the unusual case where a direct rights-conferring strategy might not work, the ancient device of the *qui tam* action gives Congress an effectively unlimited ability to create general public standing to

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184. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992); Scalia, *supra* note 31, at 893 n.58.

185. *Defenders of Wildlife*, 504 U.S. at 578; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

186. 504 U.S. at 572–78.

187. *Id.* at 580 (Kennedy, J., concurring). Justice Kennedy hinted at some limits on Congress's power, so it is not clear whether this strategy would always work. See *id.* at 581, 580–81 (noting that Congress could not allow suits to vindicate "interest in the proper administration of the laws").

188. 524 U.S. 11 (1998).

189. *Id.* at 19.

enforce federal law. All Congress has to do is offer a public bounty to any plaintiff who demonstrates that a defendant has violated federal law. Imagine that Congress passed the following statute (which might be called the “Universal Standing Act” so as to have the patriotic acronym “USA”):

Whoever violates the Constitution or any federal law shall (in addition to all other remedies) forfeit the sum of \$100, which may be recovered in a civil action, one half to the use of the person prosecuting for the same, the other half to the use of the United States.

This *qui tam* language<sup>190</sup> would give any person a monetary stake in an action enforcing the allegedly violated federal law and thereby resolve any problem with the plaintiff’s standing. *Defenders of Wildlife* itself hinted that such a statute could confer standing on private plaintiffs who would otherwise lack it,<sup>191</sup> and this suggestion proved correct in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.<sup>192</sup> In that case, the Court unanimously confirmed that a *qui tam* bounty sufficiently confers standing upon any plaintiff.<sup>193</sup>

I have elsewhere discussed the significance of the *qui tam* tradition with regard to another question about the authority of federal courts—namely, their power to hear suits against states.<sup>194</sup> The tradition is equally relevant to the justiciability questions discussed here.<sup>195</sup> It refutes Justice Scalia’s position regarding congressional authority to create decentralized enforcement schemes in which any person is authorized to enforce federal law in court. *Qui tam* actions have created precisely such schemes throughout our nation’s history.<sup>196</sup> Moreover, Congress traditionally used *qui tam* schemes for the precise purpose Justice Scalia argues against—authorizing any person to bring judicial actions to enforce legal duties of federal officials. For example, early *qui tam* statutes authorized any person to bring suit against federal marshals for failing to fulfill their duties with regard to the census<sup>197</sup> or against federal customs collectors for failing to post a table of rates, fees, and duties conspicuously in their offices.<sup>198</sup>

190. The language used here is the traditional form for a *qui tam* statute. See, e.g., Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102; Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131.

191. 504 U.S. at 573.

192. 529 U.S. 765 (2000).

193. *Id.* at 787.

194. Jonathan R. Siegel, *Congress’s Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44 (1999); Jonathan R. Siegel, *The Hidden Source of Congress’s Power to Abrogate State Sovereign Immunity*, 73 TEXAS L. REV. 539 (1995).

195. For other articulations of this point, see Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 599–602 (2005); Nichol, *Standing for Privilege*, *supra* note 166, at 316; and Sunstein, *supra* note 168, at 232–34.

196. See *Stevens*, 529 U.S. at 774–78 (tracing the use of *qui tam* actions from thirteenth-century England to the early American Colonies).

197. Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102.

198. Act of July 31, 1789, ch. 5, § 29, 1 Stat. 45.

Justice Scalia might respond that the *qui tam* tradition does not refute his standing arguments because he argues only that standing doctrine prevents Congress from authorizing suits by plaintiffs who suffer no distinctive injury. *Qui tam* actions, he might say, do not violate this principle because, as the Court held in *Stevens*, a *qui tam* statute effects a valid, partial assignment of the federal government's injury to a private plaintiff.<sup>199</sup> Such a response would, however, only highlight the point that to the extent justiciability doctrines can be avoided by trifling actions, they provide no more real protection than would a constitutional principle forbidding the President to sign bills on Sundays.

Presumably, no one could imagine that Article III strictly forbids suits by plaintiffs who are not distinctively injured but that Congress could authorize suits by such plaintiffs if it requires that they first make a ritual sacrifice in front of a federal courthouse.<sup>200</sup> Yet that is essentially what official standing doctrine and the *qui tam* tradition together provide. Congress may not, the Court held in *Defenders of Wildlife*, authorize suits by "any person," paying no heed to the requirement of injury, but as the Court held in *Stevens*, the simple device of a *qui tam* action allows Congress to confer standing upon plaintiffs suffering no distinctive injury.<sup>201</sup> Standing doctrine should turn on real distinctions, not on gestures designed to propitiate the gods of justiciability.<sup>202</sup>

Congress's ability to confer rights and the *qui tam* device show that this justiciability doctrine does not protect the Executive from Congress and the courts acting in combination.<sup>203</sup> Congress's ability to create justiciable

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199. *Stevens*, 529 U.S. at 773 n.4.

200. This image is borrowed from Tushnet, *supra* note 114, at 1705.

201. The *qui tam* device also provides Congress with a ready means to avoid issues of mootness. The Universal Standing Act, if passed, would create nonmootable lawsuits because even if a violation of federal law abated, the plaintiff's claim for money would remain live.

202. Tushnet, *supra* note 114, at 1705.

203. Of course, I am placing a lot of weight on *qui tam* actions here, and one might ask whether such suits are constitutional, despite their pedigree. See generally Caminker, *supra* note 172 (exploring the constitutionality of *qui tam* actions vis-à-vis Articles II and III). Some suit forms, though historically allowed, are now regarded as outside the judicial power. See *infra* subpart III(G). *Qui tam* actions, however, have such a solid pedigree—extending back not only to the nation's founding but for hundreds of years before that, and continuing in use throughout our history, see, e.g., *Stevens*, 529 U.S. at 774–78 (tracing the use of *qui tam* actions from thirteenth-century England to the early American Colonies); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (listing several early U.S. statutes authorizing *qui tam* actions); *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (referring to the history in English law of statutes providing for actions by one without any personal interest in the suit save the recovery of a penalty or forfeiture)—that it is hard to imagine striking them down. They do not seem comparable to feigned actions, which were used in this country only for a short time and which were controversial even in their heyday. See *infra* subpart III(G). *Qui tam* actions form part of justiciability doctrine and must be considered in deciding what purposes the doctrine could serve.

Professor Myriam Gilles suggests that the *qui tam* device provides standing for relators only with regard to cases in which the United States has suffered an injury to its proprietary interests, not to its sovereign interests. Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and*

causes where none might otherwise exist undermines Justice Scalia's argument that the courts can play no role in the redress of undifferentiated, widely shared injuries, as well as the similar, frequently heard argument that it is "emphatically . . . 'not the role of the judiciary'" to act as "continuing monitors" of executive branch action.<sup>204</sup> In light of Congress's ability to authorize and direct the Judiciary to act in exactly these roles, these statements ring hollow. At most, the question is whether the Judiciary can assume these roles without congressional instruction or whether it must await specific empowerment from Congress. That is, if justiciability doctrine does anything, it serves only to authorize Congress, rather than the courts, to control when judicial action will be permitted in cases in which the government acts illegally but does not inflict upon any individual an injury that current standing doctrine would recognize. Whether this is a purpose that could justify treating standing doctrine as a constitutional requirement will be considered in Part IV.

#### D. *The Passive Virtues*

Alexander Bickel famously celebrated the capacity of justiciability constraints to serve as "passive virtues"—to give the Supreme Court a chance to do by "not doing."<sup>205</sup> Bickel maintained that the Court is able to exercise principled judgment in deciding constitutional issues only because justiciability constraints allow it to exercise an unprincipled discretion in choosing which issues to decide.<sup>206</sup> Sidestepping awkward cases, Bickel says, allows the Court to avoid the dilemma of choosing between striking down unconstitutional but popular governmental actions and effectively legitimating them.<sup>207</sup> So perhaps the vital purpose of justiciability is to give the courts a mechanism by which to avoid awkward cases.<sup>208</sup>

As noted in the opening of this Article, even the staunchest critic of justiciability constraints must, on occasion, breathe a sigh of relief upon

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*the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 342 (2001). With respect, I would suggest that this argument is wrong logically and wrong historically. It is wrong logically because once the government imposes a fine for violation of a law, it has a proprietary interest in the collection of the fine. Thus, there is no distinction between the two kinds of cases. It is wrong historically because, as the examples cited in the text above show, early *qui tam* statutes authorized relators to sue persons (including government officials) who had violated federal law, but not in a way that would cause the government a proprietary injury.

204. *E.g.*, *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2570 (2007) (plurality opinion) (quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)). Actually, the quoted opinion disclaims a judicial role in acting as a continuing monitor of "the *wisdom* and *soundness* of Executive action." *Id.* (internal quotation omitted) (emphasis added). Of course, all that is suggested here is that the Judiciary would pass on the *lawfulness* of executive action.

205. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 169 (1962).

206. *Id.* at 132.

207. *Id.* at 29–31, 130–31.

208. *Cf.* Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 52, 51–52 (1996) ("It should not be surprising to find some pressure to find otherwise borderline cases 'not ripe' or 'moot' precisely because of the costs associated with deciding the substantive question.").

seeing an undesirable case go away because of justiciability problems. Nonetheless, there are several reasons why justiciability's role as a discretionary judicial-avoidance mechanism does not justify regarding the justiciability constraints as constitutional requirements. First, the justiciability doctrines, being supposedly mandatory, are not well suited to the purpose of granting the courts a general discretion not to decide cases. Second, in many instances the doctrines at most postpone, and sometimes not for very long, decision of controversial constitutional issues. Finally, the courts' use of the justiciability doctrines for this purpose requires too much damage to the doctrines themselves.

Most of the justiciability doctrines are ostensibly mandatory. The Supreme Court insists, for example, that the Constitution itself imposes the requirement that the plaintiff in a federal lawsuit have suffered an injury that is fairly traceable to the actions of the defendant and likely to be redressed by favorable judicial action.<sup>209</sup> Thus, giving courts the unprincipled discretion that Bickel celebrates is not the *ostensible* purpose of the justiciability doctrines; at best, the doctrines occasionally prove susceptible of unprincipled manipulation that serves that end. But ostensibly mandatory rules can never do a really good job of giving the courts unprincipled discretion. Too often, a case will fall so clearly within the justiciability doctrines that even the most manipulative judges will have no respectable way of dumping it.<sup>210</sup>

Consider, for instance, the hot-potato issue of same-sex marriage. Judging from the Supreme Court's decision in *Lawrence v. Texas*, the Court desired to invalidate laws criminalizing homosexuality while taking care not to intimate how it would rule on the same-sex marriage issue.<sup>211</sup> No court, however, could seriously claim that a gay couple's suit challenging the failure of a municipal clerk to issue them a marriage license was nonjusticiable. There would be a clear injury, the matter would be ripe, and so on. Courts will have to face the issue of whether the Constitution requires recognition of same-sex marriage (numerous courts have faced it already<sup>212</sup>), and one may safely predict that conflicting decisions on the issue will bring unquestionably justiciable cases raising it before the Supreme Court.<sup>213</sup>

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209. *E.g.*, *Allen*, 468 U.S. at 751.

210. *See* Redish, *supra* note 31, at 663 (noting that "injury-in-fact will be easily and unambiguously established" in many cases that Bickel would prefer not be resolved).

211. The Court went out of its way to note that "[the case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

212. *E.g.*, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

213. Bickel himself recognizes that each justiciability doctrine has some "content" and that no one of them, therefore, is "always available at will." BICKEL, *supra* note 205, at 170. Still, he contends that "one or another of them will generally be available." *Id.* This seems an overstatement. Again, it is hard to see how a court could avoid a gay couple's challenge to a municipal clerk's refusal to issue them a marriage license.

Sometimes, it is true, a court just cheats, as the Supreme Court notoriously did in *Naim v. Naim*,<sup>214</sup> when it refused to hear a socially difficult case that was within its mandatory jurisdiction.<sup>215</sup> But although Bickel praises *Naim* as a wise exercise in avoidance,<sup>216</sup> justiciability doctrines gave no respectable cover to the Court's shirking of its duty. The decision was simply incorrect and widely recognized as such.<sup>217</sup> *Naim* does not demonstrate the usefulness of justiciability doctrines as a tool of judicial avoidance; it demonstrates only that the Court can engage in avoidance whether or not justiciability doctrines give it the slightest basis for doing so.

Furthermore, even where justiciability allows a court to avoid an issue because it is not pressed in a proper "case," the issue can recur and sometimes does so quite soon. The Court's questionable standing ruling in *Warth v. Seldin*<sup>218</sup> allowed it to sidestep the constitutionality of zoning restrictions, but the issue came back just two years later in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>219</sup> The Court ducked the constitutionality of affirmative action in university admissions in *DeFunis*<sup>220</sup> but reached the issue four years later in *Bakke*.<sup>221</sup> It was admittedly convenient that the Supreme Court avoided ruling on the Pledge of Allegiance in *Newdow*, but that hardly ends the matter. Other plaintiffs, with properly justiciable cases, have challenged the Pledge of Allegiance on the same grounds,<sup>222</sup> and Newdow, after his defeat, did exactly what one would expect: he found like-minded parents and children in the California school system and enlisted them as plaintiffs in a new, justiciable lawsuit.<sup>223</sup> Thus, the courts will have to rule on the merits of the Pledge question.

Of course, postponing decision to a less sensitive time may be precisely the point of the Court's wise invocation of justiciability as an avoidance mechanism, and the passive virtues should not, perhaps, be denigrated too much because they may only postpone, and not wholly avoid, judicial

214. 350 U.S. 985 (1956).

215. *See id.*

216. BICKEL, *supra* note 205, at 174.

217. *See, e.g.*, Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) (calling *Naim* "indefensible"); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 12 (1959) ("clums[yl]"); Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 460 (2004) ("embarrassing"); Mark V. Tushnet, *The Law, Politics, and Theory of Federal Courts: A Comment*, 85 NW. U. L. REV. 454, 461 (1991) ("lawless"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) ("wholly without basis in the law").

218. 422 U.S. 490 (1975).

219. 429 U.S. 252 (1977).

220. *See DeFunis v. Odegaard*, 416 U.S. 312 (1974) (per curiam) (denying standing because the petitioner would graduate law school regardless of the Court's decision).

221. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

222. *See Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992).

223. *Newdow v. Cong. of U.S.*, 383 F. Supp. 2d 1229, 1231–32 (E.D. Cal. 2005); Bob Egelko, *Atheist Sues Again over Pledge to Flag*, S.F. CHRON., Jan. 6, 2005, at B3.

decision of socially difficult issues. Still, postponement may be of little value. For example, the Pledge of Allegiance issue seems likely to remain volatile for a very long time; if it returns to the Supreme Court, say, ten years from now, in a clearly justiciable case, it seems unlikely that the postponement will have helped to defuse the issue.

Finally, the use of justiciability doctrines as discretionary avoidance mechanisms must inevitably involve manipulation and distortion of those doctrines, inasmuch as the doctrines were not designed for that purpose. The result can only be to render the doctrines even more uncertain and less susceptible of their ostensibly mandatory application. *Newdow* provides a good example. As some Justices complained, the Court managed to dump the case only by bringing in considerations never before mentioned in standing decisions.<sup>224</sup> The Court invoked an unrelated line of cases concerning the federal courts' reluctance to interfere in matters of state domestic relations and concluded that Newdow's circumscribed relationship to his daughter under state law created a prudential barrier to his standing.<sup>225</sup> As others have noted, in its efforts to rid itself of one awkward case, the Court not only made bad standing law (by asserting that noncustodial parents may lack a cognizable interest in their children's education), but may have caused serious damage to the law of domestic relations and the ability of noncustodial parents to secure their rights.<sup>226</sup>

The situation is reminiscent of that of courts deciding contract cases prior to the recognition of a principle against enforcement of unconscionable contractual provisions. As the drafters of the Uniform Commercial Code recognized, it is better to have an express rule against unconscionability than to have courts "attempt[] to achieve the result by an adverse construction of language, by manipulation of the rules of offer and acceptance, or by a determination that the term is contrary to public policy or to the dominant purpose of the contract."<sup>227</sup> Such manipulation of standard contract doctrines as a clandestine substitute for unconscionability damages the doctrines and makes them less capable of proper application. Manipulation of justiciability doctrines causes similar problems. If we want courts to have a general discretion to avoid decision of socially difficult cases, we should say so,<sup>228</sup>

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224. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 19 (2004) (Rehnquist, C.J., concurring).

225. *Id.* at 12–13 (majority opinion) (citing, for example, *Ankenbrandt v. Richards*, 504 U.S. 689 (1992)).

226. See, e.g., Erwin Chemerinsky, *Tiptoeing Around 'Under God,'* L.A. TIMES, June 15, 2004, at B13 (rebuking the Court for making "bad law concerning the rights of noncustodial parents to sue on behalf of their children and, even worse, abdicat[ing] its fundamental role in the U.S. system of government"); Warren Richey, *Pledge Case Puts Chill on Parental Rights*, CHRISTIAN SCI. MONITOR, June 17, 2004, at 2 (indicating that the opinion denies noncustodial parents the "fundamental parental right" of protecting their children from unconstitutional government action).

227. U.C.C. § 2-302 cmt. 1 (2005).

228. The Supreme Court, of course, can usually avoid difficult questions by denying certiorari. Lower courts usually lack this discretion, however, and while the Supreme Court's denial of

but allowing them to achieve the result surreptitiously by manipulation of justiciability doctrines imposes a high price as those doctrines become damaged through abuse.

*E. Political Questions*

One justiciability requirement is unlike all the others: the “political question” doctrine. Unlike the other requirements, which concern the proper circumstances under which courts can act, the political question doctrine limits the issues courts can consider, regardless of the circumstances. For this reason, the political question doctrine serves a clear purpose: freeing the political branches from judicial review with regard to certain matters.

The political question doctrine keeps courts away from certain issues altogether. It is not just a question of fussing about the precise circumstances in which the courts can act. It represents a judgment that as to certain issues, our government will function best if the political branches operate without any judicial control at all. Of course, as to any particular issue, one might agree or disagree with that judgment, but plainly a purpose is served by freeing the political branches from judicial review in areas where judicial intervention would do more harm than good.

It is true, as Professor Louis Henkin suggested, that in many cases the political question doctrine is merely a confusing and unnecessary way to express the obvious point that the courts should not invent constraints on the political branches where the Constitution does not impose any.<sup>229</sup> In many cases in which a court invokes the doctrine, the court has simply determined that the challenged action of the political branches of government is not subject to any legal constraint.<sup>230</sup> In such cases, the court would reach the same result by applying the rule that a plaintiff’s case must, of course, be

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certiorari at least prevents a socially awkward lower court ruling from gaining national status, it leaves the ruling on the books and may leave conflicting rulings on the books. What the Supreme Court would really need is discretionary power to vacate lower court rulings without rendering its own decision. The California Supreme Court achieves something like this result by its “depublishing” practice—sometimes, the California Supreme Court will decline review of a decision by a California court of appeal but will simultaneously order that the lower court’s opinion be withdrawn from publication, depriving it of precedential effect. See Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1034–35 (1993) (explaining the California Supreme Court’s use of depublication to shape the law by stripping the precedential value of appellate opinions with which the court disagrees without addressing the merits of the case or providing reasons for the action).

229. Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 622 (1976).

230. See, e.g., *New Jersey v. United States*, 91 F.3d 463, 469–70 (3d Cir. 1996). In this case, the court invoked the political question doctrine to dismiss the plaintiff state’s claim that the failure of the United States to enforce the immigration laws imposed unconstitutional costs on the state. The court’s holding was, however, based on its determination that the Constitution does not require the federal government to police aliens in a way that avoids such costs.

dismissed if it states no claim upon which relief could be granted.<sup>231</sup> In these “bogus” political question doctrine cases, the doctrine serves no purpose and might best be discarded.

In rare cases, however, courts actually hold that although the Constitution constrains the behavior of the political branches, the courts cannot enforce the constitutional constraint. For example, in *Morgan v. United States*,<sup>232</sup> the D.C. Circuit (speaking through then-Judge Scalia) dismissed a claim that the House of Representatives had improperly resolved a closely contested election for a House seat because the Constitution provides that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members.”<sup>233</sup> The Constitution certainly constrains the behavior of a house of Congress judging a contested election—the house must seat the candidate who received more lawful votes.<sup>234</sup> Yet the court concluded that the Constitution has entirely removed the resolution of contested congressional elections from judicial scrutiny.

Cases of the *Morgan* type, though rare, show a justiciability constraint doing real work. As a policy matter, one might or might not agree that the power to resolve contested legislative elections is best lodged in the legislative body itself. But the point is that the political question doctrine is doing real work, whether or not it is good work. It frees the houses of Congress from any outside interference as they resolve contested elections. Because the political question doctrine goes to the issue to be resolved, not to the circumstances under which a court may resolve an issue, it serves a real purpose in those rare cases in which it applies.

#### F. *Miscellaneous Theories*

There is probably no end to the possible theories behind the justiciability requirements. Some miscellaneous theories, not fitting into the main categories presented above, are considered here.

1. *The Council of Revision Argument.*—Judges and scholars sometimes attempt to derive support for justiciability requirements from the Constitutional Convention’s rejection of a Council of Revision. The Framers, this argument runs, considered the possibility of giving judges power to review legislation outside the context of a case but rejected it. By rejecting the proposed Council of Revision, the Framers demonstrated their

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231. See Jonathan R. Siegel, *Political Questions and Political Remedies*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 243, 246 (Nada Mourada-Sabbah & Bruce E. Cain eds., 2007).

232. 801 F.2d 445 (D.C. Cir. 1986).

233. *Id.* at 445–46, 451 (quoting U.S. CONST. art. I, § 5, cl. 1 (alteration in original)).

234. This requirement follows from the constitutional provisions requiring that the House of Representatives “shall be composed of members chosen every second Year by the People of the several states,” U.S. CONST. art. I, § 2, and that the Senate “shall be composed of two Senators from each state, elected by the people thereof,” *id.* amend. XVII.

desire that courts review legislation only in the context of cases.<sup>235</sup> Under this view, the justiciability requirements prevent the courts from acting as a de facto Council of Revision.

This argument was exploded long ago.<sup>236</sup> The Council of Revision would have permitted judges to share in what ultimately became the President's power to veto legislation *for any reason*. Its power would not have been limited to the rejection of unconstitutional legislation; indeed, its proponents cited as a reason in its favor the power that it would give to judges to reject statutes that “may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.”<sup>237</sup> Thus, the Council of Revision would not only have permitted judges to review legislation under different *procedural circumstances* than is permitted under modern judicial review; it would have allowed judges to void legislation for very different *reasons*.

Therefore, the Convention's rejection of the Council of Revision does not prove anything about the Framers' views regarding the proper circumstances for judicial review. It seems likely that the Council of Revision's most salient feature was its *substantive* power to strike down legislation for any reason, not its *procedural* power to consider legislation outside the context of a case. But in any event, where a collective body rejects a proposal that has two prominent features, it is a non sequitur to conclude that the rejection proves the body's disapproval of one of those features in isolation.

2. *A Social Choice Theory.*—Professor Maxwell Stearns provides a “social choice” explanation for justiciability constraints, particularly standing doctrine, that is a variant of the Brilmayer “representational” theory.<sup>238</sup> According to Stearns, the critical purpose behind standing doctrine is related to the “path dependency” of constitutional law—the (alleged) fact that because of the principle of stare decisis, the outcomes of the Supreme

235. See, e.g., *United States v. Richardson*, 418 U.S. 166, 189–91 (1974) (Powell, J., concurring) (discussing the Founders' arguments against the Council of Revision); Ernest J. Brown, *Qui Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 15–16 (arguing against relaxation of standards of standing on the grounds that it too nearly approached the rejected Council of Revision); 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, 6, 38–39, 86 (2001) (“The Convention specifically rejected proposals, such as a Council of Revision, that would have permitted wholesale review of legislation untied to any actual controversies.”); Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. PITT. L. REV. 351, 401, 400–01 (1993) (claiming that a court considering the constitutionality of a statute outside the context of a particular application “would truly be acting as a Council of Revision”).

236. See, e.g., Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 93–94 (1984) (contrasting the Council of Revision's role in enacting legislation with the postenactment judicial review of the current Court).

237. 2 THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at 73 (Max Farrand ed., 1911).

238. STEARNS, *supra* note 122, at 97.

Court's constitutional cases depend on the order in which the cases come to the Court.<sup>239</sup> This path dependency, Stearns argues, gives ideological litigants an opportunity to manipulate constitutional doctrine by controlling the order in which they bring cases.<sup>240</sup> Therefore, Stearns concludes, modern standing doctrine is best understood as a device that "presumptively prevents ideological litigants from strategically timing cases in federal court solely to manipulate the substantive evolution of constitutional doctrine."<sup>241</sup> It does so by limiting the ability of ideological litigants to create cases that suit their path-manipulative strategies.<sup>242</sup>

Like Professor Brilmayer's argument, this argument focuses on the restraint that standing doctrine imposes on the ability of litigants to create law that affects others through the mechanism of *stare decisis*. Unlike Brilmayer, however, who is primarily concerned with protecting the ability of the persons "most affected" by government policies to represent their own interests,<sup>243</sup> Stearns is concerned with protecting the courts themselves from ideological litigants who desire to exploit the law's path dependency.<sup>244</sup>

Still, to the extent that Stearns's argument focuses on the *stare decisis* effect of cases brought by ideological litigants, it suffers from a defect similar to that of Brilmayer's argument. It greatly overstates the restraint that standing doctrine imposes on the ability of ideological litigants to create cases that could be used to exploit the law's path dependency. Stearns asserts that "[t]he principal standing ground rules require that claimants be injured by fortuitous historical circumstances beyond their control as a precondition to litigating in federal court."<sup>245</sup> That is certainly *not* true; Stearns is simply restating the Great Myth that courts just decide cases as they come along randomly. In reality, standing doctrine, even at its most stringent, does not require potential litigants to wait for "fortuitous historical circumstances" before suing. 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.<sup>246</sup> As a result, ideological litigants have considerable, if not unlimited, freedom to create justiciable cases that they can use to pursue their alleged schemes of path manipulation, and interest groups exploit this

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239. *Id.* at 177–80.

240. *Id.*

241. *Id.* at 159.

242. *Id.*

243. Brilmayer, *supra* note 99, at 310.

244. STEARNS, *supra* note 122, at 159.

245. *Id.*

246. *See id.* at 177–80. Like a good economist, Stearns falls back on the assertion that standing rules can sufficiently have their desired effect even if they do not prevent ideological path manipulation, provided they make it more costly. *Id.* at 179 cmt. \*. But there is a vast difference between saying that standing rules limit litigation to those who are injured "fortuitous[ly]," *id.* at 159, and saying that standing rules allow ideological litigants to manipulate the judicial process but throw a little sand in the gears when they do so. It seems much harder to believe that the latter is really a constitutional purpose.

freedom by seeking out ideal plaintiffs for test cases.<sup>247</sup> Once again, therefore, it seems that standing doctrine does such a poor job of serving the asserted purpose that the purpose cannot justify regarding the doctrine as a constitutional requirement.

### G. *The Historical–Originalist Theory*

So far, this Article has explored and rejected numerous possible purposes for the justiciability doctrines. But one possibility remains—the whole search for *purpose* is misguided. An originalist might argue that the purpose of justiciability doctrines is irrelevant because courts must enforce the intentions of the Framers concerning the judicial function, and the Framers would have intended courts to be limited by the modes of judicial proceeding that were familiar at the time of the Framing. Whether the resulting justiciability constraints are wise or foolish, purposeful or purposeless, we are stuck with them, some would suggest, on the basis of original intent.

This originalist view has important adherents. Justice Frankfurter believed that the federal judicial power “could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’”<sup>248</sup> Justice Scalia believes that Article III adopted “the traditional, fundamental limitations upon the powers of common-law courts”<sup>249</sup> and that the “common-law understanding” is the “constitutional understanding . . . of what makes a matter appropriate for judicial disposition.”<sup>250</sup> Most recently, the Supreme Court itself has endorsed the Frankfurter view.<sup>251</sup> Some scholars, similarly, take the view that the justiciability constraints should be understood by reference to the Framers’ original understanding, as illuminated by eighteenth-century judicial forms.<sup>252</sup>

247. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 500 (1961) (considering a challenge to a Connecticut birth control statute, brought by a woman whose life would be endangered if she became pregnant); *Steffan v. Aspin*, 8 F.3d 57, 59 (D.C. Cir. 1993) (hearing a challenge to the military’s exclusion of homosexual persons, brought by “one of the most promising students at the United States Naval Academy”).

248. *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). Frankfurter believed that the Constitution “presupposed an historic content” for the phrase “the judicial Power.” *Id.*

249. *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting).

250. *Id.* at 339.

251. See, e.g., *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Coleman*, 307 U.S. at 460) (quoting Frankfurter’s formulation favorably); see also *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998) (same).

252. See, e.g., CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 65 (6th ed. 2002) (“[T]he business of the courts should be the kind of judicial business with which [the Framers] were familiar in the English courts.”); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *YALE L.J.* 816, 816, 816–18 (1969) (“[I]t is hardly to be doubted that the Framers contemplated resort to English practice . . .”); Leonard & Brant, *supra*

This Article's arguments, based on the structural or functional role that justiciability constraints play, do have some originalist component. To the extent that modern justiciability requirements serve no purpose, it seems unlikely that they correctly implement what the Framers intended—especially given the generally purposeful nature of most constitutional constraints.<sup>253</sup> But notwithstanding this originalist element, this Article has treated functional analysis, not originalist expectations, as the guide to the content of Article III. The main point is that we should not interpret the ambiguous terms of Article III to impose purposeless constraints, regardless of original expectations. It is therefore necessary to explain the error in the originalist argument.

The fundamental difficulty with the originalist view is that it fails to account for universally accepted modern principles of justiciability. Although not everyone may realize it, it is accepted that the words “cases” and “controversies” can take on new meanings over time. Courts have deviated substantially from the understanding of what could constitute a “case” or “controversy” as of 1789, and it seems that no one, not even the strongest proponents of constitutional constraints on justiciability, desires to return to the original understanding in this regard.

The point can be seen in several ways,<sup>254</sup> but perhaps the best proof lies in the development of the declaratory judgment action. The declaratory judgment action is a recent innovation. Traditionally, English and American courts acted only on requests for some coercive remedy, such as damages or an injunction.<sup>255</sup> An equitable action in which the plaintiff sought nothing from the defendant, but wanted a decree that would remove doubts about the legality of a potential course of conduct, was “unknown to either English or American courts at the time of the adoption of the Constitution and for more

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note 235, at 34 (asserting that the Framers' interpretation of constitutional provisions should be binding).

253. See *supra* Part II.

254. In addition to the main point developed in the text, see *infra* note 266 for a brief mention of other judicial innovations. For an extended discussion of a closely related point, see Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004). In this excellent article, Professor Bellia explains that much current confusion about justiciability doctrines arises from an attempt to constrain modern courts by rules derived from the eighteenth-century forms of action. *Id.* at 783. As Bellia explains, modern doctrines such as standing represent attempts to deduce justiciability requirements from requirements generally applicable to judicial proceedings at the time of the Framing, but such attempts must fail because, under the forms of action, there were no “generally applicable” requirements. *Id.* Rather, each action had its own requirements, modes of proceeding, and substantive law. *Id.* at 784. Once reforms abolished the forms of action, there was no clear way to apply the different constraints traditionally attached to the different forms to the “civil action” that became the unified mechanism for exercise of judicial power. *Id.* at 817–18.

255. 10 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2751 (3d ed. 1998); C.S. Potts, *The Declaratory Judgment*, 9 TEXAS L. REV. 172, 172–73 (1931); Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69, 72, 76–77 (1917).

than half a century thereafter,<sup>256</sup> and was traditionally regarded as “impossible.”<sup>257</sup>

The result was that parties could not bring many kinds of actions with great potential social utility. In innumerable situations, parties who needed to know their legal rights for planning purposes had no means to obtain a judicial determination and could only act in accordance with their best guess, suffering the consequences if they were wrong.<sup>258</sup> English courts reformed their practice starting in 1852,<sup>259</sup> but that is long after our Framing period, and American practice, in the words of one commentator, remained “incredibly stupid” and denied “remedies which no civilized country ought to deny its citizens” well into the twentieth century.<sup>260</sup> As late as 1928 the U.S. Supreme Court stated that to grant purely declaratory relief “is beyond the power conferred upon the federal judiciary” because “the proceeding is not a case or controversy within the meaning of Article III of the Constitution.”<sup>261</sup> Nonetheless, when Congress passed the Declaratory Judgment Act, which expressly empowers federal courts to hear cases calling for such judgments,<sup>262</sup> the Supreme Court upheld the statute. The Court rejected an originalist approach to justiciability. It held that Article III “did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the

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256. *Willing v. Chi. Auditorium Ass’n*, 277 U.S. 274, 290 (1928); *see also* *Cross v. De Valle*, 68 U.S. (1 Wall.) 5, 14 (1864) (“A chancellor will not maintain a bill merely to declare future rights.” (emphasis omitted)).

257. *Cf. Guar. Trust Co. of N.Y. v. Hannay & Co.*, [1915] 2 K.B. 536, 547 (Buckley, L.J., dissenting) (expressing the opinion that the maintenance of such an action is not possible).

258. For example, if a patentee threatened a manufacturer with a claim of patent infringement, the manufacturer could not seek a judicial determination of its rights. *Sunderland*, *supra* note 255, at 81; *see* *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 735 (Fed. Cir. 1988) (“Before the [Declaratory Judgment] Act, competitors victimized by that tactic were rendered helpless and immobile so long as the patent owner refused to grasp the nettle and sue.”); *Treemond Co. v. Schering Corp.*, 122 F.2d 702, 703–04 (3d Cir. 1941) (“Before the passage of [the Declaratory Judgment] Act patentees received greater protection . . . . Competitors desiring to introduce an article somewhat similar to one already patented met with much difficulty.”); *Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co.*, 5 F. Cas. 345, 350 (C.C.S.D.N.Y. 1876) (No. 2543) (“Until the plaintiff shall be prepared to assert that the two patents are substantially for the same invention . . . I do not see how the statute respecting interfering patents can be invoked.”). A lessee on a long-term ground lease could not learn whether its lease permitted it to knock down its building and build a new one. *Willing*, 277 U.S. at 290. Owners of land might be unable to determine whether they held the land in fee simple or had only some lesser interest. *E.g.*, *Collins v. Collins*, 19 Ohio St. 468, 470 (Ohio 1869). Persons who believed that a criminal statute was unconstitutional could not obtain an advance judicial declaration regarding its validity. *E.g.*, *Shredded Wheat Co. v. City of Elgin*, 120 N.E. 248, 249 (Ill. 1918). *But see Ex parte Young*, 209 U.S. 123, 146–48 (1908) (allowing anticipatory action where the penalty for violating the statute was severe).

259. EDWIN BORCHARD, *DECLARATORY JUDGMENTS* 241 (1934); *Sunderland*, *supra* note 255, at 73–77.

260. *Sunderland*, *supra* note 255, at 77.

261. *Willing*, 277 U.S. at 289.

262. 28 U.S.C. § 2201 (2000).

federal courts.”<sup>263</sup> In regulating judicial procedure, the Court held, “Congress may create and improve as well as abolish or restrict.”<sup>264</sup>

Today, the rule that federal courts may entertain declaratory judgment actions is uncontroversial. Whether or not such actions were familiar in 1789, they are a useful mode of proceeding that courts ought to be able to hear.<sup>265</sup> The assumption that Article III confines courts to proceedings that would have been familiar to the Framers is therefore incorrect.<sup>266</sup> Article III permits development of the judicial power based on social utility.

Contrariwise, some methods of bringing matters before a court that were familiar in early usage have fallen into disfavor. It is well known that federal courts will not hear some matters that were part of the traditional business of the courts at Westminster, most notably requests for advisory opinions.<sup>267</sup> Less well known are some other, rather startling types of judicial business that did reach American shores. Early usage, for example, permitted legal issues to be resolved by a “feigned case,” in which the plaintiff and defendant made (or even fictitiously claimed to have made) a wager over a point of law; the court would resolve the point of law in the course of deciding who had won the wager.<sup>268</sup> American courts, including the Supreme Court, heard cases brought by this procedure,<sup>269</sup> and indeed the

263. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937) (internal quotation omitted).

264. *Id.*

265. *See, e.g., Wright & Kane, supra* note 252, at 68.

266. Other examples of innovation in judicial procedure include the expansion of standing doctrine, which, although it retains the alleged common law requirement of injury, has expanded the categories of injury far beyond those known to the common law. *Compare, e.g., Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939) (denying standing unless the defendant violated a “legal right” of the plaintiff), *with Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (recognizing standing if the plaintiff was injured “in fact”). As Judge Posner puts it, “[n]otions of standing have changed in ways to induce apoplexy in an eighteenth-century lawyer.” *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 990 (7th Cir. 2006), *rev’d sub nom. Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

267. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) (noting the prohibition on advisory opinions).

268. *See, e.g., 3 BLACKSTONE, supra* note 76, at \*452; Lindsay G. Robertson, “A Mere Feigned Case”: *Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 260–63 (tracing the English origins of the practice and describing its application in the United States prior to 1810).

269. For example, a manufacturer of sugar and a federal collector of customs resolved a tax dispute by alleging that they had made a wager over the applicability of the disputed tax. The suit reached, and was resolved by, the Supreme Court. *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 33–34 (1804); *see also* Charlotte Crane, *Pennington v. Coxe: A Glimpse at the Federal Government at the End of the Federalist Era*, 23 VA. TAX REV. 417, 455–61 (2003) (explaining how the parties framed the “feigned case” in order to invoke jurisdiction). For more examples, *see* Robertson, *supra* note 268, at 262–63 (discussing the use of feigned wagers in *Pennington* and in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796)). *See generally* Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999, 1010–18 (1974) (discussing generally “feigned issue” cases and procedures from New Jersey, New York, Virginia, and the federal courts).

“feigned case” was just one of many fictionalized procedures used for bringing cases under the common law system.<sup>270</sup>

And yet, the feigned-issue procedure offends modern sensibilities. If two parties could get a court to decide a question of law by making a wager about it, the entire doctrine of justiciability would be rather pointless. Doctrinally, it is hard to see what would be wrong with a suit to collect on such a wager: the action would take a familiar form (breach of contract), the plaintiff would have standing, and so on. Modern courts have, in fact, sometimes resolved suits about such wagers without perceiving any justiciability problems.<sup>271</sup> Nonetheless, and despite the historical use of this suit form, it is said today that a federal court would not resolve a question of law if the only reason to do so were to settle a bet.<sup>272</sup>

Thus, notwithstanding its frequent repetition, the contention that Article III limits federal courts to modes of proceeding that would have been familiar in 1789 is untrue. The Framers’ likely expectations about the nature of proper judicial business, as measured by the business of eighteenth-century courts, do not determine the rules of justiciability today in either direction. Article III permits socially useful innovation in judicial procedure and forbids some modes of proceeding that were familiar to the Framers.<sup>273</sup>

270. For example, the action of trover frequently required the plaintiff to fictitiously allege that the defendant had found the plaintiff’s goods. 3 BLACKSTONE, *supra* note 76, at \*151–52; Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 455–56 (1996); L.L. Fuller, *Legal Fictions* (pt. 1), 25 ILL. L. REV. 363, 367–68 (1930). Actions of ejectment required the often fictitious allegation that the defendant’s tenant (who might not have existed) violently drove the plaintiff’s tenant (another fictitious person) off the land at issue. The famous case of *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), in which the defendant’s fictitious tenant went by the charming name of “Timothy Trytittle,” used this procedure. See *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 1 (1813) (noting the use of the name in earlier pleadings); Robertson, *supra* note 268, at 257 n.48 (discussing generally the use of fictional tenants in ejectment actions, and listing some common fictitious names); cf. *Pomeroy’s Lessee v. State Bank of Ind.*, 68 U.S. (1 Wall.) 592, 593 (1864) (noting that an ejectment suit was “brought by a nominal plaintiff, as at common law”).

271. See, e.g., *Newman v. Schiff*, 778 F.2d 460 (8th Cir. 1985). Schiff, a tax protester, offered \$100,000 to anyone who cited a law that requires an individual to file a tax return. *Id.* at 462. The plaintiff provided the proper citations (26 U.S.C. §§ 1, 6012, 6151), but Schiff refused to pay. *Newman*, 778 F.2d at 463 nn.5–6. The court ultimately ruled against the plaintiff, but perceived no justiciability problem with the suit, even though it essentially involved a wager over a point of law. See *id.* at 464–67 (deciding the merits of the case on contract-law issues of offer, acceptance, and ratification).

272. See, e.g., *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 876 (7th Cir. 1987) (“[A] ‘pure’ wager, in which A bets B \$100 that a court will say a particular thing about C’s rights vis-à-vis D, is not justiciable.”).

273. In addition to the point developed here, there is also considerable debate concerning whether advocates of the originalist argument have done their historical research correctly. Some scholars contend that eighteenth-century rules did not require what we today regard as standing to sue. See, e.g., Berger, *supra* note 252, at 819–20 (claiming that eighteenth-century English law allowed “strangers,” who had not been personally injured, to attack jurisdictional “excesses”); Jaffe, *supra* note 176, at 1269–71 (discussing admittedly meager evidence suggesting that eighteenth-century courts might have allowed “public actions” in mandamus proceedings by private individuals who had no personal interests at stake); Sunstein, *supra* note 168, at 178, 168–79 (arguing, based on

Given that courts today hear important categories of cases that could not pass muster under an originalist doctrine of justiciability, and that this practice is generally accepted, we must also accept that social utility, not originalist expectations, is the proper measure of permitted forms of judicial action. In interpreting Article III, courts should be guided by a structural understanding of which Article III constraints serve useful purposes and which do not.

#### *H. The Riddle Remains*

Our understanding of the Constitution can never be perfect, but it is usually not that hard to discern the purposes of the Constitution's most important structural features. If anyone asks why the constitutional process for passing legislation is so stringent, there is general agreement that the Framers deliberately made it difficult for Congress to act, so as to restrain the feared legislative power and to ensure that federal legislation would have substantial societal support.<sup>274</sup> If anyone wants to know why we care so much about restricting federal courts to acting only on cases within the nine categories of federal judicial power, it is easy enough to observe that prior to the adoption of the Constitution, each state had its own functioning judicial system, people were concerned about the prospect that new-fangled things called federal courts would be resolving disputes that previously would have gone to the good old state courts, and they wanted to know what *kinds* of cases these new courts would be resolving.

It should be surprising, therefore, that even though the judicial system places great weight on the principles of justiciability, no one has proposed a purpose behind these principles that has received general acceptance. Most of the proposed purposes turn out, on close inspection, to be unlikely candidates. Most are at best very poorly served by the actual justiciability principles. To the extent that justiciability doctrines merely require potential plaintiffs to jump through hoops in order to engage the judicial machinery, they accomplish practically nothing.<sup>275</sup> To the extent that the doctrines prevent certain suits from being brought at all, the excluded suits do not correspond to any proposed purpose of the exclusion.<sup>276</sup> We are left only with the principles' historical pedigree, which cannot sustain them. The contrast between the justiciability requirements and most other constitutional constraints, which have easily discernible and generally accepted purposes, is indeed a riddle.

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English precedents and on early congressional enactments, that Article III was not originally intended to restrict Congress's power to create standing). However, I prefer to put my case on purposive rather than historical grounds.

274. See, e.g., *INS v. Chadha*, 462 U.S. 919, 958–59 (1983) (“[I]t is crystal clear . . . that the Framers ranked other values higher than efficiency.”).

275. See *supra* section III(C)(1).

276. See *supra* subsection III(C)(2)(b).

Our inspection of potential purposes behind the justiciability principles has not, however, been wholly unprofitable. It has revealed some purposes that the principles might reasonably be thought to serve: enhancing the judicial function and allowing Congress more control over the circumstances under which certain actions can be challenged. The final Part of this Article considers how justiciability doctrines might best be reconceived in light of these potential purposes.

#### IV. Answering the Riddle

The analysis of Part III shows two fundamental problems with justiciability doctrines: first, they often accomplish little or nothing other than to make judicial review needlessly cumbersome, and second, even where they appear to do something, the restraints that they impose are not well aligned with any purpose that they are said to serve. Courts could improve justiciability doctrines by focusing on their purposes. Where justiciability constraints are purposeless, they should be discarded. Where they serve a purpose, there is at least the possibility that they should be retained. This Part of the Article first reexamines the whole concept of justiciability in light of what has been discovered about its purposes and then attempts to set forth what a purpose-based justiciability doctrine would look like.

##### A. *Justiciability, Purpose, and the Role of the Federal Courts*

Part III's exposure of the purposelessness of the justiciability requirements has important implications not only for those requirements, but for the overall role of the federal courts. It suggests that courts should reject the dominant, private rights view of their role and embrace the public rights model. Doing so would not lead to judicial tyranny because it would leave in place the most important constraint on the judicial role.

1. *Rejecting the Private Rights Model.*—The analysis of Part III suggests that the dominant, private rights view of the justiciability requirements, and of the role of the federal courts that follows from them, is largely mythical. The notion that courts enforce the Constitution and the laws only as an *incident* of their true function of deciding cases might be true if we really lived in the world posited by this pious, self-abnegating judicial myth: a world in which parties brought suit only when injured by “fortuitous historical circumstances beyond their control,”<sup>277</sup> in which parties were just trying to get redress for their injuries, and in which constitutional or other issues arose only as a necessary incident to the decision of the resulting cases. In fact, as Part II explained, the real world is very different. The ability of interest groups to seek out plaintiffs for test cases, the ability of

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277. STEARNS, *supra* note 122, at 159.

parties to get themselves injured deliberately so as to create cases, the ability of Congress to create justiciable causes where none existed before, and most basically, the ability of activists to bring lawsuits that affect everyone through the mechanism of *stare decisis* suggest that in our legal system, courts *do* have the special function of enforcing the Constitution and the laws, and ensuring that government behaves lawfully. As noted earlier, the public rights or special functions view is popular in the scholarly literature, although it is often taken as a *premise* competing with the premise posited by the private rights view.<sup>278</sup> The point here is that this view should be seen not as a premise but as a *deduction* from the structure of justiciability doctrine and from the doctrine's failure to serve any purpose.

As Part III suggested, even within the formal structure of the private rights model, it is usually possible, with rare exceptions, to achieve the results of the public rights model. It is usually possible to create some lawsuit in which the legality of a questioned practice can be tested and judicial enforcement of the Constitution and the laws achieved. It is usually just a matter of jumping through the necessary hoops. That being so, why require hoops to be jumped through? If, as Part II suggested, they serve no purpose but to add cost and vexation to what is really a public law system, we should discard them. It cannot be a constitutional purpose to permit individuals to use the courts to compel enforcement of the Constitution and the laws, but to make the process technical and expensive. The fiction of the private rights view may have been useful early in our nation's history to mask the magnitude of the power that the Judiciary asserted when it first exercised judicial review,<sup>279</sup> but in our more mature state, with the power of judicial review firmly established, the fiction can be discarded.<sup>280</sup>

Moreover, in sharp contrast to the frustrating riddle that appears when one seeks the purpose of the justiciability constraints imposed by the private rights view, the purpose served by the public rights view is obvious—so obvious that it would hardly seem necessary to mention it if proponents of the private rights view did not treat it so cavalierly. Under this view, the courts serve the purpose of promoting the rule of law and fulfilling the Constitution's vision of "establish[ing] Justice"<sup>281</sup> by requiring government to behave lawfully. This vital, law-enforcing role of courts seems far more than a happy accident or "incident" of the courts' case-deciding function. The purposelessness of justiciability under the private rights view, and the

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278. See *supra* notes 30–35 and accompanying text.

279. See Redish, *supra* note 31, at 653 (suggesting that John Marshall used the private rights approach to limit the political repercussions of asserting the power of judicial review).

280. For a discussion of the use of and persistence of legal fictions, see generally L.L. Fuller, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 363, 513, 877 (1930–1931). Fuller explains that courts may use fictions to obscure the process of legal change, L.L. Fuller, *Legal Fictions* (pt. 2), 25 ILL. L. REV. 513, 519–20 (1931), but that the fiction is generally dropped once it is recognized as wasteful or superfluous, Fuller, *supra* note 270, at 377–80.

281. U.S. CONST. pmbl.

vital purpose served by courts under the public rights view, should lead to the conclusion that the public rights view is the correct one.

The public rights view can also be supported on other grounds: it has some originalist support,<sup>282</sup> and echoes of it can be seen in some aspects of current justiciability doctrine.<sup>283</sup> But the point of this Article is not to ground the public rights view in doctrinal or historical support. The point is to arrive at the public rights view by analysis of purpose. It seems implausible that the Constitution requires attachment to ancient forms that serve no discernible purpose and that can usually be manipulated to achieve what they are said to prevent. If the ends of the public rights view can be achieved anyway, it seems pointless to maintain restrictions that allow those ends to be achieved only in a cumbersome way—particularly given the strong purposes served by allowing courts to fulfill their special role.

2. *The Proper—and Properly Limited—Role of Courts in a Democratic Society.*—Suggesting that the judicial system in fact reflects a public rights view of the role of the federal courts, and that the courts should openly embrace this view, gives rise to the fear that there would then be no constraint on the judicial power. No matter how strongly one shows the purposelessness of justiciability requirements, there remains the nagging

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282. For example, Hamilton suggested that the federal courts “were *designed* to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority,” THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 55, at 467 (emphasis added), and observed that “there ought *always* to be a constitutional method of giving efficacy to constitutional provisions,” THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 55, at 467 (emphasis added). He observed that the Constitution’s limitations, such as the prohibitions on bills of attainder and ex post facto laws, “can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 55, at 466. This Framers, at least, appeared to regard the correction of unconstitutional government behavior as a prime function of federal courts, not as a mere “incident” of some other role. See also Redish, *supra* note 31, at 653–54 (noting a similar strain of reasoning to Hamilton’s in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); Jaffe, *supra* note 176, at 1308 (arguing that the requirement of direct and differentiated injury “cannot . . . stand in the face either of tradition or practice”).

283. Most notably, the public rights view can be discerned in the rule that courts can consider otherwise moot cases if the issue presented is “capable of repetition, yet evading review,” *e.g.*, *Roe v. Wade*, 410 U.S. 113, 125 (1973) (quoting *S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 515 (1911)), and the rule that a criminal defendant, whose conduct a legislature may validly proscribe, may defend himself on the ground that the statute under which he was convicted could, in some other case, be used to prosecute someone in violation of the First Amendment, *e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). The courts have justified each of these rules on the ground that without the rule, issues might escape judicial review indefinitely. *S. Pac. Terminal Co.*, 219 U.S. at 515; see also *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (noting that “because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions,” those whose expression is not constitutionally protected are allowed to challenge a statute). If judicial review were a mere “incident” to the real judicial function of deciding cases, the prospect that certain issues might never be the subject of judicial decision would not be troubling. These exceptions suggest that even current doctrine places value on the issue-resolving, not merely the case-deciding, function of the courts.

sense that we need them because they are all that protect us from “government by judiciary.” But in fact, even if freed from constraints on justiciability, courts would still play only a “proper—and properly limited—role . . . in a democratic society.”<sup>284</sup> The critical constraint on judicial interference with democracy lies not in the procedural conditions for judicial action but in the substantive standard that courts apply on the merits.<sup>285</sup> Most fundamentally, it lies in the principle that courts do not review the wisdom of the actions of the political branches but only their legality.

The Constitution leaves the vast majority of social decisions to elected officials. It does not specify whether taxes should be high or low. It neither requires nor forbids governments to offer welfare benefits.<sup>286</sup> It does not say whether government should help farmers or let them battle market forces unaided.<sup>287</sup> It does not specify what government departments should exist and how they should be structured; that is for Congress to decide.<sup>288</sup> These are just a few of the enormous range of matters left to political control.

In our democratic society, judges have nothing to say about this enormously important set of choices made by politically accountable officials. If we had no doctrines of justiciability whatsoever, the courts would still play only a proper, and properly limited, role in our democratic society, so long as they confined themselves to enforcing legal constraints on executive and congressional action. The people, acting through their elected representatives, would still make the vast majority of choices about the structure of our society. The courts would do no more than enforce the legal constraints that the people or their elected representatives have put in place on legislative and executive behavior.

Believers in strong justiciability doctrines have lost sight of this fundamental point. The sensible desire to constrain the *substantive* role of courts has spilled over into an often purposeless fetish over regulating the *procedural conditions* under which the courts may exercise their power. But if courts stopped considering procedural justiciability altogether (retaining only the political question doctrine), they would in no way take over our democratic government. The most likely result would be some slight

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284. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

285. See 4 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24:21, at 293 (2d ed. 1983) (“The problem of excessive government by judges is only *peripherally* affected by determinations of *who* may litigate; it is directly affected by determinations of *what* judges may do.”); Redish, *supra* note 31, at 657 (“[T]he appropriate battleground for judicial restraint is in the fashioning of the substantive constitutional decision.”).

286. *E.g.*, *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982); *Harris v. McRae*, 448 U.S. 297, 317–18 (1980).

287. *Schroder v. Bush*, 263 F.3d 1169, 1171 (10th Cir. 2001).

288. See, *e.g.*, *Morrison v. Olson*, 487 U.S. 654, 659–60 (1988) (holding that Congress may create independent counsel within the Department of Justice); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935) (holding that Congress may make Federal Trade Commissioners independent of plenary presidential removal power).

increase in the number of occasions on which courts *uphold* lawful governmental action.<sup>289</sup> In some cases, courts would reach and strike down illegal government actions more quickly, and with less procedural bother, than they do under current law. There might even be some circumstances in which illegal government actions that escape challenge under current law would get struck down. But what would be so terrible about that? The political branches are not supposed to take illegal actions in the first place.

Of course, there is always the argument that the more opportunities there are for judicial action, the more opportunities there are for a willful, activist judge to exceed her role and to impose improper limits on actions of the political branches, even while maintaining the guise of merely enforcing legal constraints on political action. The answer, however, is that if a judge really wants to be willful and activist, justiciability is not going to stand in her way. The justiciability doctrines are too malleable to constrain an activist judge, and too many cases are justiciable even under the strictest rules of justiciability.<sup>290</sup> Justiciability is simply not going to save us from judicial activism. The only thing that can save us is judicial restraint. If a judge is not going to be restrained on the merits, it is pointless to imagine that the judge might be restrained by justiciability, and if the judge is restrained on the merits, then justiciability is not needed to keep the judge from intruding on political discretion.

Thus, the notion that justiciability doctrines are “founded in concern about the proper—and properly limited—role of the courts in a democratic society”<sup>291</sup> is misplaced. Substantive law confines courts to a limited role. To the extent that it does not, justiciability will not come to the rescue.

3. *The Final Piece of the Puzzle.*—The preceding sections suggest that the purposelessness of conventional justiciability doctrines indicates that the public rights view of the judicial role is correct. However, the alert reader will recall a potential purpose for justiciability doctrines that needs to be discussed further.

In arguing for the purposelessness of justiciability doctrines, Part III relied partly on the argument that justiciability doctrines do not serve the purposes that are claimed for them and partly on the argument that they simply do not accomplish much of anything, inasmuch as they allow the essence of the public rights view to flourish anyway. But it was noted that there are exceptions to this second argument—justiciability doctrines do permit some actions to escape review altogether. These exceptions must now be dealt with, and doing so gives rise to two possible ultimate conclusions for this Article: one, the public rights view, and the other, a somewhat weaker

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289. I say “slight” because, as this Article has suggested, almost all illegal government actions are subject to challenge in a proper case under current law anyway.

290. See *supra* section III(C)(1).

291. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

conclusion that might be called the “empowering Congress” view of justiciability.

As noted earlier, one rebuttal to the exceptions is that Congress—using some tricks, such as *qui tam* actions, if necessary—can authorize judicial review where it would not otherwise be possible. The exceptions and this rebuttal, put together, give rise to a possible purpose of justiciability doctrines: perhaps they exist to empower Congress to control whether courts should entertain public actions to enforce legal constraints in situations that current law does not view as imposing individualized harms. On this view, the justiciability doctrines at least do *something* and could not be criticized as wholly pointless and cosmetic. But the doctrines really do nothing to the extent that they attempt to resist the power of Congress to authorize judicial review, and so to that extent they should be discarded. Again, the claim is not so much a premise or policy argument about what is good for society as it is a deduction from the structure of what may be accomplished even within current justiciability doctrines.

This view of justiciability gives rise to one possible ultimate conclusion for this Article; namely, courts should always permit actions *if Congress authorizes them*. Under this view of justiciability, courts should determine that Congress can always empower any person to demand that the law be enforced through judicial action. Courts should not require that Congress actually use the various devices, such as *qui tam* actions, that it may use to accomplish this goal, for they are merely cumbersome technicalities. Rather, courts should enforce congressional mandates, such as the one not enforced in *Defenders of Wildlife*, that “any person” may bring suit to enforce specified provisions of federal law.<sup>292</sup> Allowing Congress to control the choice between centralized and decentralized enforcement of federal law may be a real purpose that justiciability doctrines could fulfill, but requiring Congress to jump through judicially mandated procedural hoops, which add nothing of substance but only propitiate the gods of justiciability, is not an appropriate constitutional purpose.

This empowering Congress view has had notable judicial and scholarly adherents. Justice Harlan, for example, believed that public actions should be permitted but only when authorized by Congress.<sup>293</sup> Professors Monaghan and Sunstein similarly would leave control over justiciability matters in

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292. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (rejecting the view that “congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law” met the injury-in-fact requirement for bringing suit).

293. *Flast v. Cohen*, 392 U.S. 83, 131–32 (1968) (Harlan, J., dissenting) (suggesting that the Court should have adhered to the principle that “individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits,” and that “[a]ny hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President”).

Congress's hands.<sup>294</sup> And the claim is different from current doctrine, under which courts sometimes refuse to hear congressionally authorized suits.<sup>295</sup> So establishing this view, by showing that judicial resistance to congressionally authorized suits is pointless and can always be overcome, would be a useful conclusion.

There are, however, problems with this view that lead back to the public rights view. First, as to statutory matters, it is unnecessary. As noted earlier, with or without justiciability rules, Congress could control the circumstances under which courts can enforce federal statutory mandates.<sup>296</sup> The choice between centralized and decentralized enforcement of legal mandates is a vital one,<sup>297</sup> but as to statutory matters, justiciability doctrine ultimately has no impact on this choice. Only as to constitutional constraints is there a doubt as to Congress's power to control the circumstances for enforcement. As a practical matter, therefore, maintaining justiciability doctrine gives Congress only one thing it would not have anyway: namely, control over when widespread enforcement should be permitted for those constitutional provisions that do not, under current law, give rise to widespread standing. Thus, the empowering Congress view posits that courts maintain the whole structure of justiciability doctrine just to allow Congress control over enforcement of a small set of constitutional mandates.

The difficulty with the argument that we have justiciability doctrines to empower Congress to control enforcement of certain congressional mandates is that it would leave enforcement of the affected constitutional provisions in the hands of the very actors whom those provisions constrain, thereby draining those provisions of any purpose. Constitutional constraints would be meaningless because there would be no effectual power in the government to restrain the infractions of them.<sup>298</sup> It seems unlikely that the structure of justiciability doctrine exists for the purpose of making constitutional constraints on government ineffective.

Justice Scalia, of course, suggests that justiciability doctrines exist precisely for the purpose of allowing the people to decide only collectively how much enforcement we want of constitutional provisions that protect the people only collectively. Under that view, however, we never needed the

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294. Monaghan, *supra* note 30, at 1376; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1461 (1988).

295. See *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (holding that despite statutory authorization, individual members of Congress did not have Article III standing to challenge the constitutionality of the Line Item Veto Act because they did not have a "personal stake" in the dispute); *Defenders of Wildlife*, 504 U.S. at 557–58 (holding that despite statutory authorization, plaintiffs did not have standing to challenge a rule promulgated by the Secretary of the Interior interpreting the Endangered Species Act).

296. See *supra* subsection III(C)(2)(c).

297. See *Morrison*, *supra* note 195, at 608–17 (noting many differences between those enforcement schemes in which government officials must bring each enforcement action and those in which members of a broad public may enforce legal rules).

298. See *supra* note 282 (citing Hamilton's arguments on this point).

constitutional provisions in the first place. For example, we hardly need the Statements and Accounts Clause to tell Congress to publish as much of the federal budget as it politically decides ought to be published.<sup>299</sup> That is the default starting point. The empowering Congress view turns certain constitutional constraints into admonitions that not only are merely hortatory, but also are pointless, in that they do no more than redundantly confirm the majority's ability to do what it likes.

Thus, there are two important things to understand about the empowering Congress view. First, even if this view is accepted, it leads to a liberalization of current justiciability doctrines because if the purpose of justiciability is to empower Congress to control enforcement of certain legal norms, courts should allow Congress to exercise that power without requiring compliance with further restrictions that add nothing. Second, however, the view is somewhat implausible in that with regard to those constitutional provisions that it affects, it empowers the very body that the provisions should constrain. This implausibility is the final piece of support for the public rights view.

### *B. A Purposeful Doctrine of Justiciability*

If this Article has persuaded the reader that the Constitution leaves Congress and the courts free to reform justiciability doctrines over time in light of their social utility without regard to historical limitations and that the doctrines, as they have been developed, serve little or no useful purpose and should be further reformed, then the Article will have served its main purpose. Specifying precisely how each doctrine should be applied is not the Article's main goal. Still, it is worthwhile to examine what justiciability doctrines would look like if they were reconsidered and retained only where they serve some real purpose.

The purpose that best survived the examination of Part II was enhancing the judicial function. While some of the justiciability constraints do not actually serve this purpose, others do. A focus on this purpose provides a guide that could allow a proper doctrine of justiciability.

*1. Advisory Opinions.*—Perhaps the most basic question is whether federal courts should refuse to issue advisory opinions. Other aspects of justiciability doctrines are often reduced to this one: for example, it is said that an opinion rendered in a moot case would effectively be an advisory opinion.<sup>300</sup> Therefore, resolving the status of advisory opinions is crucial to justiciability doctrine.

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299. That is the effective result of the Supreme Court's decision that no one has standing to enforce the Statements and Accounts Clause. *See* *United States v. Richardson*, 418 U.S. 166, 179–80 (1974).

300. *E.g.*, *Hall v. Beals*, 396 U.S. 45, 48 (1969).

The source of the prohibition on advisory opinions is unclear. The Supreme Court has said that “suits of this character are inconsistent with the judicial function under Art. III,”<sup>301</sup> but that is mere *ipse dixit*. Courts in numerous other nations and American states issue advisory opinions;<sup>302</sup> plainly such opinions are not intrinsically inconsistent with the concept of a judicial function. *M’Naghten’s Case*,<sup>303</sup> one of the best known of all criminal cases, was an advisory opinion but seems no less judicial because of that.

As subpart IV(A) suggested, the essence of the judicial function lies not in the procedural circumstances of the judicial decision but in its substance, and particularly in the kinds of questions the court will examine. A decision may be properly “judicial” if it confines itself to judicial questions. Thus, when Canada’s Supreme Court advised that Canada’s Parliament could authorize same-sex marriage,<sup>304</sup> it acted judicially, even though it did not act in the context of what U.S. law would recognize as a “case” because it examined only whether Parliament had power to enact the proposed law, not whether Parliament *should* do so.

Thus, instead of thinking about the abstract status of advisory opinions, a better perspective is to ask what purposes are served by allowing or not allowing courts to issue them. Social utility should be the guide.

One can certainly perceive purposes behind the rule against advisory opinions. The rule conserves judicial resources by allowing courts to avoid unnecessary decisions, and it often promotes decision of issues in circumstances conducive to good decisions. Consider, for example, a request for an advisory opinion as to the constitutionality of a bill pending in Congress. Passage of a bill is always uncertain, so the issue of the bill’s constitutionality might never actually arise, and a court’s passing on it might just waste time. Bills are moving targets until the time of passage, so an opinion on a particular version might not determine the constitutionality of a bill subsequently passed. For the opinion to carry real weight, it would have to come from the Supreme Court, our busiest tribunal. To be useful, it would have to

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301. *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972).

302. *E.g.*, MASS. CONST. pt. 2, ch. 3, art. 2 (“Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.”); *In re Advisory Opinion to the Attorney Gen.: English—The Official Language of Fla.*, 520 So. 2d 11 (Fla. 1988) (answering a question regarding the validity of an initiative petition); Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79 (Can.) (determining whether a law permitting same-sex marriage would be within the power of the Canadian Parliament); *M’Naghten’s Case*, (1843) 8 Eng. Rep. 718 (H.L.) (appeal taken from Eng.) (answering questions about the insanity defense); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 19 (1989) (noting that German law permits certain advisory opinions).

303. (1843) 8 Eng. Rep. 718 (H.L.) (appeal taken from Eng.). The case arose when the House of Lords, agitated by the acquittal of a murder defendant on an insanity plea, asked the judges to provide more guidance on the limits of the insanity defense. William E. Mikell, *McNaghten’s Case and Beyond*, 50 AM. L. REG. 264, 264–70 (1902).

304. *Same-Sex Marriage*, 3 S.C.R. 698.

come quickly, which would deprive the Court of the percolation that helps it to render sound decisions. So one can understand the Court's reluctance to pass on these questions.

Similarly, requests for judicial rulings on entirely abstract questions concerning conduct that is not occurring could be a poor use of judicial resources. Consider, for example, a suit for an opinion on the much-debated question of whether the President can start a war without congressional approval. If posed at a time when no such war is even in the offing, the question would be wholly abstract. The President, however, never starts a war in the abstract; there are always particular circumstances, which might bear on the constitutionality of the President's action.<sup>305</sup> To address all the nuances of the question under all circumstances that might arise would require a treatise, not a judicial opinion. Courts are poorly positioned to issue such vast rulings, and any opinion rendered might still not anticipate circumstances that actually arise.

Courts might also simply lack time to address every question that anyone might like to put to them. One need only look at the list of twenty-nine detailed questions (many with subparts) submitted to the Supreme Court Justices by Thomas Jefferson on behalf of President Washington<sup>306</sup> to see why the Justices were loath to answer them. Better to let an Executive Branch lawyer advise on most such questions.

Finally, and most subtly, if courts were required to answer every legal question put to them, society would be deprived of the benefits that may flow from leaving questions unanswered.<sup>307</sup> The Supreme Court has spent over 200 years avoiding definitive resolution of some questions (such as the limits of Congress's power to deprive courts of jurisdiction or to extract information from the Executive), and so long as the ultimate answer remains unknown, the law remains flexible, and everyone has an incentive to compromise and work matters out in a way that everyone can accept.

Still, notwithstanding these points, advisory opinions could sometimes be of great social utility. First, they may save social resources. Consider again the possibility of a judicial opinion regarding the constitutionality of a bill pending in Congress. Producing such an opinion would absorb judicial resources but could save congressional resources. Judicial opinions are expensive, but acts of Congress cost even more. It is wasteful to get a bill through Congress only to have the Supreme Court strike it down, particularly if the bill might have been altered slightly to make it constitutional.

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305. Cf. *M'Naghten's Case*, 8 Eng. Rep. at 722 ("The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case.").

306. 10 THE WRITINGS OF GEORGE WASHINGTON 542-45 (Jared Sparks ed., Boston, Russell, Shattuck & Williams and Hilliard, Gray & Co. 1836).

307. Professor Sunstein has written an entire book celebrating these benefits. See CASS R. SUNSTEIN, ONE CASE AT A TIME (1999).

Advisory opinions would save social resources whenever a judicial opinion, though expensive, would cost less than the resources saved by advance planning.

Also, an advisory opinion might sometimes produce the best judicial decision precisely because the pressures of a live case would be absent. As Justice Holmes observed, great cases can distort judicial judgment.<sup>308</sup> Although justiciability doctrines deprecate judicial action taken in the “rarified atmosphere of a debating society,”<sup>309</sup> that rarified atmosphere might sometimes produce the soundest results.

A recent ballot proposition in Colorado provides an excellent example. In 2004, Coloradans voted on whether to amend their state constitution to provide that their presidential electors be chosen proportionally rather than on the basis of the usual winner-take-all system.<sup>310</sup> There was some doubt as to the power of a state’s people to enact such a proposition,<sup>311</sup> but under current law, a suit challenging the Colorado ballot proposition prior to its adoption would have been nonjusticiable. Such a suit would call for an advisory opinion, which would have no impact if voters defeated the amendment—as they did.<sup>312</sup> Justiciability protected the courts from wasting time on an unnecessary decision.

And yet, allowing the suit to proceed prior to the election would have served important purposes. Given the closeness of the 2004 election, it was possible, prior to election day, that the Colorado initiative’s validity might have controlled the outcome of the whole election. Whether or not the Colorado initiative was valid, courts would surely have done a far better job of ruling on it prior to the election, while everyone would still have been behind a “veil of ignorance”<sup>313</sup> as to who would benefit from any given outcome. Once election day was over, courts might have had to face the question of the initiative’s validity knowing that the whole presidential election rested on their decision. Whatever one thinks of *Bush v. Gore*,<sup>314</sup> it seems clear that the 2000 election dispute was not the Judiciary’s finest hour. Almost everyone believes that some judges—either on the Florida Supreme

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308. *N. Sec. Co. v. United States*, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

309. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

310. Jo Becker, *Colorado Initiative Could Swing Election: Ballot Proposal Would Award State’s Electoral Votes Based on Popular Tally*, WASH. POST, Sept. 19, 2004, at A6.

311. The federal Constitution provides that each state’s electors shall be appointed “in such Manner as the Legislature thereof may direct.” U.S. CONST. art. II, § 1 (emphasis added); see *Bush v. Gore*, 531 U.S. 98, 111–15 (2000) (Rehnquist, C.J., concurring) (noting that this constitutional provision confers powers on a particular branch of the state government).

312. Kirk Johnson, *Electoral Vote Redistribution Is Defeated*, N.Y. TIMES, Nov. 3, 2004, at P9.

313. See JOHN RAWLS, *A THEORY OF JUSTICE* 136–37 (1971) (discussing a theory of justice in which special interests are nullified by assuming that “parties are situated behind a veil of ignorance” in which principles can only be evaluated through general considerations because individuals “do not know how the various alternatives will affect their own particular case”).

314. 531 U.S. 98 (2000).

Court or the U.S. Supreme Court—proved incapable of applying law neutrally knowing that their ruling would decide the election. Surely it would have been better to have courts decide the validity of Colorado’s initiative in advance, even if unnecessarily, than to have another 2000-style dispute, which impugned the integrity of the entire judicial system.

Current justiciability doctrine posits that this is just too bad. The Constitution apparently forbids courts from protecting us against another *Bush v. Gore*. A better rule would look to the social utility of an advance decision.

These balanced reasons for and against the social utility of advisory opinions suggest that while such opinions should not be categorically forbidden, neither would it be best if anyone had power to demand an advisory opinion about anything, anytime. This difficulty may explain the rule against advisory opinions. Because judicial jurisdiction, where it exists, is usually mandatory,<sup>315</sup> courts may be concerned that if the door were open to advisory opinions, they would face an endless series of academic or recreational requests for rulings on contentious points of law that are neither currently arising nor even likely to arise.

The best rule, therefore, would be to give courts discretion over cases calling for purely advisory opinions. Courts should be empowered to consider “how importunately the occasion demands an answer.”<sup>316</sup> Such discretion could be provided and guided by statute,<sup>317</sup> or by judicial doctrine in the absence of statute.<sup>318</sup> Requests for wholly abstract rulings on matters not currently arising and not likely to arise anytime soon should probably continue to be denied, but courts would consider the potential utility of an advisory opinion on a case-by-case basis. Courts might be guided by such considerations as whether a sufficient factual basis for intelligent adjudication of legal issues is present even in advance of events presenting what the law currently regards as a justiciable case<sup>319</sup> or whether the issue presented is one that can properly be resolved on the basis of law rather than policy.<sup>320</sup>

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315. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

316. *LEARNED HAND, THE BILL OF RIGHTS* 15 (1958).

317. *Cf.* 28 U.S.C. § 1367(c) (2000) (giving discretionary jurisdiction over supplemental claims).

318. *Cf.* *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (approving discretionary pendent jurisdiction prior to the enactment of § 1367). Of course, if the rule against advisory opinions were recognized as nonconstitutional, it would follow that Congress could require courts to issue advisory opinions whether they wished to or not. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 164 (1997) (holding congressional grant of standing to “any person” overrides prudential standing doctrines). Thus, courts could exercise discretion only if Congress did not take away that discretion.

319. *See* William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 698–99 (1994) (explaining declaratory judgment actions on this basis).

320. *See* Jaffe, *supra* note 176, at 1302.

The critical point, though, is that advisory opinions should not be viewed as constitutionally forbidden. Once this point is established, it becomes easier to deal with the other, more frequently arising justiciability doctrines because there need be no fear that allowing a case to slip through them will result in a forbidden advisory opinion.

This suggestion is less radical than it might seem. Although the rule against advisory opinions is said to be the bedrock principle of justiciability,<sup>321</sup> in fact some accepted suit forms are effectively requests for advisory opinions, with declaratory judgment actions being the most obvious example. Landes and Posner discuss this point in detail,<sup>322</sup> and they observe that these suits are allowed because the social benefit of resolving legal issues in advance can outweigh the social costs of anticipatory litigation.<sup>323</sup> All that is suggested here is following this purpose-based approach to justiciability more generally, rather than retreating to doctrinal formalism in cases that call for pure advisory opinions.

2. *Adversity*.—The basic requirement of adversity should be retained. This requirement serves a real and important purpose: it contributes to sound judicial decision making. As discussed earlier, courts lack the time and resources to investigate all possible arguments and factual issues that a case presents and must rely on adverse presentation of arguments to inform the judges who choose the final results. Without adverse parties, we could expect inferior judicial decisions.

The requirement of adversity should be interpreted with this purpose in mind. Courts should pay less attention to doctrinal categories into which the parties may fall and more attention to the practical question of whether the parties are appropriately presenting adverse arguments. Of course, a court may never truly know whether a lawyer is presenting the best possible arguments or strategically holding something back, but that is true under the present system, which simply assumes that a party will make proper arguments if the party falls into appropriate doctrinal categories.

The case of *Craig v. Boren*,<sup>324</sup> which was technically a standing case, exhibits the appropriate attitude toward the adversity requirement and justiciability generally. The case presented a challenge to an Oklahoma law prohibiting the sale of beer to men under the age of twenty-one, while

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321. See, e.g., WRIGHT & KANE, *supra* note 252, at 65 (calling the rule against advisory opinions “the oldest and most consistent thread in the federal law of justiciability”).

322. See Landes & Posner, *supra* note 319, at 684. In addition to declaratory judgment actions, they note that quiet title actions, actions for anticipatory breach of contract, actions seeking injunctions against anticipated harm, and actions for judicial review of administrative rules that have not yet been applied are requests for forms of advisory opinions. *Id.*

323. *Id.* at 688–98. Being economists, they say it with equations, but I have always been somewhat skeptical of the usefulness of equations involving immeasurable quantities such as the social costs and benefits of entertaining anticipatory litigation.

324. 429 U.S. 190 (1976).

permitting such sale to women over the age of eighteen.<sup>325</sup> The plaintiffs asserted that the law violated the equal protection rights of men between the ages of eighteen and twenty-one.<sup>326</sup> The plaintiffs included a licensed vendor of beer and a man who, at the time of suit, was between eighteen and twenty-one.<sup>327</sup> By the time the case reached the Supreme Court, the male plaintiff was over twenty-one and thus no longer affected by the challenged law.<sup>328</sup> The question therefore arose whether the beer seller (who was adversely affected because the law cost her some customers) could raise the rights of her eighteen-to-twenty-year-old male customers.<sup>329</sup>

The Court allowed the case to proceed. It emphasized the practical ability of the beer-selling plaintiff to present the issues to the Court. The Court noted that “insofar as the applicable constitutional questions have been and continue to be presented vigorously and ‘cogently,’ . . . the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose.”<sup>330</sup> The Court thus recognized that determination of whether the justiciability requirements are satisfied should be guided by a sense of their underlying purpose.

3. *Standing*.—The doctrine that would change most under a purpose-based approach to justiciability would be the doctrine of standing. Part II suggested that in cases where governmental action affects a broad class, the standing doctrine rarely serves a useful function. It rarely does anything to enhance the judicial function, to preserve the interests of those that the doctrine regards as the “affected” group, or to protect us collectively from judicial interference in public affairs. At most, it serves to empower Congress to control standing in a small set of cases arising under the Constitution (those where government action might be illegal but causes no injury recognized under current doctrine), but as concluded above, that seems an unlikely constitutional purpose for this justiciability doctrine. Standing doctrine should therefore be refocused in light of what little it can do to further the purpose of enhancing the judicial function.

This is not to say that a purpose-based doctrine would allow anyone to sue anyone else for anything. Notably, the arguments made earlier to show that standing doctrine serves no useful function primarily apply to cases where allegedly unlawful action affects widespread groups. In cases of focused injury, the matter would be different. Thus, for example, if A damages B’s property in a car accident and B chooses to let the matter go, it seems clear that the law should not permit anyone else to sue A to collect B’s

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325. *Id.* at 191–92.

326. *Id.* at 192.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 194.

damages, even if such a plaintiff were required to distribute the damages to B.<sup>331</sup> An analysis of purpose confirms this result. If a stranger were permitted to sue in this situation, B would inevitably be burdened, as the litigation would likely require testimony or other participation by B. Limiting suit to B serves the purpose of preserving B's autonomy by respecting B's judgment that litigation is not worth the trouble. Whether this is viewed as a restriction on standing or on causes of action, as Fletcher suggests,<sup>332</sup> a revised doctrine of standing would recognize the proper purpose that is served by limiting the right to sue in such ordinary private lawsuits.

A similar analysis would apply even to governmental action where such action affects only a specifically identifiable individual. Thus, for example, when the Social Security Administration denies an applicant's claim for disability benefits on grounds that are specific to the applicant, no one but the applicant should be entitled to seek judicial review. Again, if the rejected applicant determines that the burdens of litigation are not worth the potential reward of benefits, no one else should have the right to impose those burdens on the applicant.

A different situation is posed, however, when allegedly unlawful governmental action affects, as it often does, a large class of people, and the alleged unlawfulness rests on common issues that can effectively be argued without the necessity of individual participation. In such situations, where everyone in the group is, under current doctrine, already exposed to the possibility that anyone else in the group will litigate the common issues, it seems far less important to respect any particular member's choice to forego litigation. In such matters, the common issues should be litigable by any appropriate plaintiff, such as an interest group, with standing doctrine serving only to verify that the putative plaintiff will appropriately and vigorously litigate the issue presented.<sup>333</sup> Where enforcement of the legal constraints on government is already so widely distributed, little purpose is served by maintaining the current injury requirements, particularly given that as noted earlier, there is and can be no rule against deliberately becoming a member of the injured class.

A somewhat remote analogy may once again be helpful here. A trustee in bankruptcy is vested with the powers of certain hypothetical parties, such

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331. Landes and Posner suggest that limiting standing to B is necessary to preserve B's property rights in his legal claim. If strangers could sue, they suggest, injured parties could lose their rights if they do not win the race to the courthouse. Landes & Posner, *supra* note 319, at 718–19. However, they do not consider the possibility that strangers might be allowed to sue but would have to pay any damages collected to the injured party.

332. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233 (1988).

333. See Monaghan, *supra* note 30, at 1371 (recommending that courts require that “issues be sharply defined and capable of judicial solution”); Tushnet, *supra* note 114, at 1706–07 (recommending a similar “barebones” approach to standing doctrine).

as a hypothetical bona fide purchaser of real property.<sup>334</sup> These powers allow the trustee to subordinate the interests of certain other creditors (for example, the holder of an unrecorded mortgage), and the trustee has them even if the hypothetical parties do not actually exist.<sup>335</sup> Yet the rule is fair: other creditors with lesser interests took the risk that such persons exist, and when their interests are subordinated, they should not be heard to complain that they do not actually exist. The holder of, say, an unrecorded mortgage should know that her interest is precarious and could be subordinated by a bona fide purchaser at any time. The fact that her interest was subordinated in a slightly different way should not engage our sympathy.

A similar lesson applies to standing. If a right is held by a single person (say, the right to sue about a car accident), that person could justly claim unfair surprise if someone else brought the suit against his wishes. But when unlawful actions affect a widespread class, so that the defendant and those whom traditional standing doctrine would regard as injured are already exposed to the risk that anyone in a large group might bring a suit that could affect their interests, it seems but a slight extension to disregard the standing requirement and to permit suit by one standing in the shoes of a hypothetically injured party.

Finally, although unlawful private action can also affect widespread groups, the change advocated here would affect only suits against governments because private action can almost never violate the Constitution. Apart from the Thirteenth Amendment's prohibition against slavery, constitutional constraints are directed against government action, not private action. Private action can violate only statutory law (or common law), and as noted earlier, Congress already has plenary control over who can bring suits in these areas regardless of what standing doctrine provides.<sup>336</sup> Really, therefore, the standing debate is only about constitutional cases, and these will almost invariably be cases against governments.

4. *Mootness and Ripeness.*—Mootness and ripeness would undergo changes similar to that of standing doctrine if courts adopted a purpose-based approach to justiciability. Courts would not eliminate these doctrines entirely but would apply them so as to serve actual purposes rather than to preserve doctrinal purity.

If a case becomes moot and the relevant activity ceases with no likelihood of immediate recurrence as to anyone, dismissal seems appropriate. As with cases seeking wholly advisory opinions, further processing of the case would tend to drain judicial resources unnecessarily.

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334. 11 U.S.C. § 544(a) (2000); LAWRENCE P. KING ET AL., *COLLIER ON BANKRUPTCY* ¶ 544.02 (15th ed. 2006).

335. KING ET AL., *supra* note 334, at ¶ 544.02.

336. *See supra* subsection III(C)(2)(c). Congress's powers extend to common law cases because a legislature can change common law by statute.

If, however, the case involves ongoing governmental action that continues to affect a substantial group of people and the plaintiff will continue to litigate vigorously, the case should continue.

This is hardly a radical suggestion. The Supreme Court has already determined that a class action can continue notwithstanding the mootness of the claim of the named plaintiff.<sup>337</sup> The above suggestion therefore represents but a slight extension of the current rule to cover situations in which the parties can vigorously litigate an important, recurring issue without taking the formal steps necessary to certify the case as a class action.

Ripeness doctrine would perhaps change less, inasmuch as it has already undergone the most necessary change, which occurred when the Supreme Court approved anticipatory challenges to agency rules that require immediate change in the conduct of regulated parties.<sup>338</sup> The guiding principle should be similar: where ongoing governmental action has immediate effects, or future effects that can be identified with sufficient certainty that they can profitably be litigated, and which are so likely to occur that a court challenge will not be an unnecessary drain on judicial resources, a challenge should be ripe. Where there is genuine doubt as to whether the allegedly unlawful action will *ever* really take place, it would probably be wiser to withhold judgment on the validity of the challenged action.

5. *Political Questions*.—Finally, as noted earlier, the political question doctrine serves a genuine purpose. Whether it is a good purpose is a separate question, which I have discussed elsewhere.<sup>339</sup> Insofar as this Article is concerned, the conclusion is simply that unlike some other justiciability doctrines, the political question doctrine does not need to be discarded as purposeless.

## V. Conclusion

In applying the justiciability doctrines, courts should be guided by the doctrines' purposes. To do this, courts must first decide what those purposes are. The justiciability doctrines' lack of clear, generally accepted purposes, in contrast with the plain purposefulness of most constitutional provisions, poses a riddle. Most of the purposes suggested by courts and scholars are implausible. The best view is that justiciability doctrine should serve to enhance the performance of the judicial function. A reconstructed justiciability doctrine based on this purpose would relax current justiciability constraints, particularly with regard to standing. Such a reconstructed doctrine is consistent with the properly limited role of courts in a democratic society:

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337. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 759–67 (1976).

338. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967).

339. See Siegel, *supra* note 231.

democracy requires courts to limit the substance of their rulings but does not imply a limit on the permitted modes of judicial proceeding.