A POLEMIC AGAINST THE STANDING REQUIREMENT
IN CONSTITUTIONAL CASES
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Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.1

—Alexander Hamilton

I. INTRODUCTION

The notion of “standing” is a dangerous absurdity. It is an absurdity because it completely fails to achieve its stated purpose, has no grounding in the text or structure of the Constitution, and is the most incoherent and manipulable “rule” the Supreme Court has ever contrived. It is dangerous because it keeps individuals from having legitimate grievances heard in a court of law, insulates egregiously unconstitutional laws from review, and renders large swathes of the Constitution into mere nugatory aspirations.

Standing doctrine will be familiar to anyone who has practiced in a federal court or completed a legal education in the United States in the past forty years. According to the Supreme Court, the “irreducible minimum” of standing is composed of the plaintiff showing an actual or threatened injury that can be traced to the defendant, and that is redressable by the court.2 The doctrine is said to be explicitly required by the Constitution to keep the Judicial Branch within its proper boundaries.3 It supposedly has the fortuitous side-effect that cases are presented in adversarial, fact-rich

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2 Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). The Court, in its infinite wisdom, has also articulated a series of “prudential considerations” for the standing inquiry, which it applies when it wants to and does not apply when it does not want to. See id. at 492 n.4.

contexts⁴ without the “floodgates” of litigation being opened up that would overwhelm the system.⁵ The Court’s recitations of the standing formula and its purported justifications have become boilerplate elements of published opinions. It is as if, through sheer force of repetition, the Court hopes its audience will be hypnotized by the mantra of standing and forget that the doctrine was fashioned relatively recently and out of whole cloth.⁶ In short, the Court would have us believe that the way things are now is the way they have to be, but this is not true.

This Article is one in a long line. Over forty years ago, Louis Jaffe wrote, “There is already an enormous and adequate literature on the law of standing.”⁷ The vast majority of this literature has been critical of the Supreme Court’s creation and application of the doctrine,⁸ and commentators have suggested a wide variety of reform.⁹ This Article goes

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⁴ Valley Forge Christian Coll., 454 U.S. at 472.
⁵ Contra Kenneth E. Scott, Standing in the Supreme Court—A Functional Analysis, 86 HARV. L. REV. 645, 673–74 (1973) (characterizing high litigation costs as the barrier holding back the floodgates).
⁹ See, e.g., Heather Elliott, The Functions of Standing, 61 STAN. L. REV. 459, 515 (2008) (arguing standing should be replaced with “prudential abstention doctrine”); Richard Murphy, Abandoning Standing: Trading a Rule of Access for a Rule of Deference, 60 ADMIN. L. REV. 943, 987 (2008) (arguing replacement of standing doctrine with “clear error” approach to interpretation); Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. REV. 1741, 1776 (1999) (arguing that standing doctrine should be revised to be simpler, more objective, more consistent, and more deferential to democratically accountable branches); Eric J. Segall, Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions, 54 U. PITT. L. REV. 351, 402–03 (1993) (arguing that standing doctrine should apply only to protect a societal rights); Sunstein, supra note 6, at 166–67 (arguing that the injury in fact test should be replaced by a cause of action inquiry); Mark V. Tushnet, The New Law of Standing: A Plea for Abandonment, 62 CORNELL L. REV. 663, 700 (1977) (suggesting that standing should be refused only if (continued)
It argues not that the standing doctrine should be tinkered with or liberalized, but instead that, at least when the constitutionality of a statute or act is in question, the doctrine should be wholly abolished. In short, the standing doctrine does not deserve to be at the front of every published decision involving federal law, but buried so deep in the graveyard of discredited and discarded judicial inanities that it can never be dug up again.

In place of standing, this Article proposes that any individual be afforded the opportunity to contest the constitutionality of any statute or government act. Article III courts would become open constitutional courts. This proposition may seem breathtakingly radical at first glance. However, it is only radical to the extent that the idea of an entrenched written constitution was once thought radical, or that judges should have the ability to declare legislation void was once unthinkable. The ratification of the United States Constitution was a seismic shift in the history of law, an event that was an order of magnitude different than what had gone before. The rule of law, as incarnated in the Constitution, that the powers of every member of every branch of government are limited in crucial ways cannot be served if recourse to that fundamental document can be made only in the fortuitous event that an individual suffers an “actual injury.”

plaintiff could not present case adequately, factual concreteness was lacking, or plaintiffs more directly affected would be likely to come forward).

10 Accord Christian B. Sundquist, The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III, 1 COLUM. J. RACE & L. 119, 157 (2011) (“The convoluted doctrine that evolved from the Court’s disingenuous interpretation of ‘case’ or ‘controversy’ must be forsaken completely. Merely modifying the requirements of standing will do little to guard against privilege and political decision-making. Instead, the entire language of standing must be removed from the judicial toolbox.”). Sundquist’s article reaches many of the same conclusions as I do, although we reach these conclusions through somewhat different arguments.

11 This proposal is limited to claims based upon the Constitution, which are referred to generally as “constitutional cases” in this Article. The standing doctrine is used to prohibit a wide variety of other lawsuits and is especially dominant in administrative law cases involving environmental law. This Article does not take a position on the suitability of standing requirements in nonconstitutional cases.

12 This description is borrowed from the title of Patrick Keyzer’s book proposing the abolition of standing in Australia. See Patrick Keyzer, Open Constitutional Courts (2010).

The reasons for retaining the murky and confused standing requirement in constitutional cases are astonishingly poor once one looks below the surface. There is no contemporary evidence that the framers meant the “case or controversy” limitation in Article III to create a standing barrier.\(^{14}\) In fact, the notion of standing was unknown to the framers’ generation, and for over a century, the Supreme Court entertained cases that today would not meet the Court’s test.\(^{15}\) Basing the application of standing doctrine on the supposed necessity of ensuring the separation of powers completely ignores the related necessity of what we today call maintaining checks and balances.\(^{16}\)

The framers were far more concerned with Congress or the President exceeding their powers than they were of the Supreme Court doing so.\(^{17}\) In any event, the standing doctrine is a ridiculously poor device for ensuring separation of powers because it is essentially random in nature. Standing doctrine instructs federal judges not to decide a subset of cases, but that subset of cases bears no direct relationship with the very different subset of cases that could induce an unwary court to expand its powers

\(^{14}\) See discussion infra Part III.

\(^{15}\) See, e.g., Union Pac. R.R. Co. v. Hall, 91 U.S. 343, 355 (1875) (allowing plaintiffs to move for a mandamus that would enforce a public duty).

\(^{16}\) See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803) (“The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . .”); THE FEDERALIST NO. 51, supra note 1, at 261 (James Madison) (“To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the [C]onstitution? The only answer that can be given is . . . the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places); Raoul Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 YALE L.J. 816, 828 (1969) (“Overemphasis of the ‘separation of powers,’ however, is apt to obscure the no less important system of ‘checks and balances.’”).

\(^{17}\) See, e.g., THE FEDERALIST NO. 78, supra note 1, at 396 (Alexander Hamilton) (“It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature . . . . The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.”); Berger, supra note 16, at 832, 834 (“We must remember that the present stature of Congress by no means corresponds to the place it occupied in the minds of the Founders. For them Congress was an object not of awe but of apprehension,” and “the founders must have welcomed any traditional mechanism that could aid in keeping Congress within bounds.”).
illegitimately. In other words, the Judicial Branch already has every opportunity it could ever ask for to aggrandize power unto itself simply by deciding on the merits cases in which an actual injury exists. Carving out an unrelated subset of cases from judicial cognizance has no more effect on the overall separation of powers than if judges were to roll dice for each constitutional case and dismiss the action when snake eyes turn up. Policy arguments that standing is necessary for an adversarial process that sharpens the issues and allows for introduction of the best available evidence simply fails in light of the fact that, historically, many plaintiffs who do have traditional standing litigate the constitutionality of acts or laws for purely ideological purposes and make quite good adversaries for the government. As for the floodgates argument, the time and money involved in shepherding a case through the American legal system is enough to deter all but the most determined litigants, regardless of a standing requirement. Even for wealthy or persistent litigants, courts would retain their traditional ability to dismiss frivolous or vexatious claims. The cases that would make it through are cases in which a serious, arguable claim exists that a statute or governmental act violates the Constitution. Those are the types of cases federal courts should want to hear, as they go to one of the fundamental reasons for the courts’ existence.

On the other hand, the case for abolishing the standing requirement rests on a simple foundation that is as sound as the Constitution itself: For the Constitution to be law, it must be enforceable; but the standing doctrine has rendered several portions of the Constitution functionally void. If it is reasonable to assume that the framers of the Constitution wanted it to be more than merely a list of rhetorical exhortations, then it must also be reasonable to assume they would not want the judiciary to pick and choose which portions to enforce based on whether the plaintiff suffered an arbitrary and amorphous “injury in fact.” The standing doctrine itself is the injury in fact, as it limits the ability to enforce the fundamental law of the nation. The rule of law cannot exist when citizens are functionally prohibited from finding out whether those laws are valid to begin with. Simply put, everyone has an interest and a right to know whether the laws which purport to bind them are, in fact, constitutional. The ideological

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18 See, e.g., Marbury, 5 U.S. at 174 (“It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”).

19 See Keyzer, supra note 12, at 123 (“[T]he constitutional provisions that underpin the guarantee of judicial review in the Constitution can and should be interpreted as yielding an entitlement to know whether a law is valid . . . .”); Donald L. Doernberg, “We the People”: (continued)
plaintiffs, "bystanders," and "busybodies" that the Court dismisses so callously as not being worthy of its time should in fact be praised as civic-minded individuals who care about the country and the direction it is headed. Such plaintiffs may be wrong, shortsighted, selfish, or naive; but at least they are not apathetic. They do not deserve the special humiliation of being told not only that they have lost, but that they had no business playing the game in the first place. If their claims are meritless, our courts are quite capable of dismissing their suits accordingly, and no harm is done. However, if they present even an arguable case that a law or action is unconstitutional, they should be heard, because if they are right, then they have given our system of constitutional supremacy a chance to function as intended. We need not live in "fear of too much justice."

II. THE NULLIFICATION EFFECT

A constitution can mean something, or it can mean nothing. It can be binding on the government, or it can be a long series of good suggestions to be discarded when convenient. It can be judicially enforceable or judicially ignored. There is no mystery as to where the U.S. Constitution

John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CAL. L. REV. 52, 96 (1985) ("When government violates the Constitution, the stake in the outcome of the controversy is society’s stake, and is the most fundamental interest possible: the interest in government functioning as agreed upon by its creators.").

Ironically, for the purposes of criminal prosecutions, defendants are presumed by law to know what the law is, but the standing doctrine often prevents us from knowing whether a law is constitutional.


21 See, e.g., United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973) (stressing that plaintiffs must have a “direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders”).

22 See, e.g., Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (rejecting organizations with a mere “special interest” from bringing litigation on behalf of any individual citizen).

23 Doernberg, supra note 19, at 98 (“The Court’s belittling references to ‘generalized grievances’ imply that government’s obedience to the Constitution is too meager an interest to deserve judicial attention. In fact, in a society based on the Lockean model, there can hardly be a greater interest, or one more worthy of judicial attention.”). The doctrine of standing is thus akin to requiring every potential voter on a legislative referendum to personally explain how the outcome would affect his or her own interests.

falls on the spectrum. The entire thrust of the document itself and the context of its origins indicate the desire to simultaneously grant and limit power. The notion that the Judicial Branch serves as a key protection against the expansion of executive and legislative power is reflected in multiple places in *The Federalist Papers*, such as in Number 78:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.25

The U.S. Constitution was meant to be enforceable, and except for the Preamble, was meant to be enforceable in its entirety. The framers took their work seriously and did not anticipate that only certain portions of the Constitution would be afforded weight in the future. Hamilton noted, “[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions.”26 On this, Chief Justice Marshall was in agreement: “It cannot be presumed that any clause in the [C]onstitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.”27 Any judicial doctrine that effectively excises multiple guarantees and prohibitions from the Constitution is a gross betrayal of this fundamental precept, and should be treated accordingly. Yet, this is precisely the effect of the standing doctrine. A concise summary of oft-discussed examples will demonstrate the point.

In a one-paragraph, per curiam decision, the Supreme Court in *Ex parte Lévitt*28 managed the impressive feat of functionally erasing the Emoluments Clause29 from the Constitution while simultaneously allowing an individual clearly forbidden by it to join the ranks of the Court. The

26 *The Federalist* No. 80, *supra* note 1, at 403 (Alexander Hamilton).
28 302 U.S. 633 (1937) (per curiam).
29 U.S. Const. art. I, § 6, cl. 2.
Emoluments Clause provides: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time . . . .”  

Every constitutional provision can lead to interpretive difficulties in cases at the margins, but the core of the Emoluments Clause is clear: “[W]henever a federal office is created, or has its compensation increased, the Emoluments Clause makes all Senators and Representatives ineligible for appointment to that office until their current congressional term ends.”  Ex parte Lévitt involved a challenge to then-Senator Hugo Black’s appointment and confirmation to the Supreme Court on the basis that, while in the Senate, he assisted in passing legislation to provide all members of the Supreme Court with full pensions upon retirement at or after the age of seventy. As one of the few scholarly treatments of the Emoluments Clause notes:

[T]he remuneration available at age seventy to a Justice who no longer desired active service had increased significantly—from zero to full salary. . . . This enhanced financial package made the office of Associate Justice more attractive than it had been, creating a disability under the Emoluments Clause that should have prevented Black’s appointment until his Senate term ended . . . .

The Supreme Court, faced with its first opportunity to give meaning to the Emoluments Clause, shirked away from its responsibility on the basis that the plaintiff lacked standing. After all, he was only a citizen and member of the Supreme Court bar, and had “merely a general interest common to all members of the public.”  It is fair to say that the Emoluments Clause is a relatively minor and obscure provision of the Constitution, and that Black, in the eyes of many, turned out to be an excellent judge who did much to further the cause of civil liberties. The

30 Id.
32 See id. at 114–17.
33 Id. at 116–17.
34 Ex parte Lévitt, 302 U.S. 633, 634 (1937).
35 Id.
point, however, is that if the plaintiff in *Ex parte Lévitt* did not have standing to raise the issue, it is difficult to imagine who would. Citizens are all bound by the rulings of the Supreme Court, yet most have “merely a general interest” in knowing whether the members of Court are constitutionally entitled to be there?

The result of *Ex parte Lévitt* is that issues under the Emoluments Clause are effectively left to the President to consider regarding appointments, and left for the Senate to consider regarding confirmations. The consequences are predictable:

> While the courts have remained above the fray, Congress, on the other hand, selectively has raised possible Emoluments Clause issues surrounding presidential appointments. Such challenges, however, were clearly motivated by pure partisan politics, giving the observer the uneasy sense that the advocates did not themselves believe the constitutional arguments they were making.\(^37\)

The Emoluments Clause was put there for a reason;\(^38\) the reason was not simply to be a tool for partisan political maneuvering.

A similar unfortunate result took place after a challenge made under the related Incompatibility Clause, which provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”\(^39\) The Incompatibility Clause serves the general purpose of diffusing power between the Legislative and Executive Branches by ensuring disparate membership,\(^40\) but has special significance regarding military service. The framers wanted to ensure that Congress was not dominated by the military, but also wanted Congress’s eminent members to be able to immediately take up important leadership positions

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\(^{38}\) See *id.* at 156–74 (discussing various views on the purpose of including the Emoluments Clause in the Constitution).

\(^{39}\) U.S. Const. art. I, § 6, cl. 2.

\(^{40}\) See, e.g., *The Federalist No. 76, supra* note 1, at 387 (Alexander Hamilton) (calling the Incompatibility Clause one of the “important guards against the danger of executive influence upon the legislative body”) (cited in Schlesinger v. Reservists Comm., 418 U.S. 208, 232 (1974) (Douglas, J., dissenting)).
in times of war by resigning from office.\textsuperscript{41} Thus, the Emoluments Clause is limited to “civil offices” and extends to the length of the members’ terms (regardless of resignation), while the Incompatibility Clause applies to all offices (civil and military), but applies only during members’ continuance in office.\textsuperscript{42} As David Dow explains:

> To those familiar with military regimes, this is a rather important constitutional guarantee. The [I]ncompatibility [C]lause epitomizes—and protects—the balance between civilian and military power. It reflects the wisdom that just as war is too important to be left to the generals, legislation is too important to permit military dominance.\textsuperscript{43}

The Supreme Court was asked in \textit{Schlesinger v. Reservists Committee}\textsuperscript{44} to resolve the interesting question of whether members of Congress could simultaneously be members of the military reserve. The plaintiffs, citizens and taxpayers, argued that reserve membership could create undue influence by the Executive Branch on the Legislative Branch and create conflicting obligations on congressmen who were simultaneously members of the reserve.\textsuperscript{45} The framers considered the ultimate issue in the case—the relationship between military and civilian influence in Congress—to be serious and compelling. The issue was also one that could not simply be left to the political branches to resolve, as collusion to undermine civilian control would be possible. But leaving it to Congress was exactly the effect of the Court’s decision to dismiss the case for lack of standing because the plaintiffs had not suffered “concrete injury.”\textsuperscript{46} The Court remarked, “The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.”\textsuperscript{47} But why is it necessary to establish constitutional bounds by selectively deciding

\textsuperscript{41} See O’Connor, \textit{supra} note 31, at 106 & n.84.
\textsuperscript{42} U.S. CONST. art. I, § 6, cl. 2.
\textsuperscript{44} 418 U.S. 208 (1974).
\textsuperscript{45} \textit{Id.} at 212.
\textsuperscript{46} \textit{Id.} at 222–23. At least one lower court has found standing to sue under the Incompatibility Clause in the context of a challenge to a member of Congress serving as a judge in a military court. The government strongly contested standing, and the case was not appealed to the Supreme Court. See \textit{United States v. Lane}, 64 M.J. 1 (U.S. Armed Forces 2006). I am grateful to Seth Tillman for bringing this case to my attention.
\textsuperscript{47} \textit{Id.} at 227.
when—or what parts—to enforce? Are we to be aghast at the importune temerity of “mere” citizens asking the highest judicial tribunal in the land to resolve a fundamental question of constitutional law?48

*United States v. Richardson* demonstrates the nullifying effect of the standing doctrine in yet another context. Here, the Court was asked to give effect to a portion of the Constitution which stated: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”50

There is no great mystery as to the purpose of this provision: the need for Congress and the Executive to remain accountable for their spending to the people who elect them is obvious.51 Without knowing how much money is spent, and for what purpose, the electorate cannot determine whether government officials are keeping their promises and directing the machinery of government to achieve the priorities that the nation as a whole has set.52 A statement of expenditures is also a crucial way to uncover errors and corruption.53

In *Richardson*, the plaintiff sought, under the Regular Statement and Account Clause, to force publication of the amount of money Congress appropriated to the CIA and a general description of how the appropriation was used.54 Since the CIA’s inception, Congress’s standard practice has been to conceal any appropriations to the CIA through appropriations to other government agencies, and then to have the Office of Management and Budget transfer the funds from those agencies to the CIA.55 The practice has the intended effect of keeping the budget of the CIA confidential, and the unintended effect of making it impossible for the

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48 See *Dow*, *supra* note 43, at 1213 (“That the incompatibility clause protects all Americans equally scarcely seems reason enough to deny to a group of them the power to raise the issue in the federal courts.”).


50 U.S. Const. art. I, § 9, cl. 7. In lieu of a better title, this Article refers to this as the “Regular Statement and Account” Clause.

51 See *Note*, *The CIA’s Secret Funding and the Constitution*, 84 Yale L.J. 608, 615 (1975).

52 See *id*.

53 See *id*.

54 418 U.S. at 168.

55 See *Note, supra* note 51, at 618–19.
public to know how much of their published budgets other agencies are actually using.\footnote{See id. at 619–20 (“Because the funds transferred to the CIA can come from any government agency, the Congress and the public cannot with assurance accept the account covering any government agency as the regular statement and account the Constitution requires.”).}

The issue raised in this case is a good one. On the one hand, the practice of secretly funding the CIA appears to violate the constitutional provision requiring a “regular Statement and Account of the Receipts and Expenditures of all public Money.”\footnote{U.S. Const. art. I, § 9, cl. 7. See Dow, supra note 43, at 1213 (“[The plaintiffs’] claim [in Richardson] was that the Constitution guarantees all Americans the right to know how the various agencies of government spend their money. This was not an abstract grievance about political theory; it was an assertion that the Constitution compels an open and accountable government which fully discloses its expenditures.”); Note, supra note 51, at 619–20 (“Such practices must be judged a prima facie violation of the first part of the Clause. . . . The auditing procedure suggested by the second part of the Clause is also abrogated.”).} On the other, the argument for national security seems plausible, and the Court has often afforded weight to that interest in other contexts when interpreting the Constitution.\footnote{See Note, supra note 51, at 627.} One could imagine multiple reasonable ways to resolve the tension. The Court could have said that the funds appropriated to the CIA could remain concealed “off-book,” but could not be hidden in a way that distorted the published appropriations directed towards other agencies. Alternatively, the Court could have said that “lump sum” appropriations to the CIA must be disclosed, but not in such detail that they could reasonably pose a risk to national security.\footnote{This alternative is the one favored in Note, supra note 51, at 633 (“The Constitution requires, at a minimum, lump-sum appropriation and accounting, and an end to secret transfer of funds.”).}

The Court even could have said it would defer to Congress’s judgment regarding both national security implications in this context and whether to allow the current practice to continue unchanged. In some of those results, the plaintiff would have been satisfied, and in others, he would clearly have lost. In every result, however, the provision would have remained effectively valid and enforceable if Congress tried to conceal appropriations that had nothing to do with national security. The worst possible result would have been to say that the plaintiff had no right to bring the case in the first place because that renders the provision \textit{unenforceable in every instance}—that is exactly what the Court did.
By denying the plaintiff standing because he is simply a taxpayer, a voter, and not “in danger of suffering any particular concrete injury,” the Court has asked us all to take out scissors and excise the Regular Statement and Account Clause from the Constitution (remember to remove the Eligibility and Incompatibility Clauses as well). If “mere” taxpayers or voters have no right to enforce the provisions, no one will. According to the Court in Richardson:

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. . . . Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

Thus, to its credit, the Court recognized the obvious consequences of the standing doctrine when those consequences are applied to the structural guarantees in the Constitution: no one will have standing, and those provisions will fall outside the scope of judicial review. To its discredit, however, the Court seemed satisfied with this result and justified its satisfaction by offering a condescending middle-school civics lesson on democracy. However, that answer could be used to sweep away the entire institution of judicial review—Why not make the entire Constitution nonbinding and leave it to the political process to enforce? The justification given by the Court is as absurd as the result.

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61 Id. at 179.
62 See Segall, supra note 9, at 361–62 (“[T]he Richardson Court was not troubled that the private rights model and the resulting personal injury requirement might render some constitutional provisions judicially unenforceable. The Court failed to consider, however, whether a constitutional provision can have meaning as a limitation on governmental power if it cannot be enforced in federal court.”).
63 See Susan Bandes, The Idea of a Case, 42 Stan. L. Rev. 227, 267–68 (1990) (“In Schlesinger and Richardson, however, the Court denied standing despite its recognition that no better plaintiff was likely to exist and that the issue might therefore never be (continued)
How could members of the electorate decide that Congress was giving too much—or too little—funding to the CIA without seeing a regular statement of appropriations? It makes no sense to leave it “to the political process” if participants in that process lack information crucial to making a decision. Similarly, how could it make sense that members of Congress are to decide for themselves whether their roles as legislators are compatible with membership in the military under the Incompatibility Clause or whether they should be barred from assuming offices in the Executive Branch when they voted to increase the financial attractiveness of that appointment under the Emoluments Clause? Again, *The Federalist Papers* is on point:

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the [C]onstitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the 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 interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law.64

A reasonable assumption is that specific prohibitions and guarantees placed in the text of the Constitution were to be more than mere rhetorical devices to be used and manipulated during “the political process.”65 The framers saw both the necessity and the danger of power. If a limitation on

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64 *The Federalist No. 78, supra* note 1, at 395 (Alexander Hamilton).

65 Dow, *supra* note 43, at 1213. Dow expresses concern that standing is problematic when societal rights are at issue: “The consequence of this insistence is that under current doctrine, no one may enforce societal rights. Societal rights thus cease to be constitutional guarantees at all and become instead merely words.” *Id.* at 1199.
power was to be left solely to the discretion of Congress or to the voters at the ballot box, that limitation would not have been explicitly placed in the Constitution to begin with.66 And if a limitation is in the Constitution, there is no rational reason for rendering it a nullity simply because the plaintiff has not satisfied whatever vague and ever-changing definition of “injury” the Court has adopted since it last changed its mind a month or a year before. The precise limitation in the Constitution is what is important, not who happens to bring it to the Court’s attention.

This nullification problem of using standing in constitutional cases is not confined to the Emoluments, Incompatibility, and Regular Statement and Account Clauses. Apart from the guarantees listed in the Bill of Rights, many of the limitations on government are of a nature in which “actual injury” is unlikely. The Twenty-Seventh Amendment’s prohibition on members of Congress raising their salaries during their current term in office is a good example: no one, including taxpayers or members of Congress themselves, has standing to litigate a claim under the Amendment.67 The issue may still have political ramifications, but it had that before the Amendment was ratified—its presence in the Constitution makes little difference. Presumably, nothing but political pressure could stop Congress from raising the compensation of a popular president during a term in office despite a clear prohibition from doing so in the Constitution,68 on which Alexander Hamilton remarked that “[i]t is not

66 See Richardson, 418 U.S. at 200–01 (Douglas, J., dissenting) (“What purpose, what function is the clause to perform under the Court’s construction? The electoral process already permits the removal of legislators for any reason. Allowing their removal at the polls for failure to comply with Art. I, s. 9, cl. 7, effectively reduces that clause to a nullity, giving it no purpose at all.”); Doernberg, supra note 19, at 99–100 (“[T]he Court in effect makes constitutional decisions a matter of majority vote. . . . [A] process against which the Constitution was to provide some insulation.”). See also The Federalist No. 51, supra note 1, at 262 (James Madison) (“A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”).

67 See, e.g., Schaffer v. Clinton, 240 F.3d 878, 880 (10th Cir. 2001) (denying standing to several types of plaintiffs to challenge cost-of-living raises to Congressmen). Segall raises the example of the Twenty-Seventh Amendment. Segall, supra note 9, at 395. Segall argues standing limitations should be relaxed when “societal rights,” like those created by structural provisions of the Constitution, are involved. Id. at 355. Segall also asserts: “Federal courts must hear these kinds of lawsuits or parts of the Constitution will be judicially unenforceable.” Id. at 395.

68 U.S. Const. art. II, § 1, cl. 7.
easy . . . to commend too highly the judicious attention which has been paid to this subject in the proposed Constitution. . . . It is impossible to imagine any provision which would have been more eligible than this.”69 Similarly, the restriction in Article I, Section Nine, Clause Eight that prohibits Congress from bestowing titles of nobility is unenforceable, despite Hamilton calling it “the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.”70

Even the Establishment Clause survives only because the Court crafted two narrow, and somewhat idiosyncratic, exceptions to the normal standing doctrine to allow challenges to be made. Any laws involving actual coercion or that burden the exercise of religion would create injuries for the purpose of standing, but such laws could be challenged under the First Amendment’s guarantee of religious freedom.71 For the Establishment Clause to have an independent meaning, it must apply to laws that neither are coercive nor burden individual religious practice. However, a law directing funds to a particular religion, or even establishing a national church, would not constitute an actual injury to any individual.72 If the Court imposed normal standing doctrine, then the Establishment Clause would become toothless. To address this problem, the Court in Flast v. Cohen73 recognized taxpayer standing to challenge government action under the Establishment Clause. Later, the Court interpreted the term “injury” incredibly broadly in the Establishment Clause context. While the Court has normally found ideological or (for lack of a better word) psychological injuries insufficient to confer standing in other areas, it has recognized that something as simple as an individual walking past a statue or display that arguably endorses religion is sufficient

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69 The Federalist No. 73, supra note 1, at 371 (Alexander Hamilton).
70 The Federalist No. 84, supra note 1, at 436 (Alexander Hamilton).
72 See Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test, 86 Mich. L. Rev. 266, 297 (1987) (“Governmental action violating the clause generally involves some form of support for religion. But the religion so benefited is not injured . . . and nonadherents to the religion may be hard pressed to show any concrete injury which they have personally suffered.”).
injury to that person to constitute standing. The contradiction is evident: the Supreme Court defines injuries broadly under the Establishment Clause and narrowly under the rest of the Constitution. The reason for the contradiction is evident as well: without it, the Constitution’s fundamental guarantee of government neutrality towards religion would be gutted. The problem is that the Supreme Court has effectively picked which provisions of the Constitution are judicially enforceable through the manipulable and nontransparent facade of an inquiry into standing.

The nullification objection to the standing doctrine is enough on its own to demonstrate that the doctrine is a bizarre and irrational gloss on the fundamental precepts contained in the Constitution. Standing is the Court-mosquito’s proboscis, which sucks the lifeblood out of constitutional provisions. If the Constitution clearly demanded an inquiry into standing, then the principle of fidelity to the text would understandably outweigh other concerns. However, as explained in the next section, nothing compels, or even permits, the Court to entangle the Constitution with the judicially-conjured standing doctrine.

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74 See, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 577–78 (1989) (deciding the constitutionality of a crèche placed in a county courthouse); Mary Alexander Myers, Note, Standing on the Edge: Standing Doctrine and the Injury Requirement at the Borders of Establishment Clause Jurisprudence, 65 Vand. L. Rev. 979, 993–94 (2012) (citing Van Orden v. Perry, 545 U.S. 677 (2005)) (“[T]he Court has also held that outside the Establishment Clause context, psychological injuries with slight or tenuous connections to alleged constitutional violations are not sufficient injuries for standing purposes. The general stance against purely psychic or ideological injuries is in tension with Flast and current Establishment Clause standing jurisprudence.”). Apart from its impact on environmental law, the relationship between standing and the Establishment Clause is perhaps the most frequently discussed aspect of the doctrine, and for that reason will not be discussed further here.

75 See Pierce, supra note 9, at 1762 (“Any judge can write a reasonably well-crafted opinion granting or denying standing in a high proportion of cases. The Supreme Court has issued so many opinions on standing with so many versions of injury, causation, redressability, and zone of interests that any competent judge can find ample precedent to support broad or narrow versions of each of the doctrinal elements that together comprise the law of standing.”).

76 For the metaphor, though in a different context, I am indebted to Frank Swancara, Obstruction of Justice by Religion: A Treatise on Religious Barbarities of the Common Law, and a Review of Judicial Oppressions of the Non-Religious in the United States 222 (1936).
III. The Case or Controversy Crutch

The requirement that litigants demonstrate standing is purportedly mandated by the Constitution’s statement that the “judicial power” of the United States extends to a described list of “cases” and “controversies.” The words “cases” and “controversies,” given their ordinary meaning, would not imply a standing limitation. If a court hosted a motivated plaintiff and an uncompromising defendant to do something “judicial” (such as deciding on the constitutional validity of a law), the vast majority of people would declare this to be a case. The ordinary definition of controversy is even broader. It is perfectly plausible, however, that what the framers meant by cases or controversies in the constitutional context is very different; the meanings of words change over time. Putting aside the issue of how much weight should be given to original intent, the inquiry becomes whether there is historical evidence that the words cases or controversies in a judicial context were limited to circumstances in which the plaintiff had suffered an actual injury. The answer to that inquiry is quite clear: No. Three results from this inquiry conclusively support this answer.

First, no evidence exists that the framers intended cases or controversies to be words of limitation equivalent to standing. Neither those words nor any notion of standing were the subject of discussion during the drafting of the Constitution. Raoul Berger noted decades ago that the ‘cases and controversies’ language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums.”).

Scalia, to his credit, notes that the premise that standing derives from “case or controversy” language is “[s]urely not a linguistically inevitable conclusion.” Scalia, supra note 3, at 882. See also Pierce, supra note 9, at 1763 (“Neither ‘case’ nor ‘controversy’ is defined, and both terms are broad enough linguistically to encompass every case the Court has declined to resolve on standing grounds.”).

Bandes, supra note 63, at 231 (“The intent of the Framers provides little additional guidance. The records of the Constitutional Convention contain virtually no discussion of the subject, with the sole exception of James Madison’s observation that the judicial power ought ‘to be limited to cases of a Judiciary Nature.’” (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed. 1911))); Berger, supra note 16, at 818 (“‘[S]tanding’ is not mentioned in the Constitution or the records of the several conventions.”); Sunstein, supra note 6, at 173 (“There is relatively little explicit material on the Framers’ conception of ‘case or controversy.’”)).
that “‘standing’ was neither a term of art nor a familiar doctrine at the time the Constitution was adopted.”

Moreover, Cass Sunstein writes that “there is no direct evidence that injury in fact or concrete interest was intended to be a constitutional prerequisite under Article III.” Even if, in the absence of direct evidence, one was to infer that the framers intended the language to reflect the requirements of the English common law they were familiar with, standing doctrine still finds no support. Jacob Reitz notes “the long pre-revolutionary history in England of courts giving advisory opinions and entertaining suits by persons without injury to personal interests,” a proposition that Berger supports by referencing the frequent practice of giving “strangers” authority to initiate litigation through a variety of procedural devices. Richard Pierce examined four historical studies on the matter and concludes: “The findings of the four historical studies are remarkably consistent. Both English and colonial courts regularly resolved disputes brought by ‘strangers’ and ‘informers.’ Neither English nor colonial courts applied any jurisdictional limit that bore any resemblance to the modern law of standing.

Indeed, in *The Federalist Papers*, Alexander Hamilton distinguished the judiciary’s role of enforcing the Constitution from its role of resolving private rights, noting that independence was necessary for both roles. Nowhere did he imply that the former should occur only as an occasional and fortuitous by-product of the latter. Susan Bandes sums up the point well:

> Nothing in [A]rticle III demands loyalty to the private rights model. The spare “case or controversy” language by its terms dictates at most that the courts operate within a sphere of expertise distinct from that of the political branches. Adherence to the private rights model is

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82 Sunstein, *supra* note 6, at 173.
83 See Pierce, *supra* note 9, at 1764 (interpreting Madison’s statement to suggest “that the Framers wanted to restrict the courts to resolving the types of disputes they had traditionally resolved”).
85 Berger, *supra* note 16, at 819–20, 827 (“At the adoption of the Constitution, in sum, the English practice in prohibition, certiorari, quo warranto, and informers’ and relators’ actions encouraged strangers to attack unauthorized action.”).
86 Pierce, *supra* note 9, at 1764.
87 *The Federalist No. 78, supra* note 1, at 397–98 (Alexander Hamilton).
required only if one accepts, first, that the case language was keyed to the common law forms, second, that those forms limited the courts to a narrowly conceived dispute resolution function, and third, that current day constitutional interpretation must adhere to that understanding. Several influential scholars have demonstrated that these conclusions are, if not simply wrong, then certainly open to serious doubt.88

Second, throughout its history, the Supreme Court has regularly heard cases in which plaintiffs had not suffered injuries. In revisionist history worthy of 1984, the Court claims that not only is it applying standing doctrine now, but that it always has applied it: “We have always insisted on strict compliance with this jurisdictional standing requirement.”89 This is bad history or a blatant lie, as the widespread existence of the qui tam action demonstrates:

The purpose of this action is to give citizens a right to bring civil suits to help in the enforcement of the federal criminal law. Under the qui tam action, a citizen—who might well be a stranger—is permitted to bring suits against offenders of the law. Qui tam actions are familiar to American law. . . . In the first decade of the nation’s existence, Congress created a number of qui tam actions. . . .

The qui tam action was accompanied by the informers’ action. Through this action, people can bring suit to enforce public duties; successful plaintiffs keep a share of the resulting damages or fines.90

The reason that qui tam and informers’ actions are important is that they are perfect examples of historically viable actions that do not involve any injury to the plaintiff. Surely, Congress would not have enacted so many statutes authorizing such actions in so many varied contexts91 if the Supreme Court had explicitly stated that they violated Article III.

88 Bandes, supra note 63, at 283. Bandes’s article makes a strong case that the Court’s interpretation of the “case or controversy” language is deeply misguided.
90 Sunstein, supra note 6, at 175.
91 See id. (listing qui tam provisions to enforce liquor import laws, Indian trade laws, postal requirements, and slave trade prohibitions).
In a related context, Sunstein notes the 1875 case, *Union Pacific Railroad Co. v. Hall*,92 involving the issue of whether Union Pacific was required to utilize a particular railroad bridge between Omaha, Nebraska, and Council Bluffs, Iowa, as part of its statutory duty to operate “as one connected, continuous line.”93 The plaintiffs, seeking a writ of mandamus to compel the company to use the bridge, were simply merchants who used Union Pacific to transport their wares from time to time. The Court noted that “they had no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally.”94 The Court discussed the defendant’s objection to the plaintiffs’ ability to seek enforcement of a public duty without gaining the assent of the Attorney General, and framed the question as “whether private persons can sue out the writ to enforce the performance of a public duty, unless the non-performance of it works to them a special injury.”95 The Court, approving of an English case that held that private persons could sue,96 also answered the question in the affirmative.97 In fact, the Court even dismissed what must have been an old trope—even at that point—about how such a permissive doctrine “exposes a defendant to be harassed with many suits.”98 Notably, nowhere in the lengthy opinion did the Court mention Article III’s reference to cases and controversies.

A recent article by Elizabeth Magill shows that even in the twentieth century the Court still heard challenges brought by individuals who had suffered no actual injury themselves.99 Magill notes that the principle of “standing for the public” had currency even as it sometimes operated alongside a more restrictive doctrine in other cases:

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92 91 U.S. 343 (1875); Sunstein, *supra* note 6, at 174.
93  *Union Pac. R.R. Co.*, 91 U.S. at 343–44 (quoting Pacific Railroad Act, ch. 120, 12 Stat. 489, 495 (1862)).
94  *Id.* at 354.
95  *Id.* at 355.
96  *Id.* at 354 (citing The King v. Severn & Wye Ry. Co., (1819) 106 Eng. Rep. 501 (K.B.) (describing a case where “a private individual, without any allegation of special injury to himself, obtained a rule upon the company to show cause why a mandamus should not issue commanding them to lay down again and maintain part of a railway which they had taken up”).
97  *Id.* at 355.
98  *Id.* at 356.
All recent authorities seem to agree that injury to the general interest we all have in seeing the government abide by the law cannot constitute an injury in fact.

But the truth is, for several decades in the middle of the last century, Congress was allowed to authorize legal challenges to government action by parties whose only cognizable interest was just that: that the government abide by the law.\footnote{Id. at 1132–33.}

Magill details a line of cases, beginning with \textit{FCC v. Sanders Bros. Radio Station},\footnote{309 U.S. 470 (1940).} in which the Court allowed uninjured plaintiffs to bring suit under Congressional authorization to enforce compliance with economic, broadcasting, and environmental statutes.\footnote{Id. at 473–76.} The idea, as summed up by Magill, was that “judges and government litigants acknowledged that Congress could authorize ‘public actions’ . . . [meaning] that Congress could authorize suits . . . by those who suffered no personal or proprietary injury that could be distinguished from the rest of the population, but who were nonetheless authorized to bring suit.”\footnote{Magill, supra note 99, at 1168–69.} The “standing for the public” principle began in 1940, persisted into the 1970s,\footnote{See id. at 1134–35.} and was clearly at odds with precedents that took a more restrictive view of standing.\footnote{See id. at 1148 (“Sanders Brothers’ standing for the public principle seems inconsistent with several Supreme Court precedents, . . . But in the middle of the twentieth century, [it] stood as good law alongside those earlier cases.”).}

Taken as a whole, the widespread existence of qui tam and informers’ actions, the mandamus ruling by the Court in \textit{Union Pacific Railroad}, and the \textit{Sanders Brothers} “standing for the public” cases make it clear that any attempt by the Court to pretend it has always required an injury-in-fact under Article III’s case or controversy requirement is doomed to failure.\footnote{Occasionally plaintiffs use the following statement by the \textit{Marbury} Court as support for standing doctrine: “The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 170 (1803). A close reading of this quotation shows why (continued)
Third, the standing doctrine is a relatively recent judicial creation. Scholars’ accounts vary somewhat on exactly when the doctrine came into existence: Berger suggests 1923,107 William Fletcher argues that “an articulated separate law of standing did not exist until the 1930’s,”108 and Pierce notes that “[t]he first opinion that stated in dicta that Article III standing limits judicial power was issued in 1944” while “[t]he first opinion that referred to ‘injury-in-fact’ as an Article III limit on judicial power was issued in 1970.”109 The bottom line is that “a strong scholarly consensus holds that standing’s injury requirement is a twentieth-century invention.”110

The Court has a penchant for referring to the seemingly open-ended cases or controversies language in Article III as if they constituted a secret, Da Vinci Code-style cryptogram that only the Court’s own keen powers of observation could unlock to reveal a hidden Eleventh Commandment: “Thou Shalt Not Suffer the Uninjured to Litigate.” Just like that novel’s “revelations,” a few moments of reflection and research make it clear that the judicially-concocted edifice of “standing doctrine” has no historical merit. Pre-American Revolution English common law did not recognize a doctrine equivalent to standing; neither did colonial courts. The framers never described the grant of judicial power as including only those who could demonstrate an injury, nor is there any evidence that they intended the words cases or controversies to be words of limitation. The Supreme Court, in every century of its existence except for the current one, often heard claims from litigants who could not demonstrate an injury, nor is there any evidence that they intended the words cases or controversies to be words of limitation. The Supreme Court, in every century of its existence except for the current one, often heard claims from litigants who could not demonstrate standing under today’s ever-shifting standards. Any claim that faithful adherence to the text of the Constitution, the intent of the framers, or long-settled precedent requires the use of the standing doctrine in constitutional cases is simply unwarranted.

the use of this quotation is inapt: Marshall is discussing occasions where political discretion has been given to the Executive; obviously, this discretion must give way where limited by constitutional text.

109 Pierce, supra note 9, at 1765.
110 Murphy, supra note 9, at 968. Some have argued that the origins of standing lay in the desire of New Deal-era members of the Court to insulate progressive legislation from attack, much like standing doctrine today is often favored by conservative members of the Court to defend legislation from left-leaning civil liberties and environmental groups. See, e.g., Sunstein, supra note 6, at 179.
IV. ABSOLUTE SEPARATION CORRUPTS ABSOLUTELY

The standing doctrine has allowed the Court to exercise a false humility. “You see,” one can imagine the Court saying in reference to the doctrine, “we don’t like interfering with the other branches and only do it when we absolutely must!” Separation of powers, although not a concern during the origins of the standing doctrine, has become the primary justification for the standing doctrine’s continued existence and application.\textsuperscript{111} Indeed, the Court has identified the standing doctrine as part of its “overriding and time-honored concern about keeping the Judiciary’s power within its proper constitutional sphere.”\textsuperscript{112} Reading case after case, one gets the impression that the standing doctrine is the lone, solitary fortress that allows citizens to escape the apocalyptic scenario of judicial activism and court-led tyranny. Taken at face value, the separation of powers explanation for the standing doctrine paints a portrait of the Court as a model of consistent self-restraint, refusing to aggrandize power unto itself at the expense of democracy.\textsuperscript{113} The problems with this justification are twofold.

First, the standing doctrine is wholly inadequate as a safeguard against judicial encroachment on executive or legislative power because it operates

\textsuperscript{111} See, e.g., Raines v. Byrd, 521 U.S. 811, 820 (1997) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.” (quoting Allen v. Wright, 468 U.S. 737, 752 (1984))). See also Eugene Kontorovich, What Standing Is Good For, 93 VA. L. REV. 1663, 1673 (2007) (“More recently, the Court has begun to argue that standing reinforces the separation of powers.”); Reitz, supra note 84, at 453 (“[T]he chief doctrinal basis for standing in U.S. federal law today is the constitutional doctrine of separation of powers . . . .”).\textsuperscript{112} Raines, 521 U.S. at 820.\textsuperscript{113} Heather Elliott notes that the standing doctrine purports to serve multiple aspects of separation of powers, including the “pro-democracy” function (avoiding undue judicial interference with the political branches) and the “anti-conscription” function (preventing Congress from enlisting the courts in carrying out legislation in contravention of the Executive Branch’s requirement to “take care” that the laws are “faithfully executed”). Elliott, supra note 9, at 468. See also Harold J. Krent & Ethan G. Shenkman, Of Citizen Suits and Citizen Sunstein, 91 MICH. L. REV. 1793, 1794–95 (1993). In constitutional cases, the “pro-democracy” aspect of separation of powers is the main concern; the “anti-conscription” aspect assumes greater importance in the variety of “citizen-suit” provisions enacted by Congress that do not involve constitutional claims. Under the analysis in this Article, there can be no valid basis to complain that, in constitutional cases, the judiciary is interfering with the executive’s “take care” function because that function only extends to laws that are constitutionally valid to begin with.
in an essentially arbitrary fashion. The “injury-in-fact” criterion bears no particular or principled correlation to the propriety of judicial intervention in any given case. The subset of all cases in which an injury-in-fact occurs does not meaningfully relate to the subset of all cases in which the judicial branch is constitutionally, and therefore properly, charged with resolving the dispute. The standing doctrine operates on the implicit assumption that injury and propriety are linked, but an explanation as to how or why is nonexistent.\footnote{David M. Driesen, Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication, 89 Cornell L. Rev. 808, 824 (2004). Examining the connection between the separation of powers theory and injury-in-fact, Driesen asserts: [A] theory of standing must explain why that [proper] role [for the Court] justifies a particular standing doctrine, such as the requirement that litigants experience injury-in-fact. The Court’s desire to avoid improper interference in the political decisions of the executive and legislative branches does not explain injury-based standing any more than a simple statement that a court must remain within its proper role.} As David Driesen notes, “If one assumes that a proper judicial case requires injury, then one can say that any case without an injury is an improper proceeding . . . But this linking does not explain why a proper judicial proceeding must have injury; it just assumes it to be true.”\footnote{Id. at 825 (emphasis added).}

As discussed previously, there are several cases where injury is lacking, but where the Constitution clearly contemplates intervention. Similarly, there are several cases where injury is clearly present, but where the Court is still faced with enormous temptation to overreach and interfere with democratically elected decision-makers.\footnote{See Sundquist, supra note 10, at 130–31 (listing Citizens United v. FEC, 558 U.S. 310 (2010); Lawrence v. Texas, 539 U.S. 558 (2003); Bush v. Gore, 531 U.S. 98 (2000); Roe v. Wade, 410 U.S. 113 (1973); and Griswold v. Connecticut, 381 U.S. 479 (1965) as examples of cases “of the utmost national importance” and that “arguably satisfied the current tripartite standing test,” but which “are examples of judicial power affecting large segments of society”).} The natural conclusion is that the presence or absence of injury does not validate or invalidate judicial intervention in constitutional cases. The only plausible basis to determine if the Court should intervene in a constitutional case is the Constitution itself, and the document is silent on a standing requirement.

\footnote{114 David M. Driesen, Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication, 89 Cornell L. Rev. 808, 824 (2004). Examining the connection between the separation of powers theory and injury-in-fact, Driesen asserts: [A] theory of standing must explain why that [proper] role [for the Court] justifies a particular standing doctrine, such as the requirement that litigants experience injury-in-fact. The Court’s desire to avoid improper interference in the political decisions of the executive and legislative branches does not explain injury-based standing any more than a simple statement that a court must remain within its proper role.}
The effect of the standing doctrine then is to simply carve out, essentially arbitrarily, a select subset of cases from the Court’s cognizance. In one respect, every constitutional claim the Court refuses to consider is a case in which the Court has not exceeded its proper boundaries and has thus avoided a conflict with the Executive or Legislative Branches.117 Aggregating every single occasion where the Court has determined that standing is lacking leads to a large number of cases where the Court could have exercised power but chose not to. Before the Court can be lauded for its abstemious virtue, however, a further inquiry must be made: In how many of those cases where the Court could have acted and chose not to should it have acted? Refusing to exercise power when constitutional duty demands action is no better than excessively exercising power in fulfilling that same duty.

On a related second point, this overriding concern for separation of powers conflicts with the equally fundamental role of the Court as an institution constitutionally charged with checking the Legislative and Executive Branches.118 The Court has a legitimate goal in ensuring that the judiciary remains within its proper sphere, but only in conjunction with the goal of ensuring that the Executive and Legislative Branches remain within theirs. The standing doctrine in constitutional cases purports to achieve the former and completely neglects the latter. Separation of powers and checks and balances have to work simultaneously, as made clear in The Federalist Papers:

[T]he political apothegm [that separation of powers is necessary to good government] does not require that the legislative, executive and judiciary departments should be

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117 See Scott, supra note 5, at 690 n.173. On the Court staying within its bounds, Scott offers the following opinion:

It is true . . . that any case knocked out on access standing grounds, or on any other grounds, is one less case which may present problems related to the policy role of the courts. Such an approach, however, is unselective to the point of being indiscriminate, unless one assumes, for example, that the incidence of decision role difficulties is markedly higher among cases in which access standing is questionable than among cases in which it is not. The two categories may overlap, but it is far from evident that they are highly correlated . . . .

Id.

118 See Berger, supra note 16, at 828 ("Overemphasis of the ‘separation of powers,’ however, is apt to obscure the no less important system of ‘checks and balances.’").
wholly unconnected with each other. . . . [U]nless these
departments be so far connected and blended, as to give
each a constitutional control over the others, the degree of
separation which the maxim requires as essential to a free
government, can never in practice, be duly maintained.119

By insulating executive and legislative action from review, unless the
action happens to cause a discrete injury to an identifiable individual, the
Court effectively abandons its responsibility to ensure that those actions
comply with the Constitution. Those branches are, in effect, given a free
pass as long as their actions affect only society at large and not individuals
directly, contrary to clear textual limitations in the Constitution. Raoul
Berger said it best over a half century ago:

A legislative usurpation does not change character when it
is challenged by a stranger; and judicial restraint [of that
usurpation] remains a “judicial” function, not an
“intrusion,” though undertaken at the call of one without a
personal stake. No hint that judicial restraint of legislative
usurpation was to hinge on the suitor’s “interest” is to be
found in the records of the Constitutional Convention.120

It seems odd to have to remind the Court that the checking function is
as essential to the structure of the Constitution as the separation principle.
As the Court in Marbury noted, “It is a proposition too plain to be
contested, that the [C]onstitution controls any legislative act repugnant to
it; . . . .”121 Why would standing, a historically novel doctrine of relatively
recent invention and ever-changing scope, be used to justify undermining
the most fundamental responsibility entrusted to the Supreme Court? This
thinking must be mistaken. The analysis must be faulty. Surely, the Court
has additional grounds for propounding a doctrine that can be easily picked
apart by legal novices. There must be something more. But is there?

119 The Federalist No. 48, supra note 1, at 250 (James Madison). See also The
Federalist No. 51, supra note 1, at 261 (James Madison) (“To what expedient then shall
we finally resort for maintaining in practice the necessary partition of power among the
several departments, as laid down in the Constitution? The only answer that can be given
is, . . . by so contriving the interior structure of the government as that its several constituent
parts may, by their mutual relations, be the means of keeping each other in their proper
places.”).

120 Berger, supra note 16, at 829.

121 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
V. FACTS, FLOODGATES, FRIENDS, AND FOREIGNERS

This Article establishes that nothing in the text or structure of the Constitution supports applying the standing doctrine in constitutional cases. In the absence of the standing doctrine, virtually every lawsuit alleging a violation of the Constitution would be decided on the merits. If the challenged action or statute is deemed valid, no harm is done to another branch of government. An expectation that those branches defend themselves against claims asserting that they have violated the Constitution is not an unfair one in a nation based on the rule of law. If the challenged action or statute is deemed invalid, then a serious error—a violation of the country’s fundamental law—is detected and cured. In each outcome, the Court has simply fulfilled its fundamental duty as the institution charged with enforcing the Constitution. The Court may overreach and violate the separation of powers, as it might in any case, but overreaching comes from how the Court handles the issue on the merits rather than its decision to hear the case in the first place.

The Court has made reference to reasons supporting the standing doctrine that are not constitutional in nature. These nonconstitutional reasons are even less persuasive than the constitutional ones. Based on mere assertion and sheer speculation, the Court has repeatedly proclaimed that the standing doctrine assures a fact-rich context that leads to better decision-making while simultaneously stopping the “floodgates” from opening and overburdening the legal system with a deluge of groundless claims.

The injury-in-fact element of the standing doctrine, the Court says, “tends to assure that the legal questions presented to the court will be

122 See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 471, 474–75 (1982) (“‘[S]tanding’ subsumes a blend of constitutional requirements and prudential considerations . . . and it has not always been clear . . . whether particular features . . . have been required by Art. III . . . or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution.”); Warth v. Seldin, 422 U.S. 490, 499 (1975) (stating that jurisdiction is not warranted “when the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens” and when the plaintiff “rest[s] his claim to relief on the legal rights or interests of third parties”); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (“To permit a complainant who has no concrete injury to require the court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, . . . .”).

123 See, e.g., Valley Forge Christian Coll., 454 U.S. at 472; Schlesinger, 418 U.S. at 221; Scott, supra note 5, at 673–74 (discussing the “floodgates” argument).
resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.124 The entire notion that standing doctrine leads to better decision-making on the merits has been conclusively exploded by David Driesen.125 Driesen persuasively argues that the Court’s self-proclaimed need for concrete facts is ridiculous in light of its propensity to use formal, abstract reasoning in deciding constitutional questions.126 This tendency is most pronounced when the Court is deciding facial constitutional challenges or challenges involving structural provisions of the Constitution.127 Others, including Justice Scalia, acknowledge that the existence of an injury does little to ensure that parties are genuinely adverse and present issues any better than would a committed, ideological litigant that lacks traditional standing.128 Abolishing the standing requirement in constitutional cases does not mean

124 Valley Forge Christian Coll., 454 U.S. at 472. See also Schlesinger, 418 U.S. at 221 (“Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.”).

125 Driesen, supra note 114, at 813–15. See also Elliott, supra note 9, at 468 (“[S]tanding does only a minimally adequate job in promoting concrete adversity . . . .”).

126 Driesen, supra note 114, at 813–14 (“On the one hand, the Supreme Court has insisted on justiciability criteria that aim to make adjudication concrete, rather than abstract. On the other hand, it often relies upon abstract formalist reasoning to resolve cases on the merits, thereby gaining no benefit from the concrete context.”).

127 See id. at 840.

128 Scalia, supra note 3, at 891–92 (“[I]f 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. Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no ‘concrete injury in fact’ whatever.”). See also Jaffe, supra note 7, at 636–38; Kontorovich, supra note 111, at 1672–73 (“In practice, the injury requirement bars ideological or ‘public interest’ plaintiffs. These plaintiffs are often represented, however, by well-financed, skilled, and committed organizations. Ideological plaintiffs may in fact care much more than anyone else about the question. Nor does it appear that the attorneys for such plaintiffs fail to raise relevant considerations sharply enough.”). Driesen also discusses the odd, persistent fear that the absence of standing doctrine will lead to “sham” litigation and advisory opinions. Driesen, supra note 114, at 819–20 (“As long as two parties genuinely disagree and the plaintiff seeks a judgment, not just advice, the litigation will be adverse and quite different from a request for a nonbinding advisory opinion. . . . Sham litigation might well include a plaintiff who can meet the requisites of standing, so constitutional standing requirements also seem ill-suited to the task of avoiding sham litigation.”).
that all decisions must be made in a factual vacuum; the plaintiff still has
the burden of proving the unconstitutionality of legislation or action, and if
facts necessary to establish that claim are not presented, the plaintiff will
lose. Moreover, trial judges retain sufficient discretion to order the parties
before them to address factual inadequacies necessary to the proper
determination of a constitutional issue.

Another nonconstitutional objection to abolishing the standing
requirement in constitutional cases is a fear that, if anyone can sue, then
everyone will sue. Americans are commonly perceived to be litigious, and
a “flood” of new claims could, in theory, swamp the judicial system. One
notices this fear in the standing context less frequently now, especially
after Kenneth Scott laid it to rest decades ago:

When the “floodgates” of litigation are opened to some
new class of controversy by a decision, it is notable how
rarely one can discern the flood that the dissenters feared.
The plaintiff (or the organization actually funding and
conducting the litigation, if legal rules force the use of
nominal plaintiffs) must feel strongly enough about the
issue in question to pay the bills, and that both cuts down
the flood and gives us at least a partial measure of his
“stake” in the outcome.129

Litigation is expensive—people, organizations, corporations, and
governments litigate because they think it is important, not because it is
fun. Every dollar that a public interest organization devotes to a new
lawsuit is a dollar it is not spending on recruitment drives, educational
outreach, lobbying, or some other activity. Simply put, there is no party
out there with coffers full of money merely waiting for the Supreme Court
to relax its guard so it can pounce and overwhelm the system. Scott sums
it up nicely in his famous words: “The idle and whimsical plaintiff, a
dilettante who litigates for a lark, is a specter which haunts the legal
literature, not the courtroom.”130 Indeed, even after abolishing the standing
doctrine in constitutional cases, courts would retain various means to
control its docket.131

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129 Scott, supra note 5, at 673–74.
130 Id. at 674.
131 Sundquist, supra note 10, at 161 (“While the federal judiciary may find themselves
short an arrow in their quiver of justiciability, there are still many procedural tools
remaining to dispose of meritless and fantastical claims. Additionally, courts still will be
free to resort to a multitude of prudential, sub-constitutional mechanisms to promote
(continued)
There is a more fundamental objection to the floodgates argument, and it is a simple one: the Constitution is our country’s foundational legal document, and enforcing it trumps concerns over the amount of litigation it inspires. The words “Equal Justice Under Law” adorn the Supreme Court building, not “Efficient Allocation of Scarce Judicial Resources.”

Before continuing, it is important to acknowledge that the Court’s approach to the standing doctrine has some lukewarm friends in the academy. After an extensive review of historical evidence, for example, Ann Woolhandler and Caleb Nelson conclude:

We do not claim that history compels acceptance of the modern Supreme Court’s vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on. The subsistence of qui tam actions alone might be enough to refute any such suggestion. We do, however, argue that history does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution’s meaning.132

Suffice it to say, if that tepid and equivocal endorsement is the best its partisans can formulate,133 then the standing doctrine is in trouble. Ostensibly riding to the rescue is a massive, 154-page article by Maxwell Stearns that argues, “[S]tanding substantially reduces opportunities for advertent path manipulation by non-Condorcet minorities.”134 I will not pretend to understand exactly what that means, but I am confident that the ratifiers of the Constitution thought that they were getting a document with binding, enforceable provisions to limit the dangerous abuses posed by government power, and that these same ratifiers were not particularly efficient judicial review.”). Another writer in this context suggests using class action grouping to conserve judicial resources if standing is abolished. Doernberg, supra note 19, at 112–14.


133 For example, Kontorovich states that his article “only seeks to explain standing doctrine, not to champion it” and goes on to explain that whether the benefits of standing exceed its acknowledged costs is a question for another day. Kontorovich, supra note 111, at 1667.

worried about “advertent path manipulation” and “non-Condorcet minorities.” Elaborate theory must be used cautiously in constitutional law, lest it vitiate the consent of the governed.

As a final detour, and perhaps to the horror of some American exceptionalist readers, a brief mention should be made about practices in other countries. Some European constitutional courts operate without standing requirements.135 Canadian and Australian courts have developed more limited exceptions to the standing requirement for cases where the public interest demands it136 or where the plaintiff has not suffered an injury-in-fact, but has some other type of special interest.137 There have been no reported cases of the sky falling. Indeed, those European constitutional courts that have discarded the standing requirement “do not appear to lack legitimacy,”138 and “[t]he litigation over abstract claims has proven to be every bit as professional and thorough as concrete review.”139

VI. CONCLUSION

The standing doctrine is still a miserable failure. Mind-numbing judicial rhetoric to the contrary, the standing doctrine achieves none of its purported goals: it does not ensure fidelity to constitutional text or principle; it furthers the separation of powers in only an indiscriminate and haphazard fashion; it demands facts only to see them ignored; and it protects against a nonexistent deluge of litigation. The primary problem posed by standing doctrine is a very real one in constitutional cases: it prevents the enforcement of certain clear limitations on executive and legislative power. As a syllogism, the argument proceeds as follows:

1. The United States Constitution contains explicit and structural limitations on government power.
2. The primary duty of the Supreme Court of the United States under the Constitution is to enforce these limitations.
3. Any doctrine that substantially impairs the exercise of this primary duty is invalid.
4. The standing doctrine substantially impairs this duty.
5. The standing doctrine is invalid.

137 See, e.g., Keyzer, supra note 12, at 4 (discussing Australia’s standing requirement).
138 Reitz, supra note 84, at 456.
139 Id. at 455.
What would fill the void if standing doctrine were abolished? Quite simply, a requirement that a plaintiff bring a serious—or nonfrivolous—redressable claim that a specific American government statute, policy, practice, or activity violates a specific section of the United States Constitution. Patrick Keyzer has states it well in the Australian context: “Any person should have the opportunity to access constitutional justice so long as they raise a serious, arguable question of constitutional law. They should not be denied access by virtue or their identity or the extra-pecuniary character of their constitutional questions.”

Perhaps the most frustrating aspect of the standing doctrine is its longevity. It has persisted, decade after decade, with the Court justifying it periodically with little more than reflexive pablum about “cases or controversies” and “separation of powers.” Devastating legal critiques of the standing doctrine were published over forty years ago, and the Court continues to ignore them, moving blithely on its present course of operating a veritable shell game, leaving litigants, lawyers, and lower-court judges to guess what will constitute an injury-in-fact on any given day. Meanwhile, one of the most fundamental axioms of our legal system—that constitutional provisions are meant to be supreme and enforceable—continues to be evaded through a doctrinal farce.

\[\text{KEYZER, supra note 12, at 55. Clever hypothetical problems naturally arise from this approach. However, any concocted hypothetical will pale in comparison to the very real and significant flaws of the standing doctrine.}\]