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Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause

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IDEOLOGICAL PLAINTIFFS, ADMINISTRATIVE LAWMAKING, STANDING, AND THE PETITION CLAUSE

Karl S. Coplan

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IDEOLOGICAL PLAINTIFFS, ADMINISTRATIVE LAWMAKING, STANDING, AND THE PETITION CLAUSE

*Karl S. Coplan**

I. INTRODUCTION

Although Article I of the Constitution vests legislative power in the Congress, the lawmaking process in this country has evolved to involve all three branches. Congress enacts regulatory programs, but delegates to the executive branch the task of formulating and legislating the details of implementation through regulations. Once the executive branch agencies have acted, Article III courts routinely step in to review the consistency of these regulations with congressional mandates. In many cases, especially in the case of controversial regulations, the lawmaking process is not complete until judicial review. Entities burdened by such regulations—so-called “regulatory objects”—enjoy presumed standing to challenge the scope of agency regulations. Groups of individuals benefited by such regulations enjoy no such presumption of “standing,” rather, their right to challenge depends on their ability to establish a specific injury-in-fact and the redressability of that injury through judicial decree.

These injury-in-fact and redressability requirements are most difficult to establish in the context that underlies the modern regulatory schema (i.e., regulation of societal risks such as environmental and consumer risks). These regulations seek to protect the public against harms that may have a low probability of occurrence for any given individual but pose significant risks for society at large, or even for substantial groups of individual citizens. Courts have wrestled with the concepts of injury and redressability in the context of probabilistic harms and have split on the question of whether individuals, or combinations of individuals, can establish the requisites of justiciability based on low-probability events.¹ Most recently, the United States Supreme Court rejected the use of probabilistic analysis to establish the likelihood of future injury, at least in the context of a challenge to procedural regulations.²

Many, if not most, rulemaking challenges by regulatory beneficiaries are brought by public interest organizations. These organizations usually have memberships ranging from thousands to millions of individuals. These organizational plaintiffs fall into the category of “ideological” plaintiffs—parties who invoke the judicial process to establish and enforce public rights for the benefit of many people, who are not

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1. See *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000); *Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004); *Baur*, 352 F.3d at 651 n.3 (Pooler, J., dissenting).

2. *Summers v. Earth Island Inst.*, 129 S.Ct. 1142 (2009).

primarily motivated by individual gain.³ Ideological plaintiffs—litigating everything from Religion Clause issues to consumers’ rights to environmental and health concerns—have had mixed success in establishing justiciability in Article III courts. These organizations have been required by Supreme Court doctrine to rely on the individual interests of their members to establish standing.

The traditional test for representative standing requires an organizational party to demonstrate that it has at least one member who would have standing in her own right.⁴ Under this approach, no single member of an organization may be able to show a significant injury to herself, even though, probabilistically, serious harm to at least one member of a large organization may be nearly certain. This aggregation of the risk of harm led a D.C. Circuit panel to reverse itself and recognize organizational standing on the part of the Natural Resources Defense Council (NRDC). The panel based its decision on the likelihood that at least two to four of NRDC’s members would contract skin cancer from exposure to ultraviolet radiation caused by continued use of ozone-depleting chemicals, despite the fact that the individual risk for any single member of NRDC was vanishingly small.⁵ In such a case the whole of the injury-in-fact may be greater than the sum of the individual parts, and an organization representing thousands or millions of individuals with strong concerns about a regulatory program may well possess the requisite interest in enforcing statutory norms. Literal application of the representational standing requirements, requiring a specific individual member with standing to sue in her own right, would be problematic for such organizations.

Although barely recognized by the courts, the Constitution contains a provision specifically meant to ensure the right of individuals to associate and seek remedies from all branches of the government, including the judicial branch. The First Amendment guarantees the “right of the people peaceably to assemble, and to petition the government for a redress of grievances.”⁶ Like the First Amendment guarantees of speech and freedom of the press, this constitutional provision is designed to ensure public representation and participation in the lawmaking process. Likewise, constitutional jurisprudence has evolved to ensure maximum input is provided to the political processes that lead to legislation. This is particularly true in the area of First Amendment jurisprudence, where the Supreme Court has recognized the functional importance of political speech to a representative democracy.

3. See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033 (1968). Cf. Kristen M. Shults, *Friends of the Earth v. Laidlaw Environmental Services: A Resounding Victory for Environmentalists, Its Implications on Future Justiciability Decisions, and Resolution of Issues on Remand*, 89 GEO. L.J. 1001, 1014 n.74 (2001). Shults provided:

Ideological plaintiffs are those that care about the outcome of a case for ideological reasons but do not have a personal stake in the particular dispute at hand. For instance, an environmentalist has a general ideological interest in preventing the discharge of pollutants into rivers, but will not have a concrete and particularized injury in a case such as *Laidlaw*, unless she lives along, or visits, the polluted river.

Id.

4. See *Hunt v. Wash. State Apple Advert. Comm.*, 432 U.S. 333, 343 (1977); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

5. *NRDC v. EPA*, 464 F.3d 1, 6-7 (D.C. Cir. 2006).

6. U.S. CONST. amend. I.

This Article argues for an expanded notion of organizational standing and injury-in-fact in judicial review of agency lawmaking action, based on the functional values implicit in the First Amendment right to assembly and petition for redress of grievances. Judge-made standing doctrine should recognize the difference between litigation to enforce individual rights—where inquiries into individual injury-in-fact and the relationship between an organization and its individually-injured members may be appropriate—and regulatory review litigation that is the ultimate step in the lawmaking process, where full airing of competing views is essential to the judicial review function, and the dangers to the constitutional assignment of functions is at a minimum.

Part I of this Article briefly reviews and defines the nature of “ideological plaintiffs.” Part II explores the lopsided role that industry interest groups play in all three branches of American representative government as compared to public interest and consumer groups. Part III examines the importance of judicial review of administrative rulemaking and the problematic threshold that standing doctrine raises for regulatory beneficiaries seeking to challenge administrative under-regulation. In Part IV, this Article reviews the doctrinal development of standing doctrine, the interests served by standing rules, and the uneven success ideological plaintiffs have enjoyed in establishing standing. Part V of this Article reviews First Amendment Petition Clause jurisprudence and its application to judicial petitioning activities, concluding that the Petition Clause applies to petitions seeking judicial redress and that its values are strongest when organized groups exercising their associational rights seek judicial redress. Part VI of this Article then develops and applies a First Amendment balancing approach to the values and interests served by judicial petitioning activity and standing doctrine, concluding that a standing doctrine more closely tailored to the representative capacity and sham-avoiding interests of standing doctrine would be more consistent with the Petition Clause than current standing doctrine.

II. WHAT IS AN IDEOLOGICAL PLAINTIFF?

Professor Louis Jaffe coined the term “ideological plaintiff” in his 1968 article, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*.⁷ Professor Jaffe used the term to distinguish between plaintiffs asserting traditional interests such as a “right, a privilege, an immunity, or a power,” borrowing from a 1913 article by Professor Wesley Newcomb Hohfeld,⁸ and those asserting interests as citizens. Jaffe specifically had in mind the taxpayer-plaintiff who was challenging governmental support of religious schools in *Flast v. Cohen*,⁹ and the competing broadcast license-holder in *FCC v. Sanders Broadcasting*.¹⁰ In *Sanders*, the Supreme Court recognized the standing of a holder of an existing broadcast license to seek judicial review of the grant of a new license to its would-be competitor,

7. Jaffe, *supra* note 3, at 1033.

8. *Id.* (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913)).

9. 392 U.S. 83 (1968).

10. 309 U.S. 470 (1940).

extending standing for the first time to business competitors and recognizing the status of litigants as “private attorneys general”¹¹ seeking to represent the public interest.¹²

Professor Jaffe thus set up a dichotomy between plaintiffs asserting traditional Hohfeldian legal interests and “ideological” plaintiffs asserting the public interest. Of course, Professor Jaffe recognized the inherent circularity of his definition: once the plaintiff has been recognized as a litigant, she may be said to have a legal right to the relief sought, in Hohfeldian terms.¹³

In this Article, I will use “ideological plaintiff” in terms similar to those proposed by Professor Jaffe, but a little narrower. Recognizing the circularity of an attempt to define ideological plaintiffs in terms of Hohfeldian “rights,” I propose to refer more to the root sense of the word: ideological plaintiffs are those plaintiffs motivated to seek judicial intervention not for personal gain, but to advance an *idea* such as a vision of government’s non-support of religion,¹⁴ the preservation of endangered species across the globe,¹⁵ or equal treatment without regard to race or other classifications.¹⁶

Of course, most ideological plaintiffs have mixed motives, and most might be expected to obtain some personal benefit from success. The litigant who sues to prevent clearcutting of a forest might be motivated in part by the idea of wilderness, but may also be motivated by an interest in the personal freedom to continue hiking in the forest.¹⁷ The citizens who sue to block government support for religious schools may be strongly interested in the idea of government non-entanglement with religion, but may also be motivated, at some level, out of concern for personal social status as outsiders to the favored religious group. Although it may be possible to articulate these chains of personal interest that motivate these plaintiffs, the Supreme Court has not uniformly accepted them as requisite injury-in-fact to establish standing.¹⁸

When I use the term “ideological plaintiff,” I am referring to those plaintiffs whose putative personal advantage is far outweighed, as a practical matter, by the costs of litigation, so that their pursuit of the litigation can only be seen as vigorous pursuit of the underlying societal ideal rather than personal gain. Thus, although Professor Jaffe viewed the individual environmental litigants in a case such as *Scenic Hudson Preservation Conference v. Federal Power Commission*,¹⁹ as “ideological” “non-

11. *Associated Indus., Inc. of N.Y. State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)), *vacating as moot*, 320 U.S. 707 (1943).

12. *Sanders*, 309 U.S. at 476-77.

13. Jaffe, *supra* note 3, at 1033-34.

14. *See, e.g., Flast*, 392 U.S. 83.

15. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

16. *See, e.g., Warth v. Seldin*, 422 U.S. 490 (1975); *Heckler v. Mathews*, 465 U.S. 728 (1984).

17. *Cf. Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 898-99 (1990) (rejecting standing of plaintiff for failing to prove that a member of the plaintiff’s organization was “adversely affected or aggrieved” by the agency’s action that would potentially make some public land available for private use).

18. *Compare Allen v. Wright*, 468 U.S. 737, 766 (1984) (rejecting claim of social stigma in challenge to IRS policies facilitating segregated private schools that draw students from integrated public schools) *with Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208 (1972) (accepting plaintiffs’ social interest in residing in an integrated community as basis for standing); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 102-03 (1979) (accord with *Trafficante*); *Heckler v. Mathews*, 465 U.S. at 739-40 (accepting claim of stigma injury from pension rules discriminating between male and female retirees).

19. 354 F.2d 608, 611 (2d Cir. 1965) (where a coalition of nearby property owners, recreational users, and commercial users of the Hudson River challenged approvals for a pumped storage electrical generation facility that would interfere with scenic views as well as fisheries resources).

Hohfeldian” plaintiffs,²⁰ I would not—they can be said to be motivated by strong personal interests in the aesthetics and environment of their immediate environs, including the views from their houses and their ability to enjoy the fisheries’ resources of the river. While these interests may not be “rights” in the Hohfeldian sense, they do constitute personal advantages that could well justify the level of litigation effort mounted by committed neighbors.²¹

On the other hand, the national organizations that support these litigation efforts are almost universally ideologically motivated. That is to say, these groups are organized around an idea—consumer product safety, wilderness preservation, separation of church and State, etc.—and draw support from a large membership for their litigation efforts to advance the organizing principle. Although these groups must, because of the current state of standing doctrine, identify individual members with particular interests to litigate, the financial contributions of the particular individuals benefited would rarely justify the level of litigation effort mounted by the organization. Rather, these groups prosper, or fail, on the basis of their ability to attract broad-based support from those who share their ideals.

The organizational participation in these cases, then, is usually almost purely ideological. Supreme Court standing doctrine is openly hostile to the assertion of purely ideological causes by these organizations. However, given the associational and structural role these organizations play in balancing the opposite pressures of industry lobbying groups, I believe that, in some contexts, the Court should recognize their pure ideological standing, and, as this Article will seek to persuade, the Petition Clause provides some textual and structural support for this notion.

III. THE LOPSIDED ROLE OF INTEREST GROUPS IN AMERICAN SELF-GOVERNANCE

From the founding, the American polity has grappled with the role of interest groups in our republican form of self-governance. It was James Madison’s *Federalist Number 10* that famously warned of majority factions,²² and de Tocqueville noted the Americans’ predilection for organization-joining,²³ but it was not until the vast expansion of federal government after the New Deal that America witnessed a corresponding expansion of interest group participation in government. This expansion itself led to competing academic views concerning the appropriate role of such groups in self governance.

At the same time, the nature of governance and the lawmaking process has changed dramatically from the vision of representative democracy held by the founders, with delegates to a national legislature making laws in response to the needs and wishes of the involved citizens they represent. The substantive rules prevailing in

20. Jaffe, *supra* note 3, at 1034.

21. *Communities Against Runaway Expansion, Inc. v. FAA*, 355 F.3d 678, 685 (D.C. Cir. 2004) (granting standing where neighborhoods would suffer from increased noise resulting from the proposed expansion of a major airport); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 937 (9th Cir. 1988) (granting standing to organization where community members would be adversely impacted by dredging and other construction activities).

22. THE FEDERALIST NO. 10, at 63 (James Madison) (Tudor Publ’g Co., 1937).

23. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 46-47 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1987) (1835).

the administrative state are no longer the product solely of a legislature acting according to majoritarian wishes. Rather, the end product is the result of enabling statutes enacted by the legislature, substantive law-making by the administrative agency charged with applying the statutes, and a last step of judicial review to determine the permissibility of the end product within the bounds of statutory and constitutional norms. Interest groups play a role in each of these steps, and the interest group system in this country has evolved to vastly over-represent the interests of small groups of the well-resourced—namely business interests. The appropriate role of public interest groups in this last step to counterbalance the strong role played by business interests in the first two steps is the subject of this article.

*A. Some Historical Views*²⁴

1. James Madison and Factions

James Madison, advocating for the proposed Constitution in *The Federalist Papers*, early on called out the risks of “factions”—that is, groups of citizens who share common interests and who band together to impose those interests upon the community through the mechanisms of representative government. Madison defined a faction as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”²⁵ Madison’s list of interests that motivate the formation of factions was prescient:

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; . . . have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. . . . But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.²⁶

Madison was unconcerned that factions representing the interests of political minorities would gain inappropriate influence. According to Madison, the political will of the majority would defeat minority factions: “If a faction consists of less than

24. This section is obviously a very far cry from a history of organized interest groups in the American political system. This brief summary draws from the summaries presented in KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS IN AMERICAN DEMOCRACY (1986), and Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism*, 53 VAND. L. REV. 1389 (2000).

25. THE FEDERALIST NO. 10, *supra* note 22, at 63.

26. *Id.* at 64-65.

a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."²⁷

Rather, Madison worried that popular government might allow a faction consisting of a majority political interest to impose its will on the political minority. Madison concludes (or rather argues) that the proposed Republic will deftly avoid the problems of majority factions by being sufficiently large geographically to prevent such factions from coalescing, as well as by having the filter of more objective and community-minded representatives mediating between a popular faction and the aggregate well being.²⁸

Of course, there is some tension between Madison's dismissal of the hazards of "minority" factions, easily overrun by a vote reflecting the popular will, and the remedy for majority factions, to which the same representative body is expected to be unresponsive. Madison's prediction of the inevitable formation of factions around economic and government issues was prescient, even if his sanguinity about the checking function of democratic responsibility, common sense, and good instincts of the representative body may be questioned by some.

2. *Twentieth Century Interest Group Pluralists*²⁹

The economic expansion following the Second World War saw an expansion of interest group influence on government institutions. Some scholars and historians commented on this development positively, believing that representative self-government and the best policy outcomes flowed from the competition between group interests of shifting alliances, applying pressure to government institutions with an intensity that varied with the intensity and importance of the views held.³⁰ Under this view, interest groups constituted the true means of citizen representation in government, according to their interests rather than arbitrary geographic districts. Also, in this view, interest group politics protected against majority tyranny by giving disproportional representation to the interests of a strongly concerned minority.

These theorists not only accepted that interest groups would influence government policy, they embraced and applauded the notion. According to one view, the legislative process was simply one of measuring the net sum of interest group pressure:

The legislature referees the group struggle, ratifies the victories of the successful coalitions, and records the terms of the surrenders, compromises, and conquests in the form of statutes. Every statute tends to represent compromise because the process of accommodating conflicts of group interest is one of deliberation and consent. The legislative vote on any issue tends to represent the composition of strength, i.e., the balance of power, among the contending groups at the time of voting. What may be called public policy is the equilibrium reached in this struggle at any given moment,

27. *Id.* at 66.

28. *Id.* at 68-69.

29. The following, extremely reductive summary of the interest group pluralists school of thought is drawn from the excellent treatments of this movement in MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION*, 117-25 (2d prtg. 1971); SCHLOZMAN & TIERNEY, *supra* note 24, at ix-x; and Schiller, *supra* note 24, at 1400-02.

30. See generally OLSON, *supra* note 29; SCHLOZMAN & TIERNEY, *supra* note 24; Schiller, *supra* note 24.

and it represents a balance which the contending factions of groups constantly strive to weight in their favor.³¹

Agency capture by the interest groups was not to be feared either; rather, agencies were the “army of occupation left in the field to police the rule won by the victorious coalition.”³²

Implicit in this laudatory view of interest group politics was the idea that all interests received appropriate representation in the process. Proponents of interest group pluralism theorized that this must be so, as any group of people with shared interests who saw their interests being ignored would simply form their own interest group to press their interests.³³ If they did not, the ignored interests were presumably not very intensely held and there was no harm in ignoring these weakly felt interests.

3. 1960s Critics of Interest Group Pluralism

As the Civil Rights movement began in the 1960s, academic political scientists and economists became critical of the assumptions underlying proponents of interest group pluralism.³⁴ These critics argued that interest group influence on public institutions turned public authority over to private interests. They did not accept that interest groups would form spontaneously to represent any shared interest that was being ignored by policy-makers. To the contrary, as economist Mancur Olson theorized, the more widely shared an interest was the *less* likely a rational economic actor would make the personal contributions necessary to form and support an organization to advance that interest.³⁵ According to Olson, when an interest is widely shared most people would benefit from the efforts of an organized interest group working on their behalf whether they joined and supported the organization or not. Because such organizations could not withhold the public benefits of success from non-supporters, no individual has an economic incentive sufficient to support the organization.³⁶ Under Olson’s analysis, the situation is reversed when interests are held by just a few actors; in that case a small number of individuals would find it worthwhile to band together to push for their interests even if some other members of the small group of interested parties did not join. The key determinant was the proportion of the benefit to be shared by the one actor most to benefit, and the relationship between the costs of organizing and the value of this benefit.³⁷

Professor Olson’s analysis would lead one to expect more organized representation of business interests in concentrated industries, and less organized representation of majoritarian interests. This concern was shared by James Q. Wilson and Peter B. Clark, who exposed the difficulties confronting anyone wishing to start

31. EARL LATHAM, *THE GROUP BASIS OF POLITICS: A STUDY IN BASING-POINT LEGISLATION*, 35-36 (1952).

32. *Id.* at 38.

33. *See* OLSON, *supra* note 29, at 122-23 (discussing Professor David Truman’s theory regarding the proliferation of associations).

34. *See generally* Schiller, *supra* note 24, at 1410-16.

35. OLSON *supra* note 29, at 2.

36. *Id.* at 16.

37. *Id.* at 33-34.

and maintain a political organization representing interests held by large numbers of people.³⁸ Along the same lines, another critic of the utopia posited by interest group theorists, E.E. Schattschneider, pointed out that “the flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”³⁹

However, these critics agreed with the interest group pluralists on one point: interest groups substantially influenced government institutions. As one critic of group pluralists put it, “manipulation and undebated decisions of power replaced democratic authority.”⁴⁰ Unlike the interest group pluralists, who saw such influence on government institutions as an appropriate accommodation of self-government to the intensity of the views represented by the interest groups, these critics pointed out that the effect was to turn government over to private interests. In the meantime, widely shared interests of the economically disadvantaged as well as consumers and environmentalists were left without representation in government.⁴¹

Professor Reul Schiller has theorized that judicial and legislative responses to these criticisms of the imbalanced influence of organized interests in politics resulted in: (1) the expansion of standing doctrine during the 1960s to recognize “private attorneys general” representing the public interest, (2) expanded vigor in judicial review of administrative action, and (3) the citizen suit innovation of the Clean Air Act of 1970.⁴² In his view, the judiciary came to be seen as the only institution beyond the reach of organized interest influence, and the judiciary itself responded to the imbalance that was apparent in the two more political branches of government.⁴³

4. *The Current View: Public Choice, Money, and Politics*

Drawing on Mancur Olson’s economics-based criticism of interest group pluralism, public choice theorists have posited that legislatures act based on the self-interested rational choices of individual legislators, who will always act in ways that will maximize their chance of re-election, even at the expense of the collective good.⁴⁴ These theorists conclude that legislation with a concentrated benefit and diffused costs is easiest to enact, whereas legislation with concentrated costs and diffused benefits (like environmental and health regulations) is most difficult to enact.⁴⁵

38. See Peter B. Clark & James Q. Wilson, *Incentive Systems: A Theory of Organizations*, 6 ADMIN. SCI. Q. 129, 146-49 (1961); see also JAMES Q. WILSON, POLITICAL ORGANIZATIONS 30-51, 195-211 (1973).

39. E. E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE 35 (1960).

40. C. WRIGHT MILLS, THE POWER ELITE 355 (1956).

41. See SCHLOZMAN & TIERNEY, *supra* note 24, at xi (summarizing the arguments of group pluralist critics).

42. See Schiller, *supra* note 24, at 1390-92.

43. *Id.* at 1391.

44. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 7 (1991); William N. Eskridge, Jr., *Politics Without Romance: Implications Of Public Choice Theory For Statutory Interpretation*, 74 VA. L. REV. 275, 288 (1988). Although public choice theorists such as Farber and Frickey conclude that legislation, rather than serving public interest goals, is entirely a form of interest-group rent seeking, others such as Eskridge take this economic model of multi-polar group decisionmaking even further to conclude that rational legislative decisionmaking is impossible. However, for the purposes of this article, the public choice theorists’ insight that concentrated interests have disproportionate impact on national legislation is sufficient.

45. FARBER & FRICKEY, *supra* note 44, at 7; Eskridge *supra* note 44, at 285-89.

Political scientists Kay Schlozman and John Tierney put the anti-pluralists' theories to the test in their 1986 survey of Washington, D.C., interest group activities. Based on a systematic survey of all interest groups represented, their study concluded that business interests were far better represented than groups that represented the broad public interest:

Whether one considers all the organizations having a Washington presence or just those having their own Washington offices, it is clear that Schattschneider's observations two decades ago about the shape of the Washington pressure community are apt today. Taken as a whole, the pressure community is heavily weighted in favor of business organizations: 70 percent of all organizations having a Washington presence and 52 percent of those having their own offices represent business. The overrepresentation of business interests takes place at the expense of two other kinds of organizations: groups representing broad public interests and groups representing the less advantaged.⁴⁶

Schlozman and Tierney find that this tilt in favor of business interests persists despite the explosion in the number of public interest organizations advocating for civil rights and social welfare issues since the 1960s; although the number of such organizations increased during this time period, there was a corresponding increase in the number of organizations representing business interests, leaving the overall representation skewed in favor of business.⁴⁷

Schlozman and Tierney concluded that the representational tilt in favor of business interests was magnified by the advantage business representatives had in terms of resources, particularly money. Schlozman and Tierney surveyed organizations on the factors constraining their effectiveness, and, not surprisingly, groups representing broad public interests were more likely to be constrained by money than business interests: "At least in terms of perceived relative deprivation, the very business interests that were found . . . to be advantaged in terms of the numbers of organizations active in Washington are also advantaged in terms of access to financial resources."⁴⁸ Although the organizations in the study did not necessarily rank financial resources highest on their list of attributes needed for success, Schlozman and Tierney noted that money is the one resource universally convertible into the others: "What makes money important in politics is its convertibility—the fact that it can easily be transformed into other valued political resources."⁴⁹

While Schlozman and Tierney were conducting their study, the Supreme Court issued two decisions that greatly expanded the role and influence of business organizations in politics. In *Buckley v. Valeo*,⁵⁰ the Court struck down portions of the Federal Election Campaign Act of 1971⁵¹ that limited the total amount of expenditures permissible in a federal election campaign, holding that the expenditure by political

46. SCHLOZMAN & TIERNEY, *supra* note 24, at 68.

47. *Id.* at 75-81.

48. *Id.* at 119.

49. *Id.* at 89.

50. 424 U.S. 1 (1976).

51. 86 Stat. 3, amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263 (1974) (current version at 2 U.S.C. §§ 431-56 (2000)).

campaigns was a form of political speech protected by the First Amendment.⁵² In *First National Bank v. Bellotti*,⁵³ the Court struck down a Massachusetts statute that prohibited business corporations from making expenditures to support or oppose ballot initiatives unrelated to their business interests.

The effect of these two decisions vastly increased the citizenship rights and influence of monied interests and business organizations in the political sphere. Unlimited campaign expenditures gave rise to unlimited campaign fundraising, which correspondingly increased the number and influence of Political Action Committees (PACs). As noted by Schlozman and Tierney, campaign contributions directed by corporate PACs constitute a prime means for Washington interest groups to wield influence on lawmakers.⁵⁴ Judge J. Skelly Wright, who wrote the D.C. Circuit opinion that was reversed in *Buckley v. Valeo*, lamented the impact of unleashing unlimited corporate money on voter equality. In a 1982 article, Judge Skelly wrote:

The stark reality of PACs is that they bring the power of concentrated wealth to bear on office-holders and candidates—national, state, and local—on behalf of special interests. Although only a small fraction of these groups promote particular ideologies or advocate single issues, PACs generally represent the interests of organizations, such as corporations, labor unions, and trade associations, that are forbidden by law to contribute or spend directly in federal campaigns.⁵⁵

The number of corporate PACs increased from 89 in 1974 to 1,327 in 1982.⁵⁶

There is a direct correlation between campaign spending, electoral success, and legislative success for the PACs making contributions. As noted by Judge Wright, “PAC contributions are given with a legislative purpose and it is a telling fact that they are most numerous in the more highly regulated industries, such as oil, transportation, utilities, drugs, health care, and government contracting.”⁵⁷

Judge Wright further noted that there was a close connection between acceptance by a legislator of PAC contributions and voting for that PAC’s position on contested legislation.⁵⁸ There was also a close correlation between the overall expenditures by a given campaign and electoral success by the candidate. In 1978 open-seat senate campaigns, the candidate who had more to spend on the campaign prevailed in 92.8% of races.⁵⁹ As Judge Wright observed, “When wealth of this magnitude is injected into the political bloodstream, the legislative process itself is affected.”⁶⁰

52. However, the Court upheld portions of the Act that limited campaign contributions by both corporations and individuals, recognizing the corrupting influence that unlimited campaign contributions would have on our political system. *Buckley*, 424 U.S. at 143.

53. 435 U.S. 765 (1978).

54. SCHLOZMAN & TIERNEY, *supra* note 24, at 8.

55. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 614 (1982) (footnotes omitted).

56. Press Release, Federal Election Commission, PACs Increase at Declining Rate (Jan. 17, 1982) (on file with author).

57. Wright, *supra* note 55, at 616.

58. *Id.* at 618-19.

59. *Id.* at 622 (citing FEDERAL ELECTION COMMISSION, FEC REPORTS ON FINANCIAL ACTIVITY 1977-1978, INTERIM REPORT NO. 5, U.S. SENATE AND HOUSE CAMPAIGNS 121-340 (June 1979)).

60. *Id.* at 616.

If anything, the importance of money in influencing legislation has only increased since 1982. Despite numerous and repeated efforts at campaign finance reform, corporate money has persisted in injecting itself into politics. As one Commentator noted, political money is a “hydraulic” force that will find its way into any crack left in an attempt to contain it.⁶¹ The First Amendment protections for corporate political speech, as enunciated in *Buckley* and *Bellotti*, preclude any attempt to hermetically seal off politics from money. Since 1982, the rise of “independent” issue organizations has led to an even more uncontrolled flow of money from business interests to legislators via campaign contributions.⁶² More recently, political journalists have reported on the direct link between lobbying activities, campaign contributions, and legislative success. In one case, contributions worth \$1 million were sufficient to assure legislative success for sugar subsidies worth \$2 billion annually to the sugar cane industry.⁶³ Money still buys access, and more. As Johnny Chung, a businessman and fundraiser for the Democratic National Committee, put it in the wake of the White House campaign finance scandals, “[t]he White House is like a subway—you have to put in coins to open the gates.”⁶⁴

Though new proposals for campaign finance and ethics reform arise with regularity,⁶⁵ few would propose a ban on interest group efforts to influence government altogether. Not only would such a ban run afoul of the protections for political speech afforded by the First Amendment, but it would run afoul of the First Amendment right to petition as well. Despite their finding of a strong tilt in pressure group activities in favor of business interests and contrary to the interests of ordinary citizens and the disadvantaged, Schlozman and Tierney concluded their study by acknowledging that this First Amendment right to petition interest is too strong to bear restriction on lobbying activities: “The burden for maintaining this balance does not, however, fall to the organized interests. The right to petition government collectively is so fundamental and so constitutionally protected that it cannot be restrained.”⁶⁶

Schlozman and Tierney recognized the important role of interest groups in performing a communications function between the represented and their representatives in all three branches of government. What remains to be seen is how organized interests influence the three branches of government, and whether access to this influence is equal.

B. The Twenty-First Century Law Generating Process: Not Your Founding Fathers' Separation of Powers

Separation of powers concerns underlie much of the rhetoric of the standing analysis that concerns this essay. Often, this separation of powers analysis includes some attempt to divine the framers' assumptions concerning the proper role of the

61. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999).

62. See Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 633 (2007).

63. Editorial, *America's Sugar Daddies*, N.Y. TIMES, Nov. 29, 2003, at A14.

64. Fred Wertheimer, *Unless We Ban Soft Money*, WASH. POST, Aug. 10, 1997, at C7.

65. See, e.g., BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

66. SCHLOZMAN & TIERNEY, *supra* note 24, at 408.

respective branches of government. Part of the tension underlying the imbalances in the current law of standing may result from the incompatibility of eighteenth century political theories with the realities of our twenty-first century system of government. After their study of the role of interest groups in American government, Schlozman and Tierney came to the conclusion that Madison's concerns about majority factions in *The Federalist No. 10* were misplaced:

The overall thrust of organized interest politics is quite different from that envisioned by Madison. He feared tyranny of the majority as the pernicious consequence of factional politics, arguing that the ordinary operations of democratic procedure would prevent any minority faction from prevailing. On the contrary, it seems that the politics of organized pressure builds into the American system a minoritarian tendency to counterbalance the more majoritarian proclivities of other parts of the political process. In general, organized interest politics tends to facilitate the articulation of demands by the narrowly interested and well organized. By and large, the collectivities thus benefited are well heeled; business, in particular, finds pressure politics a useful mechanism for pursuing political goals.⁶⁷

The factions that concerned Madison are not the interest group pressures that confront the American political system today. However, the modern law-generating system is a far cry from the simple process whereby representatives in Washington draft a bill, vote it into law, and the executive signs it and enforces the terms of the bill against those subject to its rules that Madison might have envisaged.⁶⁸ With the dawn of the administrative state, and with the Supreme Court's ultimate ratification of the expansion of the federal regulatory sphere and the delegation of rulemaking authority to administrative agencies during the New Deal revolution, the function of creating and validating rules regulating the conduct of industries and economic actors throughout the American polity has come to involve all three branches of government. In every modern regulatory scheme, Congress enacts the underlying statute, which charges an agency with implementing the statute through regulations having the force of law. Despite the polar principles of separation of powers,⁶⁹ adoption of these regulations

67. *Id.* at 400.

68. As one text on the administration of statutes describes the process:

High school civics teaches that government is composed of three branches: the legislative branch that enacts laws, the executive branch that implements and enforces laws enacted by the legislature, and the judicial branch that adjudicates disputes arising under the common law and under statutes enacted by the legislature. Although this is a pleasing and seemingly complete model, it is overly simplistic. . . . But the high school civics model breaks down completely when it comes to administrative or regulatory agencies. It does not mention them. Neither do the federal or state constitutions. Yet these agencies carry out most of the day-to-day work of government. Moreover, they incorporate functions of all three of the traditional branches of government. They have a legislative function. They promulgate regulations that elaborate on statutes enacted by the legislature and that have the force of law. They have an executive function. They implement and enforce statutes enacted by the legislature. And they have a judicial function. Agency employees sit in judgment on persons the agency alleges to have violated the statutes they implement.

JEFFREY MILLER, ANN POWERS & NANCY ELDER, INTRODUCTION TO ENVIRONMENTAL LAW: CASES AND MATERIALS ON WATER POLLUTION CONTROL (2008).

69. Professor Louis Jaffe reconciled the nature of administrative delegation with separation of powers by describing the legislative, executive, and judicial powers as "poles" rather than boundaries, leaving room

involves substantial policy choices that may benefit some interests and disadvantage other interests. Promulgation of regulations is not the last word on the precise normative rules, as these regulations will always be subject to judicial review, and it is not until a court has pronounced the rules to be valid or invalid is the matter finally settled.⁷⁰

It is no accident that the rise of the administrative state witnessed a concurrent rise of organized interest groups bringing pressure to bear on each decision point in the law-generating process. Indeed, it was part of the premise of the interest group pluralists that in a complex, modern society, with overlapping and diverging groupings of political interest, it is *only* through organized interest groups that the governed can make their preferences known and consent to regulation.⁷¹

1. Legislation

Every scheme of regulation begins with a statute. Of course, statutory formulation and amendment are the initial focal point for interest group participation. Interest groups have several ways of influencing the legislative process. They may use direct mail or other public relations measures to provoke letter writing campaigns to Congress. Schlozman and Tierney cite the success of a beverage and snack industry group, the “Calorie Control Council,” in instigating letters of protest against a proposed Food and Drug Administration ban on saccharin, leading to congressional action delaying the ban.⁷² Another example of successful influence of legislation by an interest group is the chemical industry’s efforts to delay the impending ban on production of the pesticide methyl bromide, which is both highly toxic and a potent ozone depletion chemical.⁷³ More fundamentally, interest groups directly influence electoral outcomes by giving money, publicizing candidates’ voting records,⁷⁴ and, more recently, supporting issue-oriented groups.⁷⁵ The vast bulk of financial support

for sharing of functions that fall between those irreducibly legislative, judicial, or executive in nature. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 28-33 (1965).

70. Schlozman and Tierney noted that “virtually every regulation issued by such agencies as the Environmental Protection Agency and the Occupational Safety and Health Administration is challenged in court either by environmentalists and consumer groups or by industry.” SCHLOZMAN & TIERNEY, *supra* note 24, at 367 (citing Steven Kelman, *Occupational Safety and Health Administration*, in *THE POLITICS OF REGULATION* 236, 259 (James Q. Wilson ed., 1980); Paul J. Culhane, *Natural Resources Policy: Procedural Change and Substantive Environmentalism*, in *NATIONALIZING GOVERNMENT: PUBLIC POLICIES IN AMERICA* 201 (Theodore J. Lowi & Alan Stone eds., 1978)); *see also* Henry Monaghan, *Marbury and the Administrative State*, 83 *COLUM. L. REV.* 1 (1983) (discussing the debate over the proper level of judicial review of administrative decisions in light of *Marbury v. Madison*).

71. Schiller, *supra* note 24, at 1412.

72. SCHLOZMAN & TIERNEY, *supra* note 24, at 188-90.

73. Omnibus Consolidated and Emergency Supplemental Appropriation Act, 112 Stat. 2681 (1998). For an account of the successful efforts by organized chemical and agricultural interests to lobby for this provision, *see* CHARLES LEWIS, *THE BUYING OF THE CONGRESS* 71-82 (1998). The problems posed by standing doctrine for environmental groups seeking to oppose regulatory implementation of this legislative rollback are discussed *infra* Part IV.D.

74. SCHLOZMAN & TIERNEY, *supra* note 24, at 209-10.

75. Leslie Wayne, *Outside Groups Spend Heavily and Visibly to Sway '08 Races*, *N.Y. TIMES*, Jan. 1, 2008, at A1.

for congressional campaigns is funneled through PACs and issue-oriented groups.⁷⁶ As with interest groups generally, Schlozman and Tierney's study revealed that the PAC community was sharply tilted towards business interests, both in the number of organizations and in dollar contributions.⁷⁷ In parallel with interest groups generally, the interests of diffuse publics (i.e., majoritarian interests) were very unevenly represented in PACs.⁷⁸ An additional way interest groups influence the legislative process is to provide direct personal benefits to legislators in the form of free travel, honoraria, and other perks.⁷⁹

Of course, interest groups also influence legislative action through the more traditional forms of "lobbying," that is, direct meetings with representatives. One tactic to increase the effectiveness of such meetings is to enlist an influential constituent of the congressperson.⁸⁰ As with other aspects of interest group representation, Schlozman and Tierney have found that this tactic is much easier for business interests to use than for public interest organizations representing more diffuse interests.⁸¹ Interest groups use contacts with legislators as opportunities to present information advantageous to their side of issue conflicts.⁸²

The sum total of these efforts to influence legislation is not without effect, as the above examples demonstrate.⁸³ And, as with interest group activities overall, there is a distinct balance of resources and outcome-effectiveness favoring the business interests subject to regulation as opposed to citizens groups that represent the more diffuse, widely shared communitarian interests of regulatory beneficiaries.

2. Administrative Rulemaking

Congressional enactment of a regulatory program is hardly the last word when it comes to establishing binding legal norms. At least since the social legislation revolution of the New Deal, Congressional enactments have consisted of broad regulatory policies, with the specific rules to be developed by agencies given delegated "quasi-legislative" functions. Although occasionally Congress may intervene to direct agency policy on the micro-level,⁸⁴ in general, the policy choices of implementation are left

76. David D. Kirkpatrick, *Congress Finds Ways of Avoiding Lobbyist Limits*, N.Y. TIMES, Feb. 11, 2007, at A1.

77. SCHLOZMAN & TIERNEY, *supra* note 24, at 248.

78. *Id.* at 251.

79. *Id.* at 266-68.

80. *Id.*

81. *Id.* at 293 (94 percent of trade associations use this technique, while only 58 percent of citizens' organizations do).

82. *See id.* at 297-301.

83. Schlozman and Tierney were somewhat guarded in their conclusions respecting the effectiveness of lobbying activities in influencing legislative outcomes, because of the impossibility of assessing what action would have occurred in the absence of interest group efforts. *Id.* at 316-17. Nevertheless, they concluded that "the effects of organized pressure on Congress can range from insignificant to determinative." *Id.* at 317.

84. *See generally* Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 175-82 (1992).

to an administrative branch of government that is not precisely described in the constitutional schema of tripartite government.⁸⁵

As with the Congressional legislative process, the agency legislative process is subject to influence by organized interest groups. These groups lobby agency personnel, participate in rule-making proceedings, provide information to agency staff favorable to their position, and—most importantly—serve on advisory committees that participate in formulating agency policy.⁸⁶ Industry interest groups use the same tactics to influence presidential policy making that they do to influence congressional policy-making,⁸⁷ leading Schlozman and Tierney to note “there may be reason to question the notion . . . that the presidency is a majoritarian institution insulated from pressures by narrow politics.”⁸⁸ Implementation of Executive Order number 12,291,⁸⁹ which expanded the review powers of the executive Office of Management and Budget, has vastly increased the direct role of the President in formulating and approving regulations.⁹⁰ More recently, former President George W. Bush issued Executive Order number 13,450,⁹¹ which required agency Performance Improvement Officers to, among other duties, “supervise the performance management activities of the agency.”⁹² This requirement was added to “improve the effectiveness and efficiency of the Federal Government.”⁹³ In the meantime, revolving-door arrangements, in which interest groups hire former agency staff members and place their own employees in influential agency staff positions, allow interest groups to influence agency policy.⁹⁴ As public financing for presidential campaigns becomes more obsolete as candidates are able to raise much more money on their own, the influence of the largest donors to the candidate can only increase.⁹⁵

85. In 1938, Dean Landis described the administrative process as not “simply an extension of executive power In the grant to it of that full ambit of authority necessary for it to plan, to promote, and to police, it presents an assemblage of rights normally exercisable by government as a whole.” JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 15 (1938). The controversy concerning whether administrative agencies are part of the executive, or are properly considered a fourth branch of government continues to this day. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541 (1994). One need not resolve this controversy for the purposes of this Article; the point is that administrative agencies exercise a mix of legislative, executive, and judicial powers that confounds eighteenth century separation of powers principles, and that their actions—like those of Congress—are influenced by organized interest groups representing regulated industries.

86. SCHLOZMAN & TIERNEY, *supra* note 24, at 330-35; *see also* Eskridge, *supra* note 44, at 297 (“[P]ublic choice theory teaches that, over time, these agencies and departments are subject to powerful rent-seeking pressures.”).

87. *See* SCHLOZMAN & TIERNEY, *supra* note 24, at 328-30.

88. *Id.* at 329.

89. Exec. Order No. 12291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2006).

90. *See* *Env’tl. Def. Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986) for an example of the Office of Management and Budget’s use of Executive Order 12291, on behalf of industry, to hamper EPA’s implementation of statutory requirements to issue regulations.

91. Exec. Order No. 13,450, 3 C.F.R. 309 (2008).

92. *Id.* at 310.

93. *Id.* at 309.

94. SCHLOZMAN & TIERNEY, *supra* note 24, at 336-37.

95. David D. Kirkpatrick, *Death Knell May Be Near For Public Election Funds*, *N.Y. TIMES*, Jan. 23, 2007, at A16 (“[T]he presidential candidates will be more beholden than ever to the so-called bundlers, often lobbyists, who solicit donations to present to campaigns in a lump sum.”).

These revolving-door arrangements have also helped lead to the phenomenon of agency “capture,” where agencies are substantially influenced by the very industries they are supposed to regulate.⁹⁶ Professor Louis Jaffe not only acknowledged this phenomenon in his 1965 treatise, but also found it an inevitable aspect of administration that agencies, to accomplish anything, must take the point of view of one interest over others rather than be representative.⁹⁷ Though Schlozman and Tierney found the capture phenomenon to be far from universal in their 1986 study, they note that many of the same tactics used to influence legislative determinations are used to great effect by business seeking to influence the administrative process—including the development of personal relationships, implicit assurances of job opportunities, and provision of one-sided information.⁹⁸ Schlozman and Tierney note the example of the pro-business EPA during the Reagan administration and cite it as an example not of capture by industry, but rather the “donation” of the agency to the industry by a deregulatory minded President.⁹⁹ A similar “donation” of the EPA to industry interests took place during the George W. Bush administration.¹⁰⁰

Schlozman and Tierney concluded that capture theory “sensitiz[es] us to the possibility that private groups may occasionally acquire positions of great influence in agency decision-making processes, thus posing a perplexing puzzle for democracy.”¹⁰¹ Professor Cass R. Sunstein observed, more generally, that due to the influence of organized interests on the administrative process, statutes “that involve diffuse and numerous beneficiaries and well-organized regulated classes . . . tend to be inadequately enforced.”¹⁰²

3. Interest Groups and the Judiciary

Interest groups influence the judicial process both directly, by bringing impact litigation and filing amicus briefs, and indirectly, by seeking to influence judicial appointments and by proselytizing judges to their point of view.¹⁰³ Several

96. See generally SCHLOZMAN & TIERNEY, *supra* note 24, at 339-46.

97. JAFFE, *supra* note 69, at 323.

98. SCHLOZMAN & TIERNEY, *supra* note 24, at 341-43.

99. *Id.* at 345-46.

100. See generally ROBERT F. KENNEDY, JR., CRIMES AGAINST NATURE 76-95, 114-42 (2005) (discussing the pro-industry stance of the EPA during the George W. Bush administration).

101. SCHLOZMAN & TIERNEY, *supra* note 29, at 346.

102. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 102 (1990).

103. SCHLOZMAN & TIERNEY, *supra* note 24, at 358-73. Although Schlozman and Tierney pointed out that direct lobbying of judges violates ethical rules, and thus concluded that the only efforts to shape judicial opinion take place in the pages of law reviews, since their study, industry groups have developed more sophisticated—and direct—means of influencing judicial attitudes. During the 1990s, industry-funded groups opposing environmental regulation began sponsoring “educational conferences” for judges, usually held in a vacation resort location, at which invited judges (who attended at no personal cost) were given lectures on property rights and takings theories that would restrict the scope of environmental legislation. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 547-49 (1998). At one point, the sponsors of these junkets claimed that one-third of sitting federal judges had “attended or asked to enroll” in one of their conferences. Ruth Marcus, *Issues Groups Fund Seminars for Judges*, WASH. POST, Apr. 9, 1998, at A12.

commentators have suggested that the same imbalance of resources that favor business interests in the two more political branches of government garners advantages in the judicial branch as well.¹⁰⁴

Nevertheless, in many cases the courts have proven more receptive to the efforts of economically and politically disadvantaged minorities than Congress and the administrative agencies. Ideologically motivated organizations have waged successful campaigns in the area of civil rights, non-discrimination, and environmental protection. The NAACP orchestrated and supported litigation striking down racially based restrictive covenants in *Shelley v. Kraemer*¹⁰⁵ as well as the landmark decision ending segregation in public schools in *Brown v. Board of Education*.¹⁰⁶ Even before the environmental revolution took statutory form in the 1970s, groups such as Scenic Hudson Preservation Conference won the right to sue to assert environmental interests and required the Federal Power Commission to take environmental values into account in performing its general "public interest" review of a power plant licensing.¹⁰⁷

Ideologically motivated organizations also played an important role in representing the interests of the benefited community in implementation of the environmental statutes adopted during the 1970s. Most of the cases forcing the EPA to issue regulations required under the Clean Air Act and Clean Water Act were brought by the NRDC.¹⁰⁸

The Supreme Court has recognized the important role that organized groups representing broad public interests play in bringing balance to the arguments and issues presented to the judiciary. This recognition has been grounded in the right to petition guaranteed by the First Amendment. In *International Union v. Brock*,¹⁰⁹ the Court explained the rationale for organizational standing in terms of the advantages to the judiciary of competent presentation of the issues:

The Secretary's presentation, however, fails to recognize the special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir or expertise and capital. "Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." These resources can assist both courts and plaintiffs. As one court observed of an association's role in pending litigation: "[The] interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure 'that

104. SCHLOZMAN & TIERNEY, *supra* note 24, at 376-77 (noting that financial resources allow interest groups to hire better lawyers and underwrite the high costs of litigation).

105. 334 U.S. 1 (1948); *see* SCHLOZMAN & TIERNEY, *supra* note 24, at 363; CLEMENT E. VOSE, CAUCASIANS ONLY 252 (1959).

106. 347 U.S. 483 (1954); *see* SCHLOZMAN & TIERNEY, *supra* note 24, at 367-68; HERBERT JACOB, JUSTICE IN AMERICA 39-40 (4th ed. 1984).

107. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 617 (2d Cir. 1965).

108. *See, e.g.*, NRDC v. Train, 545 F.2d 320 (2d Cir. 1976); NRDC v. Train, 519 F.2d 287 (D.C. Cir. 1975).

109. 477 U.S. 274 (1986).

concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.”

In addition, the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.¹¹⁰

Justice Jackson, concurring in *Joint Anti-Fascist Committee v. McGrath*, observed that “[t]he only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.”¹¹¹

The Court similarly commented favorably on the role organized groups play in asserted interests not vindicated in the other branches of government in *NAACP v. Button*: “Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.”¹¹² In recognizing this link between the petition right and group litigation activity, Justice Brennan’s opinion for the court cited, among other sources, some of the same interest group theorists that led the interest group pluralists.¹¹³ As Professors Birkby and Murphy observed shortly after the decision:

[t]his decision represents one of the few times in all Supreme Court history when the Justices have plainly and candidly admitted that they play a key role in the struggle among interest groups to shape public policy, that even though they are judges in the common law tradition they are nevertheless participants in the political process.¹¹⁴

In summary, as our republican form of self-government has evolved into the twenty-first century, well-financed narrow interests, namely business interests, exert a strong influence in the legislature through campaign contributions that buy access and lobbying efforts that convert this access into action. Broad public interests and the interests of the economically disadvantaged are less influential in the legislature. The business and regulated community similarly exerts influence on the agency rulemaking process by bringing its resources to bear on provision of favorable information, by influencing the process of appointing agency personnel and OMB review of rules, and by developing personal relationships and a pattern of revolving-door employment practices. Public interest and civil rights groups have had more success asserting their interests in the judicial branch of government. Nevertheless, standing doctrine may limit the kinds of cases that public interest, ideological plaintiff-organizations can assert in court, with profound implications for the nature of judicial review of the administrative rulemaking process.

110. *Id.* at 289-90 (internal citations omitted).

111. *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 187 (1951).

112. *NAACP v. Button*, 371 U.S. 415, 429-30 (1963).

113. *Id.* at 429-30 (citing DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (1951); ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES* (1949)).

114. Robert H. Birkby & Walter F. Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts*, 42 *TEX. L. REV.* 1018, 1043 (1964).

IV. THE IMPORTANCE OF JUDICIAL REVIEW OF RULEMAKING AND THE STANDING
HURDLES FACED BY IDEOLOGICAL PLAINTIFFS SEEKING REVIEW

In their study of how interest groups influence government, Professors Schlozman and Tierney observed that “virtually every regulation issued by such agencies as the Environmental Protection Agency and the Occupational Safety and Health Administration is challenged in court either by environmental and consumer groups, or by industry.”¹¹⁵ Additionally, Professor Louis Jaffe opined that “[t]he availability of judicial review is the necessary condition, psychologically, if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”¹¹⁶ Although Professor Jaffe commented on the widely shared social expectation in our system of government, that the judiciary will be the final arbiter of disputes about the appropriate implementation of statutory mandates, this expectation is rooted also in the constitutional limits, however weak, on delegation of rulemaking authority. Professor Cass Sunstein observed that “the basic presumption is in favor of review—an idea that draws on constitutional concerns and fears about agency failure.”¹¹⁷ In commenting on the normative effect public choice theory might have, Professor Eskridge points to a role for the judiciary in counterbalancing the interest-dominated choices made by legislatures and agencies.¹¹⁸

Thus, the idea of judicial review as the last step in the process of generating binding rules with “the force of law” is firmly established among legal scholars. Statutory regulatory schemes incorporate an assumption of judicial review of agency implementation, and indeed may seek to accelerate judicial review in order to provide certainty and uniformity. By and large, the judiciary has accommodated itself to the role of rulemaking review, but with some important qualifications on the scope of that review. Nevertheless, the law of judicial standing imposes different standards for access to judicial review for regulatory beneficiaries and regulatory objects, potentially skewing the results of the administrative process in favor of the very interests—organized business interests—that we have seen are more advantageously represented in the administrative rulemaking process.

A. Constitutional Basis for Judicial Review

The premise underlying the administrative state—that Congress could delegate to agencies the authority to adopt rules, with the force of law, governing conduct—has long been accepted.¹¹⁹ In 1825, Chief Justice John Marshall wrote, “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”¹²⁰ The Supreme Court, throughout the early history of our nation, has allowed incrementally greater grants of rulemaking power to the executive branch, generally rejecting arguments based on an implicit constitutional prohibition against the

115. SCHLOZMAN & TIERNEY, *supra* note 24, at 367.

116. JAFFE, *supra* note 69, at 320.

117. SUNSTEIN, *supra* note 102, at 218.

118. *See* Eskridge, *supra* note 44, at 303.

119. *See* JAFFE, *supra* note 69, at 41-72 (reviewing the history of delegated rulemaking authority and judicial attitudes towards delegation).

120. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

delegation of legislative power: from early statutes authorizing the President to suspend an embargo against France and Britain upon a determination that those nations ceased to violate the United States' neutral commerce,¹²¹ to the establishment of "free lists" of goods free from duties,¹²² to the establishment of minimum quality standards for imported tea,¹²³ to the establishment of rules for the use of National Forest lands carrying criminal penalties.¹²⁴

Nevertheless, in *Schechter Poultry Corp. v. United States*, the Court declared that the power to delegate legislative functions is not limitless.¹²⁵ Decided in 1935, *Schechter* established the existence of residual constitutional limits on the scope and freedom of delegation of rulemaking authority.¹²⁶ Congress must incorporate some reference to a standard governing the formulation of rules, and may not delegate to the agency a "roving commission to inquire into evils and upon discovery correct them."¹²⁷ The *Schechter* Court invalidated a portion of the National Industrial Recovery Act¹²⁸ that authorized the National Recovery Administration to establish rules for "fair competition" for various industries, including the poultry industry, as a means to promote business activity and recover from the Great Depression.¹²⁹

No case since *Schechter* has invalidated a delegation of rulemaking authority, but the principle it established—that there is some outer limit to the scope of permissible delegation—necessarily implies a constitutional role of judicial review of rulemaking activity. The constitutional mandate for judicial review has been asserted as a fundamental aspect of the nature of the judicial authority.¹³⁰ This "judicial function" view echoes Chief Justice Marshall's statement in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹³¹ The mandate for judicial review is also rooted in the Fifth Amendment guarantee against deprivations of liberty or property without due process. Under this view, the right of judicial review of the system of rules under which a deprivation takes place is part of the process that is due. As Professor Jaffe stated, "We can then conclude that, when a person is the object of an administrative order which will be enforced by a writ levying upon his property or his person, he is at some point entitled to a judicial test of legality."¹³² Such review is constitutionally necessary to ensure both that the delegation itself falls within the outer bounds established in *Schechter* and

121. See *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

122. See *Field v. Clark*, 143 U.S. 649 (1892).

123. See *Buttfield v. Stranahan*, 192 U.S. 470 (1904).

124. *United States v. Grimaud*, 220 U.S. 506 (1911).

125. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935).

126. *Id.* at 541-42.

127. *Id.* at 551 (Cardozo, J., concurring).

128. National Industrial Recovery Act Ch. 90, § 7, 48 Stat. 195 (1933) *invalidated by Schechter*, 295 U.S. 495 (1935).

129. *Schechter*, 295 U.S. at 537.

130. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied.")

131. 5 U.S. (1 Cranch) 137, 177 (1803).

132. JAFFE, *supra* note 69, at 384.

that the rulemaking activity itself falls within the bounds of the permissible delegation.¹³³

The Court's most recent consideration of a delegation challenge to rulemaking, *Whitman v. American Trucking Ass'n*,¹³⁴ was premised on both of these assumptions. In *American Trucking*, the Court found that the Clean Air Act direction to the EPA to establish national ambient air quality standards at a level "requisite to protect public health" was a sufficiently intelligible principle to survive a delegation challenge; at the same time the Court upheld EPA's establishment of a health-based fine particulate level that would cause severe economic impacts to the trucking industry.¹³⁵

B. Congressionally Expressed Presumptions of Judicial Review

Cases such as *American Trucking*, which assume the underlying constitutional necessity of judicial review of the scope and exercise of delegated rulemaking authority, are based on statutory judicial review procedures that are now part of the underlying legal landscape. The 1946 Administrative Procedure Act reflected a basic presumption of reviewability of all final administrative action:¹³⁶

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion— . . . [a]ny person suffering legal wrong because of an agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.¹³⁷

"Agency action" subject to such review, is defined to include the issuance of any agency "rule," which is defined as "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."¹³⁸ In *Abbott Laboratories v. Gardner*,¹³⁹ the Supreme Court held that the Administrative Procedure Act specifically authorized immediate, pre-enforcement review of agency rulemaking, subject only to justiciability limits of ripeness and standing.¹⁴⁰

Congress has made immediate judicial review of regulations an explicit element in many regulatory schemes. These statutory provisions not only acknowledge the inevitability of judicial review of rulemaking, but also seek to provide certainty and

133. See Monaghan, *supra* note 70, at 32-33; JAFFE, *supra* note 69, at 320-27; SUNSTEIN, *supra* note 102, at 218-20.

134. 531 U.S. 457 (2001).

135. *Id.* at 473-76, 486.

136. Professor Louis Jaffe analyzed the history of judicial review of administrative action and concluded that the Administrative Procedure Act's presumption of judicial review did no more than codify a preexisting common-law presumption of judicial review recognized by the Supreme Court. JAFFE, *supra* note 69, at 339-53, 372.

137. Administrative Procedure Act § 10(a), 60 Stat. 243 (1946) (codified with some differences in language at 5 U.S.C. § 702 (2006)).

138. *Id.* §§ 2(c), (g) (codified with some differences in language at 5 U.S.C. §§ 551(4), 551(13) (2006)).

139. 387 U.S. 136 (1967).

140. *Id.* at 149-54. The *Abbott Laboratories* decision permitted immediate judicial review of FDA regulations requiring the generic name of a drug to appear on the drug's label every time the trade name was used. *Id.* at 153. Review was sought by, and afforded to, the drug companies that were the regulatory objects of the rule in question. If the drug companies complied with the rule, they would have subjected themselves to great expense, whereas if they tested the rule by refusing to comply, they risked prosecution. *Id.* at 152-53.

uniformity by establishing terms for judicial review. For example, in the environmental arena, the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act, each contain provisions requiring any challenge to certain kinds of rule-making be brought within a short period after promulgation and in the case of rules with nationwide application requiring that challenges be commenced in the Court of Appeals for the District of Columbia Circuit.¹⁴¹ These statutes preclude the later assertion of a challenge to the validity of regulations—for example, in an enforcement proceeding. Similarly, the Federal Food, Drug, and Cosmetic Act provides that a judicial review proceeding be commenced in the Court of Appeals within ninety days of promulgation of regulations pursuant to specified sections of the Act.¹⁴² The Civil Service Reform Act provides for judicial review, to be commenced in the Court of Appeals, of a final order under the act within sixty days of the issuance of the order.¹⁴³

Congress has also accommodated the near universality of judicial review of rulemaking actions by amending the Judicial Code to address the problem of multiple actions challenging the same rulemaking in different circuit courts. Under prior practice, the first petition filed for review of a particular rulemaking action determined the forum of review; which led to highly contested “races to the courthouse” to be the first to file a judicial review proceeding in a circuit deemed favorable to the particular interest group filing suit.¹⁴⁴ The winner of the race was often determined based on a difference in filing-time measured in fractions of seconds.¹⁴⁵ In 1988, Congress amended 28 U.S.C. § 2112 to provide equal status for all petitions filed within ten days of publication of a rule in the Federal Register.¹⁴⁶ The amendment further provided that the choice of circuit would be determined by lottery from among the petitions filed.¹⁴⁷

Thus, Congress has encouraged and accommodated immediate post-promulgation review of administrative rulemaking.

C. Judicial Acceptance of Review of Rulemaking

Although the concept of pre-enforcement judicial review of agency rulemaking immediately upon adoption of a final rule might once have been considered problematic in terms of justiciability, the *Abbott Laboratories* case accepted the

141. See Clean Water Act Pub. L. No. 92-500, § 509(b) (current version at 86 Stat. 816, 892 (1972), 33 U.S.C. § 1369(b) (2006) (providing for review in Circuit Court of Appeals within 120 days of promulgation)); Clean Air Act Pub. L. No. 91-604, § 307(b) (current version at 84 Stat. 1676, 1708 (1970), 42 U.S.C. § 7607(b) (2000) (providing review in Circuit Court within 60 days of promulgation of specified rules and requiring review in the District of Columbia Circuit for rules having nationwide scope or effect)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 7006(a)(1) 90 Stat. 2795, 2827, 42 U.S.C. § 6976(a)(1) (2000) (requiring petition for review of any regulation adopted pursuant to the Resource Conservation and Recovery Act to be filed in the District of Columbia Circuit within 90 days of promulgation).

142. 21 U.S.C. § 371(f)(1) (2006).

143. Civil Service Reform Act of 1978, 5 U.S.C. § 7123(a) (2006).

144. See Marshall J. Breger, *The Race to the Courthouse is Over*, WASH. POST, Mar. 16, 1988, at A23.

145. *Id.*

146. 28 U.S.C. § 2112 (2006). In the event no petition is filed within ten days of publication, the first petition filed thereafter determines the choice of forum. *Id.*

147. *Id.*

proposition that the benefits of immediate review provided for by the Administrative Procedure Act overcame justiciability concerns.¹⁴⁸ In some ways, the decision in *Abbott Laboratories* represents a triumph of the “judicial function” premise of judicial review over the “Fifth Amendment Due Process” premise. After all, the Fifth Amendment is generally satisfied by the opportunity to raise legal objections to the rules in question at the time of their enforcement.

Abbott Laboratories involved a challenge by pharmaceutical manufacturers to a Food and Drug Administration regulation requiring all drug labels to bear the generic name for the drug each and every time the trade name appeared.¹⁴⁹ Although the underlying statute did not include the regulation in question among the categories for which it provided for immediate judicial review, the Court nevertheless found the regulations immediately reviewable as a final agency action under the Administrative Procedure Act.¹⁵⁰ While accepting the proposition of immediate judicial review of regulations, the Court did impose a ripeness test on the availability of immediate review: the petitioner would have to show some hardship if review was deferred and that the questions presented are suitable to be determined via a facial challenge to the regulations (as opposed to the concrete factual circumstances of an enforcement challenge).¹⁵¹ In *Abbott Laboratories*, the pharmaceutical companies sufficiently established hardship based on either the cost of reprinting labels for existing drug stocks to comply with the regulation or the risks of criminal penalties, civil forfeitures, and penalties if they chose to test the regulation by non-compliance.¹⁵² In addition, the Court found that the nature of the issue presented was suitable for immediate judicial review as “all parties agree[d] that the issue tendered [wa]s a purely legal one: whether the statute [had been] properly construed by the Commissioner to require the established name of the drug to be used *every time* the proprietary name is employed.”¹⁵³

Since *Abbott Laboratories*, immediate judicial review of rulemaking actions has become routine and judicially accepted as the norm. Relatively few cases have declined review of final substantive agency regulations by applying the “ripeness” criteria upon which the Court conditioned immediate review.¹⁵⁴ Courts have found the “hardship” criterion satisfied by procedural injuries¹⁵⁵ and the risk of environmental

148. 387 U.S. at 140-41.

149. *Id.* at 137-38.

150. *Id.* at 153. The Court relied, in part, on a saving clause included in the judicial review section of the Food, Drug, and Cosmetics Act. *Id.* at 146.

151. *Id.* at 153.

152. *Id.* at 154.

153. *Id.* at 149.

154. *See, e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 805 (2003) (finding non-substantive rule concerning application of dispute regulation procedures to be unripe for review); Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1204 (D.C. Cir. 1998) (challenge to evidentiary regulation not ripe); Trans Union LLC v. FTC, 295 F.3d 42, 51 (D.C. 2002) (challenge to regulation not ripe for judicial review, no formal agency guidance or enforcement action); Office of Comm'n of the United Church of Christ v. FCC, 826 F.2d 101, 102-03 (D.C. Cir. 1987) (refusing to consider challenge to new regulations under “public interest” standard outside context of specific proceeding).

155. *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 952-53 (7th Cir. 2000).

harm.¹⁵⁶ As noted above, Congress has specifically provided for immediate judicial review of specified categories of regulations. The Supreme Court has opined that such statutes permit “judicial review directly, even before the concrete effects normally required for APA review are felt.”¹⁵⁷ Other federal courts have found such specific congressional mandates for prompt judicial review to be dispositive of the ripeness inquiry.¹⁵⁸

Of course, judicial acceptance of routine immediate judicial review of regulations is a different question from the scope of that review. Hand-in-hand with judicial acceptance of the notion that Congress may delegate substantive rulemaking authority comes a measure of deference to administrative policy choices within the scope of the substantive delegation. Thus, as Professor Henry Monaghan has observed, the province of the Courts in a system of judicial review of administrative rulemaking becomes less the duty to declare “what the law is” and more a duty to determine whether the particular agency rules and policy choices fall within the scope of the authority delegated by Congress. According to Monaghan, “the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.”¹⁵⁹ The Supreme Court has itself adopted this definition of the role of courts through the *Chevron, U.S.A., Inc. v. NRDC*¹⁶⁰ doctrine of administrative deference. Under *Chevron*, an agency interpretation of law will be binding on the courts if the congress has not directly spoken to the contrary on the issue in the underlying statute, and if the agency interpretation is a reasonable interpretation of the statutory scheme.¹⁶¹ For *Chevron* deference to apply, the court must still determine that the action in question was taken pursuant to a congressional grant of substantive rulemaking authority.¹⁶²

Thus, courts have accepted the routine practice of immediate judicial review of agency rulemaking, but have also adopted a deferential standard of review that leaves the policy choices to the agencies. It bears noting that in adopting this deferential standard of review in *Chevron*, the Court invoked rhetoric that is reminiscent of the separation of powers and political accountability concerns that, we shall see, also underlie standing doctrine. According to the *Chevron* Court, deference to agency policy choices is appropriate in part because:

Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which

156. *NRDC v. Nuclear Regulatory Comm’n*, 539 F.2d 824, 837 (2d Cir. 1976).

157. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990); accord *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 479-80 (2001).

158. See *La. Env’tl. Action Network v. EPA*, 172 F.3d 65, 69 (D.C. Cir. 1999); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993); *Ass’n of Am. R.R. v. ICC*, 846 F.2d 1465, 1496 (D.C. Cir. 1988).

159. Monaghan, *supra* note 70, at 33.

160. 467 U.S. 837 (1984).

161. *Id.* at 842-43.

162. See *Nat’l Cable & Telecomm. Ass’n*, 545 U.S. 967, 1004 (2005) (Breyer, J. concurring) (notice and comment rulemaking is highly probative, but not determinative, of whether Congress delegated substantive rulemaking authority); *United States v. Mead Corp.* 533 U.S. 218, 221 (2001) (*Chevron* deference not applied to tariff classification ruling made without notice and comment procedures); *United States v. Haggard Apparel Corp.*, 526 U.S. 380, 390 (1999) (*Chevron* deference applies to regulation promulgated pursuant to notice and comment rulemaking).

Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. Though agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."¹⁶³

D. The Problem of Standing for Regulatory Beneficiaries

Immediate judicial review of substantive rulemaking has thus become the rule rather than the exception. Yet access to the mechanisms of judicial review is not afforded equally to regulatory objects and regulatory beneficiaries. Though the judiciary routinely overcomes the justiciability concerns of ripeness doctrine, standing issues continue to pose a differential hurdle to organizational plaintiffs seeking to protect the interests and visions of the broad beneficiaries of regulatory programs. The Supreme Court's standing doctrine frankly discriminates against such interests:

[T]he nature and extent of facts that must be . . . [proved] in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. . . . [W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.¹⁶⁴

Thus, organizational plaintiffs have been precluded from challenging rulemaking actions that compromised statutory interests in endangered species,¹⁶⁵ wilderness areas,¹⁶⁶ or the environmental impacts of hazardous waste disposal.¹⁶⁷

Ordinarily, under the regime established by *Sierra Club v. Morton*¹⁶⁸ and *Hunt v. Washington Apple Advertising Commission*,¹⁶⁹ a plaintiff-organization must establish standing in a representational capacity by identifying a specific member, or members,

163. *Chevron*, 467 U.S. at 865-66 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)) (internal citations omitted).

164. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)); see also *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

165. *Defenders of Wildlife*, 504 U.S. at 562.

166. *Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871, 891 (1990).

167. *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000).

168. 405 U.S. 727 (1972).

169. 432 U.S. 333 (1977).

who would suffer the requisite injury-in-fact.¹⁷⁰ Although this structure works fairly well when organizations seek to challenge specific projects or specific activities that harm specific interests,¹⁷¹ this structure breaks down when confronted by a typical rulemaking challenge. Rulemaking establishes norms and requirements for conduct that will apply into the indefinite future; unlike the organization challenging a specific project in a specific location, there is no way of telling at the time a rule is adopted who will ultimately be affected by a rule of general applicability. A rule that has the effect of decreasing the availability of cancer drugs, for example, affects the interests of those known regulatory beneficiaries who have been diagnosed with cancer; however, it also will affect the interests of countless people who have not yet been diagnosed with cancer but who will nevertheless be affected by the rule sometime in the future.¹⁷² Similarly, a rule relaxing the safety requirements for the licensing of nuclear power plants affects the interests of people residing in the vicinity of nuclear power plants yet to be proposed, who cannot possibly tell at the time of the rulemaking that they have an interest that will be affected.¹⁷³ So too, a rulemaking that declines to list certain wastes as “hazardous,” thereby not requiring disposal in carefully controlled permitting facilities, immediately affects the interests of those who reside near existing non-hazardous waste disposal facilities, as well as the interests of all those unknown persons who may have a waste disposal facility sited near their residences in the future, or who may move into a neighborhood with an existing facility.¹⁷⁴

Under these circumstances, the process of challenging rulemaking is necessarily representative and advisory. That is, the plaintiff bringing the immediate challenge to the rulemaking is acting on behalf of all future parties who will be similarly situated, and whose interests will be affected by future application of the rule.¹⁷⁵ While the organizational plaintiffs who bring the challenges are often successful in locating individual representative members for standing purposes, the benefits to these individuals rarely justify the level of effort required by the litigation. Such organizational plaintiffs thus fall into the category of “ideological plaintiffs.” Such litigation is advisory in nature, as the purpose is to establish the legal rules that will apply in the future to protect the interests of persons with interests similar to those individuals with standing in the present case.

170. *Sierra Club*, 405 U.S. at 735; *Hunt*, 432 U.S. at 343.

171. *See* *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000).

172. *Cf. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006) (finding standing based on members of organization who were terminally ill cancer patients, even though identified members had died; relying on an exception to mootness based on likelihood of similarly situated future members of organization).

173. *Cf. Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004) (denying on the merits a challenge under the Administrative Procedure Act, to relaxed agency hearing requirements for new and renewal nuclear power plant licenses).

174. *Compare* *La. Envtl. Action Network v. EPA*, 172 F.3d 65 (D.C. Cir. 1999) (finding standing for a group with members residing near existing landfills likely to receive wastes) *with* *API v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) (holding that persons residing near existing landfills had no standing to challenge a hazardous waste listing decision because they could not prove that the waste in question was likely to be disposed of in the specific landfills they resided near).

175. One Commentator has argued that all litigation is in the nature of representation of future parties who will be bound by the legal norms established in a present case. *See* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997).

Statutes providing for immediate review of rulemaking add to the imperative for these immediate judicial challenges by regulatory beneficiaries. These statutes were designed to provoke a prompt and conclusive judicial determination of the validity of complex regulatory programs, and, accordingly contain provisions limiting or precluding later judicial review. For example, the Clean Water Act provides, "Action of the Administrator [of EPA] with respect to which review could have been obtained under paragraph 1 of this subsection [requiring a petition for review within 120 days of promulgation] shall not be subject to judicial review in any civil or criminal proceeding for enforcement."¹⁷⁶

The Clean Air Act judicial review provision similarly provides, "Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section."¹⁷⁷ Immediate review at the behest of regulatory beneficiaries under these sections takes on an imperative. Seeking such review is not simply an altruistic favor to unknown persons who will be affected in the future; rather it may be the only chance that regulatory beneficiaries have to argue their view of statutory requirements. The rights of future regulatory beneficiaries may be prejudiced by the failure or insufficiency of a challenge to regulations at the time they are promulgated.

To be sure, some courts have recognized challenges "as applied" to regulations long after the limitations period has expired.¹⁷⁸ Under these cases, a regulatory beneficiary may file a petition seeking amendment or rescission of the challenged regulation, then commence a suit under the Administrative Procedure Act challenging the denial of the rescission petition.¹⁷⁹ However, there are reasons that such a deferred challenge does not put a regulatory beneficiary on the same footing as the regulatory object who is permitted to seek judicial review immediately upon promulgation of the regulation. Administrative interpretations become entrenched with time. Courts routinely give greater deference to a "longstanding" agency interpretation of the statute.¹⁸⁰ Parties subject to regulation take actions in reliance on a regulatory scheme, and courts are unlikely to upset the settled expectations and investment-backed expectations of the regulated community to accommodate a challenge brought years after a regulation was adopted.

In 2000, the United States Court of Appeals for the District of Columbia Circuit decided *American Petroleum Institute (API) v. EPA*,¹⁸¹ wherein various parties challenged EPA orders listing certain petroleum industry wastes as "hazardous."¹⁸²

176. Clean Water Act § 509(b)(2), 33 U.S.C. § 1369(b)(2) (2006).

177. Clean Air Act § 307(e), 42 U.S.C. § 7607(e) (2000).

178. See *Legal Envtl. Assistance Found. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997); *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 150-53 (D.C. Cir. 1990); *Advance Transp. Co. v. United States*, 884 F.2d 303, 305 (7th Cir. 1989); *Northwest Envtl. Advocates v. EPA*, 2006 WL 2669042, at *10 (N.D. Cal. Sept. 18, 2006); *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.*, 266 F.Supp. 2d 1101, 1120-21 (N.D. Cal. 2003).

179. 5 U.S.C. § 704 (2006).

180. *Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

181. 216 F.3d 50 (D.C. Cir. 2000).

182. *Id.* at 54. Once petroleum industry wastes are listed as "hazardous" by the EPA under the authority of the Resource Conservation and Recovery Act, they are subject to comprehensive regulations governing their treatment, storage, and disposal. 42 U.S.C. §§ 6921-39 (2000).

The final rule was challenged both by petroleum industry trade associations, which objected to the wastes that were listed as “hazardous,” and by environmental organizations, which objected to the wastes that were not listed as hazardous.¹⁸³ Without so much as mentioning standing, ripeness, or justiciability issues, the D.C. Circuit considered the industry challenges on the merits and vacated and remanded the portion of the rule that designated oil-bearing wastewaters as hazardous waste.¹⁸⁴ At the same time, the court dismissed the environmental challengers’ claims, holding that they had no standing to challenge EPA’s refusal to list oily storage tank residues as a hazardous waste.¹⁸⁵ The court rejected the environmental petitioners’ standing even though the Sierra Club had submitted affidavits from members who lived close to non-hazardous waste landfills, and expert analyses that showed that those landfills received tank bottoms waste.¹⁸⁶ According to the D.C. Circuit, the environmental petitioners would have to establish that oily wastes had in fact contaminated the groundwater near these landfills to show standing.¹⁸⁷ Even though the environmental petitioners included an affidavit from a member who had stopped canoeing in a bayou near one of the affected landfills because of pollution of the bayou, as well as an affidavit from a geophysicist attesting to the fact that oil residues had escaped into the bayou, the court found this chain of injury lacking, as “neither affiant traces the pollution of concern to [storage tank] waste.”¹⁸⁸

Other cases in the Courts of Appeals present similar disparities: industry challenges to agency rulemaking are considered on the merits while challenges by regulatory beneficiaries to the exact same rule, in the exact same case, are rejected because the organizations representing the beneficiaries cannot identify a member who would certainly be harmed. For example, the Fifth Circuit considered industry challenges to the EPA “mega rule” governing use and disposal of materials containing polychlorinated biphenyls (PCBs), while simultaneously refusing to consider the Sierra Club’s challenge to the same rule.¹⁸⁹ In another case, the Seventh Circuit also rejected the NRDC’s standing to challenge Clean Water Act general permits for storm-water discharges, on grounds that it could not show individual members who would definitely be harmed by such permits; however, the court allowed a challenge to the same general permits by industry representatives to proceed.¹⁹⁰ The D.C. Circuit has since formalized this disparity in standing analysis, announcing that petitioners in rule-challenge proceedings must submit affidavits establishing their standing along with

183. *Am. Petroleum Inst.*, 216 F.3d at 54.

184. *Id.* at 58.

185. *Id.* at 66.

186. *Id.* at 64.

187. *Id.* at 66.

188. *Id.* at 165; *see also* *Grass Roots Recycling Network, Inc. v. EPA*, 429 F.3d 1109, 1113 (D.C. Cir. 2005) (denying a group standing to challenge agency rules immediately upon promulgation because of a lack of a definitively harmed individual). *But see* *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-88 (2000) (finding standing to complain about mercury discharges, on behalf of an individual who curtailed use of a river that “looked and smelled polluted,” without proof that mercury discharges caused river to look or smell polluted).

189. *Cent. & Sw. Servs., Inc. v. EPA*, 220 F.3d 683, 702 (5th Cir. 2000).

190. *Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 967 (7th Cir. 2005).

their petition unless their standing to challenge the rule is “self evident” (i.e., they are regulatory objects as opposed to beneficiaries).¹⁹¹

The *API* case illustrates the disparity in standing to seek review of rulemaking between industry groups and the broader public who are the beneficiaries of regulation.¹⁹² Industry challenges are heard, considered, and granted, while the claims of environmental beneficiaries are ignored despite their efforts to provide expert testimony linking individual concerns and injuries to the generally applicable regulations challenged. The net differential effect of standing doctrine is glaringly apparent in *API*: the regulations that industry objects to are struck down, while the regulations that the beneficiaries object to cannot even be challenged. *Someone* will be harmed by the EPA’s refusal to list storage-tank sludges as a hazardous waste requiring careful treatment. The Sierra Club was in a good position to assert the interests of the persons harmed and devoted all of the resources necessary to argue the issue on the merits. The members it located for standing purposes, deemed unworthy by the court, were merely representative plaintiffs in any case, standing in for the entire class of persons known and unknown who would be harmed by disposing of oil-tank sludges in ordinary landfills. Yet their claim was not heard, and if a plaintiff with a direct, palpable harm from the EPA policy comes before the court in ten years seeking redress, she will face the judicial and administrative inertia represented by ten years of “settled” rules concerning the appropriate disposition of tank sludges.

This differential impact of standing doctrine is most obvious in a case such as *API*, where the direct result is to grant relief to the regulatory objects and deny it to the beneficiaries; however, the differential grant of standing has fundamental and insidious impacts on the law-generating process as well. Government agencies do not want to spend time and resources defending regulations in court. If one side of the regulatory equation generally has standing to sue, and the other side does not, agencies are likely to favor the side that can sue them in their rulemaking decisions to avoid the expenditure of resources necessary to defend regulations in court, the negative publicity, and disappointment inherent in having regulations struck down.¹⁹³ Thus, current standing doctrine reinforces the advantage industry groups already enjoy in the legislative and administrative sectors of the rulemaking process.

E. The Special Problem of Probabilistic Harms

Modern regulation concerns itself with reducing risks.¹⁹⁴ Regulation of exposure to workplace hazards, reactions to food additives, side effects of drugs, and

191. *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002). For an unusual District of Columbia Circuit case applying detailed standing analysis to regulatory objects and concluding that they did have standing, see *City of Waukesha v. EPA*, 320 F.3d 228 (D.C. Cir. 2003).

192. 216 F.3d 50.

193. See Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1435 (2000).

194. See generally STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993) (arguing that regulation properly addresses societal risks but that much modern regulation is misdirected toward addressing risks popularly perceived as grave, while ignoring risks of greater magnitude that can be controlled at lower social cost); see also CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

environmental exposure to toxins all represent attempts to control factors that may be unlikely to cause discernible harm to any particular individual, but may be likely to cause harm to many individuals in a large population exposed to the factor. For example, in *API*, in assessing whether wastestreams should be “hazardous,” the EPA used a risk threshold: if the risk of cancer death was one in 100,000, the waste was “an initial candidate” for listing, but if the risk was one in 10,000, the waste was “presumptively assumed” to merit listing as “hazardous.”¹⁹⁵ The intended beneficiaries of these risk-controlling statutes are the persons who might otherwise be injured.

Representation of the interests of these probabilistic regulatory beneficiaries poses a peculiar problem under standing doctrine. Standing for regulatory beneficiaries requires a plaintiff who is “himself among the injured.”¹⁹⁶ But in the case of probabilistic harms, it may be impossible to know at the time regulations are relaxed just who is “among the injured.”

Not surprisingly, the tension between a regulatory system that on its face seeks to protect against probabilistic harms to the population at large and a standing doctrine based on individual rights and interests has led to differing results in the federal courts. Several courts have recognized “probabilistic” standing on the part of organizations that can show they have enough members subject to the risk to make it likely that some of their members will suffer, or even on behalf of individuals exposed to the risk. Some courts have accepted that a probabilistic harm may constitute a sufficiently significant injury-in-fact to satisfy standing requirements for an individual plaintiff. These courts have reasoned that where the magnitude of the harm is sufficiently grave, even a very small probability of occurrence may satisfy the injury-in-fact requirement. Most recently, the Supreme Court rejected organizational standing based on a probabilistic argument that individual members of an organizational plaintiff would suffer procedural harms in the future.¹⁹⁷

1. Baur and Increased Individual Risk

In 2003, the Second Circuit vacated and remanded a district court dismissal of a challenge to a Department of Agriculture regulation allowing sale of meat from “downed” livestock to be sold for human consumption, posing a small threat to all meat consumers of contracting variant Creutzfeldt-Jakob disease (vCJD), an incurable and invariably fatal disease.¹⁹⁸ The court reasoned:

Because the evaluation of risk is qualitative, the probability of harm which a plaintiff must demonstrate in order to allege a cognizable injury-in-fact logically varies with the severity of the probable harm. In this case, Baur alleges that downed cattle may transmit vCJD, a deadly disease with no known cure or treatment. Thus, even a moderate increase in the risk of disease may be sufficient to confer standing.¹⁹⁹

195. *Am. Petroleum*, 216 F.3d at 60.

196. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

197. *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1151-52 (2009).

198. *Baur v. Veneman*, 352 F.3d 625, 643 (2d Cir. 2003).

199. *Id.* at 637 (citation omitted).

Baur built on cases upholding the standing of persons with interests in specific environmental resources to enforce environmental norms designed to protect those specific resources.²⁰⁰ However, *Baur* represents a step beyond these cases of plaintiffs asserting interests in specific environmental resources. There is a qualitative difference between a plaintiff asserting a statutory violation with probabilistic or inchoate effects on a specific environmental resource in which he has a proven interest, and an increased risk shared by the population at large generally, such as the safety of the food supply.

2. Methyl Bromide and Aggregating Probabilistic Injuries

Thus, *Baur* recognized an *individual* injury-in-fact based on a vanishingly small increased risk to the individual, but with grave consequences. The D.C. Circuit took a more association-oriented approach in the more recent case of *NRDC v. EPA (Methyl Bromide)*.²⁰¹ NRDC challenged an EPA regulation exempting methyl bromide, an ozone disrupting chemical, from the ban of the Montreal Protocol.²⁰² Although the EPA did not challenge NRDC's standing, the industry intervenors did. NRDC presented statistical evidence establishing that some of its 500,000 members would be likely to contract fatal cancers as a result of the incremental ultraviolet exposure caused by continued use of methyl bromide, and some larger number would contract non-fatal skin cancers. The D.C. Circuit panel initially dismissed the petition, finding the annual risk to NRDC's members to be too vanishingly small to be a cognizable injury-in-fact.²⁰³ On rehearing, in light of an EPA statistician's affidavit stating that the court's attempt to annualize the risk was invalid, the court reversed itself and found that NRDC had standing based on the aggregate risk to all of its members:

The parties vigorously dispute whether we were correct to hold as a quantitative matter that NRDC's alleged injury was trivial or whether, in NRDC's words, any "scientifically demonstrable increase in the threat of death or serious illness." On reconsideration, we have determined that the question is one we do not have to answer in this case. EPA's expert, who built the quantitative model on which both sides rely, now informs us that "[e]xpressing the risk in annualized terms is not practical" and "it is more appropriate to express the risk as a population's cumulative or lifetime risk." . . . The lifetime risk that an individual will develop nonfatal skin cancer as a result of EPA's rule is about 1 in 200,000 by the intervenor's lights Even if a quantitative approach is appropriate—an issue on which we express no opinion—this risk is sufficient to support standing. One may infer from the statistical

200. The Second Circuit cited to *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996) (allowing a challenge by owners of property at risk of forest fire damage to a logging prohibition alleged to increase the risk of fire); *Friends of the Earth, Inc. v. Gaston Copper Recycling, Corp.*, 204 F.3d 149 (4th Cir. 2000) (upholding the standing of the owner of a downstream lake and allowing him to bring a citizen enforcement suit to enforce Clean Water Act permit requirements applicable to an upstream polluter); and *Central Delta Water Agency v. United States*, 306 F.3d 938 (9th Cir. 2002) (recognizing the standing of downstream farmers to challenge reservoir release policies alleged to increase the risk of late season salinity standard violations).

201. 464 F.3d 1 (D.C. Cir. 2006).

202. *Id.* at 3.

203. *Id.*

analysis that two to four of NRDC's nearly half a million members will develop cancer as a result of the rule.²⁰⁴

There is an important difference between the approach in *Methyl Bromide* and the one taken by the Second Circuit in *Baur*. In *Baur*, the court accepted a small incremental risk of fatal illness as sufficient to support standing for that individual. In *Methyl Bromide*, the court seemed to suggest that the risk to any single individual is too small to support standing, but that the near certainty that two to four of NRDC's half-million members will develop cancer is enough to support standing for the organization.

Some members of NRDC will certainly be harmed by the methyl bromide regulation, and the D.C. Circuit accepted this harm as sufficient to support standing. The problem is that neither NRDC, nor the court, can identify those members. Thus, NRDC has standing to challenge the methyl bromide exception as an organization, although no single member would have a sufficiently significant increase in cancer risk to challenge the regulation in her own right. This synergistic approach to standing injuries is at odds with the usual formulation of representational standing, which requires the organization to identify a member who would have standing as an individual.²⁰⁵ This aggregation of risk encapsulates the problem faced by regulatory beneficiaries seeking to challenge agency rules: someone will be harmed by the regulation, but it is impossible at the outset to determine who.

The D.C. Circuit's acceptance of an alchemy of aggregate harm to satisfy the injury-in-fact element of standing analysis, like the Second Circuit's acceptance of a vanishingly small individual risk, may represent a judicial attempt to even out the opportunities for rulemaking challenges by regulatory beneficiaries.²⁰⁶ Certainly, there are many other cases where courts have considered rulemaking challenges on the merits at the behest of regulatory beneficiaries with little or no inquiry into standing, despite the steep threshold suggested by the Supreme Court's standing rhetoric.²⁰⁷

3. *The Supreme Court's Disinclination to Accept Aggregation of Interdependent Harms*

The D.C. Circuit's aggregation of group risks in *Methyl Bromide* seems to run headlong not only into the Supreme Court's rhetoric about identifying an individual organization member with standing in their own right, but also into dictum from the

204. *Id.* at 6-7.

205. *See, e.g.,* *Hunt v. Wash. Apple Adver. Comm'n.*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

206. It is worth noting, however, that the D.C. Circuit went on to uphold the methyl bromide regulations on the merits. *Methyl Bromide*, 464 F.3d at 11.

207. *See, e.g.,* *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005); *Public Citizen v. Forman*, 631 F.2d 969 (D.C. Cir. 1980). *Compare* *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) (finding standing to challenge regulations governing long term disposal of nuclear wastes where plaintiff owned property within zone EPA found to be at risk for groundwater contamination, even though such contamination would not be likely to occur for thousands of years) *with* *Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004) (denying standing where downstream property owner who alleged injuries that would occur during 100-year flood as too remote and speculative).

Supreme Court's plurality opinion in *ASARCO v. Kadish*,²⁰⁸ wherein the Court stated that "the doctrine of standing to sue is not a kind of gaming device that can be surmounted merely by aggregating the allegations of different kinds of plaintiffs, each of whom may have claims that are remote or speculative taken by themselves."²⁰⁹ The Court's plurality opinion would have denied standing to a teachers' association and a taxpayers' association in their challenge to mineral leases said to shortchange the Arizona's land-grant education fund.²¹⁰ Moreover, the plurality reasoned that the injury to the teachers' association was speculative, as there was no assurance that increased revenues to the education fund would result in increased spending on salaries and resources for teachers.²¹¹ Likewise, the plurality rejected the taxpayers' standing on the grounds that any reduction in taxes as a result of increased revenues was also speculative.²¹²

More recently, the Supreme Court more emphatically rejected the possibility of using probabilistic harms to establish standing, at least in the case of alleged procedural injuries and on a record that did not establish a factual basis for the probabilistic analysis. In *Summers v. Earth Island Institute*,²¹³ the Court reversed a finding that Earth Island Institute and the Sierra Club had standing to challenge Forest Service procedural regulations limiting the opportunity of the public to comment on certain timber sales on federal lands. By the time of the appeal, the environmental plaintiffs could point to no specific timber sale affecting specific National Forest lands used by specifically identified individual members. Responding to the dissent's suggestion that among Sierra Club's 700,000 members who enjoyed use of National Forest lands there were certainly individuals who would be affected by the regulation, Justice Scalia's majority opinion rejected probabilistic analysis in lieu of identifying specific individual members: "This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."²¹⁴

208. 490 U.S. 605 (1989).

209. *Id.* at 615.

210. *Id.* at 609-10. The *ASARCO* case was originally litigated in the Arizona state court system, resulting in a favorable decision for the taxpayer plaintiffs in the Arizona Supreme Court. *Id.* at 610. Because the decision was based on a federal statute ceding lands to the States of Arizona and New Mexico, the defendant mining companies sought, and were granted, certiorari in the United States Supreme Court. *Id.* After rejecting the original plaintiffs' standing, Justice Kennedy's opinion held that the case was nonetheless justiciable because the matter presented a live, adverse controversy before the Court, even if the original proceeding would not have satisfied federal standards for justiciability. *Id.* at 618. Four justices (Justice O'Connor did not participate in the decision), did not join the portion of the Court's opinion discussing the plaintiffs' standing, reasoning that it was unnecessary to reach the question as the Court determined that it had certiorari jurisdiction in any event. *Id.* at 633-34 (Brennan, J., concurring). The Court confirmed that federal standing law was not binding on the states, and that Arizona could hear and decide a taxpayers' suit on federal grounds. *Id.* at 617. *Cf.* *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (holding the mere fact that state courts heard and decided case on federal grounds did not in itself create federal justiciability that would otherwise be lacking).

211. *ASARCO*, 490 U.S. at 614.

212. *Id.*

213. 129 S.Ct. 1142 (2009).

214. *Id.* at 1151.

The *Summers* case arose in the eccentric circumstances of procedural injury, and the record lacked factual proof of the likely injuries of the organizations' members. Similarly, *ASARCO* arose in a different context than the aggregation of individual risks of the many similarly-situated individuals in the *Methyl Bromide* case. The *ASARCO* plurality opinion dealt with aggregation of different kinds of conditional harms—higher taxes versus decreased educational resources—by “different kinds of plaintiffs.”²¹⁵ The *ASARCO* plurality's dictum and the *Summers* decision both nevertheless suggest a hostility to this kind of aggregation on the part of the Supreme Court. Yet this sort of aggregation of individually insignificant risks of harm may be the only way that regulatory beneficiaries' interests may be considered by the federal judiciary. The question remains whether there is some interest that might successfully compete with the courts' justiciability concerns, allowing people to assemble their interests and successfully petition the courts for redress of their perceived grievances. But first, a more focused inquiry into the Supreme Court's reasoning and justifications for standing doctrine is in order.

V. STANDING JURISPRUDENCE AND ARTICLES III & II

So far, this Article has examined how judicial review by an Article III court has become an essential step in the legislative process. This review is usually provided by statute and is likely of constitutional dimension, at least as far as regulatory objects are concerned, and likely for regulatory beneficiaries as well. Differential access to judicial review for different regulatory viewpoints will necessarily have an impact on substantive policy—if only regulatory objects who seek less regulation have access to courts and regulatory beneficiaries who seek more regulation are excluded, then, in the long run, the legislative trend will be towards less regulation. Agencies will be more reluctant to issue strict regulations that can be challenged in court, than to issue more lenient regulations that cannot. Courts will more frequently strike down regulations as too strict rather than too lenient, simply because they reach the merits of more cases challenging regulations in this manner.

Yet this differential result is precisely what current standing doctrine, with its requirement of injury-in-fact accomplishes. Regulatory objects—usually business interests—are presumed to have sustained an injury-in-fact through their loss of profits and their loss of freedom to act without restraint. Regulatory beneficiaries, on the other hand—those who stand to benefit from environmental or consumer or health protections—must establish specific individual harm to cross the threshold to judicial review. Because many of the benefits provided by regulation are probabilistic, long-term, or generally shared “public rights,” ideological plaintiffs often fail to establish the “particularized injury” required by standing doctrine for adjudication.

A. *The Irreducible Elements of Standing, as Currently Understood*

Standing doctrine addresses the “who” of the litigation process. It limits the identity of plaintiffs who may challenge government action or inaction, or even private action alleged to violate statutory norms. Although courts originally crafted the

215. *ASARCO*, 490 U.S. at 615.

standing threshold to limit individual constitutional challenges to governmental action, the doctrine has expanded to limit statutory challenges to agency action (and inaction) and to restrict the sorts of cases that Congress might authorize private litigants to undertake against other private actors, particularly in the area of enforcement of environmental laws.

As a doctrine of purported constitutional genesis, standing as a distinct aspect of Article III justiciability is of relatively recent vintage. Standing as an element of justiciability is traced to 1923 when the Supreme Court decided *Frothingham v. Mellon*,²¹⁶ which rejected the justiciability of a challenge by both a federal taxpayer and the State of Massachusetts to the constitutionality of the Maternity Act of 1921.²¹⁷ The Maternity Act provided for federal aid to states upon condition that the states implement federally prescribed programs to protect maternal health.²¹⁸ The Court's discussion of the justiciability issue foreshadows current standing doctrine, with its emphasis on injury-in-fact to the plaintiff, as well as its differential recognition of standing for regulatory objects and regulatory beneficiaries:

We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.²¹⁹

This passage presages the injury-in-fact requirement by its reference to "some direct injury,"²²⁰ and also presages possible differential treatment of regulatory objects in its characterization of the power of judicial review as "little more than the negative power to disregard an unconstitutional enactment."

This standing threshold was and is framed in terms of the Article III grant of judicial power to hear "cases and controversies."²²¹ Although the text of Article III says nothing to limit the identity of appropriate litigants in federal court, the Supreme Court has found such limits to inhere in the very nature of the judicial function, implicit in the terms "cases" or "controversies." The Court has come to focus on injury to an individual right—injury-in-fact—as the irreducible quintessence of justiciable "cases" or "controversies." Some Supreme Court opinions, and a well-read article authored

216. 262 U.S. 447 (1923).

217. *Id.* at 488.

218. Maternity Act of 1921, ch. 135, 42 Stat. 224 (1921).

219. *Frothingham*, 262 U.S. at 488.

220. Cf. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163, 183-86 (1992) [hereinafter Sunstein, *What's Standing After Lujan?*] (arguing that the "injury-in-fact" requirement of current standing doctrine was a judicial importation from the Administrative Procedure Act definition of "adversely affected or aggrieved" rather than an Article III constitutional requirement).

221. U.S. CONST. art. III, § 2.

by then-Judge Antonin Scalia, also anchor the standing requirement in separation of powers concerns;²²² specifically, that the courts not improperly interfere with the executive branch's duty to "take Care that the Laws be faithfully executed."²²³

As currently stated (and oft-repeated), to have standing to commence an action, a plaintiff must (1) suffer an injury-in-fact that is (2) causally related to the action complained of, and (3) redressible by favorable action by the court.²²⁴ The Supreme Court describes these three elements as the "irreducible constitutional minimum" required for standing to invoke the judicial power under Article III of the Constitution.²²⁵ The Supreme Court has long recognized that this injury need not necessarily be to a financial or property interest; "aesthetic" and "recreational" injuries have been found to suffice,²²⁶ as well as "informational" injuries.²²⁷ An "abstract" interest in an issue, however, will not suffice.²²⁸ Though the injury-in-fact must be "concrete" and "particularized" to be cognizable,²²⁹ the Court has recognized that the mere fact that an injury is shared by many does not defeat its justiciability.²³⁰ And while the injury must be distinct and "palpable"²³¹ and not "hypothetical,"²³² it need not be large; "an identifiable trifle is enough."²³³ If these descriptions of injury-in-fact sound somewhat self-contradictory, do not be alarmed. As Justice Douglas observed, "Generalizations about standing to sue are largely worthless as such."²³⁴ Similarly, Justice Harlan complained that standing doctrine had become "a word game played by secret rules."²³⁵

In addition to the "irreducible" constitutional minimum of injury-in-fact, causation, and redressibility, the Court has added "prudential" limits on standing that are non-constitutional. These limits include a requirement that the plaintiff assert her own interests, not those of third parties, a related requirement that the injury complained of fall within the "zone of interest" protected by the relevant substantive norm the plaintiff seeks to enforce, and a requirement that the injuries asserted not be so widely

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

223. U.S. CONST. art. II, § 3.

224. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

225. *Id.* at 560.

226. *Id.* at 582 (quoting Endangered Species Act § 2(a)(3), 16 U.S.C. § 1531(a)(3)(2006)). *See also Sierra Club*, 405 U.S. at 727.

227. *See FEC v. Akins*, 524 U.S. 11, 20 (1998); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 364 (1982).

228. *Lyons*, 461 U.S. at 101.

229. *See Defenders of Wildlife*, 504 U.S. at 572; *see also Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).

230. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973).

231. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

232. *Allen*, 468 U.S. at 751 (quoting *Lyons*, 461 U.S. at 101-02 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

233. *SCRAP*, 412 U.S. at 689 n.14 (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1967)).

234. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 151 (1970).

235. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

shared as to amount to “generalized grievances” best subject for remedy by the more political branches.²³⁶ Unlike the irreducible constitutional minima, these prudential standing limitations may be abrogated by statute.

Organizational plaintiffs—the focus of this Article—must meet additional burdens to establish standing. Unless an organizational plaintiff can demonstrate an injury to a traditional property or business interest, such organizations must normally establish standing in a representational capacity.²³⁷ To do so, an organization must establish that it has at least one member who has suffered an injury-in-fact sufficient to establish individual standing for that member. In addition, the organization must establish that the matter of litigation is germane to its organizational purposes and that individual participation of the members affected is not required for complete adjudication.²³⁸

As the Court has noted with some understatement, the standing elements “cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.”²³⁹ Rather, at least according to Justice O’Connor’s opinion for the Court in *Allen v. Wright*,²⁴⁰ standing doctrine is explained through its application in case law and by reference to the interests served by its basic constitutional underpinnings: “a single basic idea—the idea of separation of powers.”²⁴¹

B. Interests Served by Standing Doctrine

Notwithstanding Justice O’Connor’s dicta in *Allen v. Wright*, standing doctrine has been justified and anchored in both more and less than Article III and separation-of-powers concerns. Some of the justifications for standing go well beyond Article III and its Case or Controversy Clause in that they draw on notions of avoiding intrusion into executive and legislative functions. Some of the justifications are less than constitutional in that they draw on more practical considerations of docket control and litigation efficiency.

Although Article III concepts of justiciability and separation of powers play a large role in shaping standing doctrine, the Court and legal scholars have also made reference to sub-constitutional concerns to limit the volume of federal litigation, ensure vigorous advocacy and specific context for judicial decision-making, avoid collusive or sham suits, and support the “passive virtues” of Supreme Court deferral of constitutional review.

I. Separation of Powers

Article III, section 2, clause 1 of the Constitution vests in the judiciary the power to hear “cases” and “controversies.” Standing doctrine, like its fellow justiciability doctrines of ripeness, mootness, and political questions, is an attempt to interpret what it means to hear a “case” or “controversy” of a judicial nature. The Court has to some

236. *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

237. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972).

238. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

239. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

240. 468 U.S. 737 (1984).

241. *Id.* at 752.

extent struggled with this basis as a definition of standing. As observed by the textualist-in-chief Justice Scalia, the text in this case is not dispositive:

Art. III, § 1 . . . does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to “Cases” and “Controversies,” but an executive inquiry can bear the name “case” (the Hoffa case) and a legislative dispute can bear the name “controversy” (the Smoot-Hawley controversy). Obviously, then, the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.²⁴²

Justice Scalia’s reference to “common understanding” of which activities are appropriate to legislatures, executives, and courts may ultimately be no more illuminating, as it begs the question of *whose* common understanding is determinative and how that understanding was reached.

Various members of the Court have sought to refer to historical practice, the perceived common understanding of the nature of the judicial function, and the boundaries set by functions vested in the executive or legislative branches to set these limits.

Justice O’Connor’s dicta in *Allen v. Wright* points the student of standing doctrine to Article III of the Constitution to define the doctrine’s boundaries. However, as Justice Scalia noted in *Lujan v. Defenders of Wildlife*, the text of Article III is hardly dispositive.²⁴³ The Court has flirted with eighteenth century historical practice, with shared understandings of the nature of a judicial case, and the proper role of the judiciary as extra-textual sources of meaning for the Article III “case” or “controversy” requirement.

Justice Frankfurter twice opined that Article III justiciability, including the identity of a proper plaintiff, was best determined by reference to the historical practices of the courts of Westminster. In his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*,²⁴⁴ he stated:

Limitation on “the judicial Power of the United States” is expressed by the requirement that a litigant must have “standing to sue” or, more comprehensively, that a federal court may entertain a controversy only if it is “justiciable.” Both characterizations mean that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed. The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a “case or controversy.”²⁴⁵

Reference to “the business of the Colonial courts and courts of Westminster” has proven less than satisfactory, however, as an explanation of justiciability doctrine. As Chief Justice Warren observed in *Flast v. Cohen*, the authority of “English judges to

242. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

243. *Id.* at 559.

244. 341 U.S. 123 (1951).

245. *Id.* at 150 (Frankfurter, J., concurring).

deliver advisory opinions was well established at the time the Constitution was drafted [a]nd it is quite clear that ‘the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.’”²⁴⁶ Thorough research conducted by Professors Winter²⁴⁷ and Sunstein²⁴⁸ established that litigation by uninjured third-party plaintiffs was quite common both in colonial times and after the founding. Criminal prosecutions were routinely carried out not by the executive branch, but by citizens. The early Congress enacted *qui tam* provisions allowing “informers suits” by uninjured citizens in the name of the United States, also reflecting Colonial and British practice. Historical practice certainly does not appear to explain the nuances of current standing doctrine, much less its doctrinal insistence on injury-in-fact as the quintessence of a judicial “case” or “controversy.”

Nor should history necessarily be dispositive. The framers of the Constitution explicitly rejected the British, colonial system of government by establishing a judicial branch as a separate and co-equal branch of tripartite government. Courts in the British system of government were part of the Executive (Crown) and Legislative (Parliament) branches; separation of powers under the British system meant only that the legislature and crown were separate.²⁴⁹ Likewise, colonial practice freely mixed judicial and legislative functions in colonial legislatures.²⁵⁰ In their experiment with a new system of government, the framers can hardly be expected to have meant to import all of the practices of a system they fought a revolution to reject. However, to reject historical practice on this ground ought to require some indication that the particular aspect of the judicial function then in practice was somehow antithetical to the newly proposed system of government. Although *The Federalist Papers* may reflect a strong urge to reject the nature of the monarchical executive,²⁵¹ there is much less indication that the framers meant to fundamentally alter the judicial functions they were familiar with, other than to ensure the independence of the judiciary from the other branches of government.²⁵²

Nevertheless, to the extent that some “common understanding” of what constitutes a “case” or “controversy” should inform the boundaries of Article III judicial power, the contemporary judicial practices surrounding the framers are certainly relevant to what this common understanding of the minimum of the judicial function should be.

246. 392 U.S. 83, 96 (1968) (citation omitted) (quoting C. WRIGHT, *FEDERAL COURTS* 34 (1963)).

247. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *STAN. L. REV.* 1371, 1394-1409 (1987).

248. Sunstein, *What's Standing After Lujan?*, *supra* note 220, at 171-77. *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *MICH. L. REV.* 689 (2004).

249. *See* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 *NW. U. L. REV.* 899, 920-22 n.82 (1997); WILLIAM BLACKSTONE, 3 *COMMENTARIES* *147.

250. Pfander, *supra* note 249, at 929-34; *see generally* Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 *YALE L.J.* 142 (1986).

251. *THE FEDERALIST* NO. 69-77 (Alexander Hamilton).

252. *THE FEDERALIST* NO. 78 (Alexander Hamilton).

2. The “Case or Controversy” Requirement

Justice Frankfurter’s famous dicta referencing the “business of the courts of Westminster” also suggests that the boundaries of standing may be determined with reference to “circumstances which to the expert feel of lawyers constitute a ‘case or controversy.’”²⁵³ Justice Scalia echoed this reference in *Lujan v. Defenders of Wildlife*, invoking a “common understanding of what activities are appropriate . . . to courts.”²⁵⁴ Under this approach to establishing Article III’s boundaries, the Court appeals to some fundamental shared notion of what the nature of a “case” is, presumably an understanding shared by “expert” lawyers based on their training and experience.

Any attempt to define what constitutes a “case,” founders on the same shores as attempts to derive objective definitions of obscenity for freedom of speech purposes or to define the “liberty” protected by the Fifth and Fourteenth Amendments by reference to “natural law” or “tradition.”²⁵⁵ Ultimately, any attempt to define a “case” by reference to a “common understanding” of what a case is simply means that a “case” is defined by reference to the individual judge’s or justice’s own inclination to hear the case. The number of five-four split decisions on standing issues in the Supreme Court itself belies the claim that standing doctrine rests on universal notions of what constitutes a proper case.²⁵⁶

Moreover, subjective definitions of a “case,” even more so than notions of “liberty” or “obscenity” tend to become self-fulfilling prophecies.²⁵⁷ Justice Frankfurter’s explicit reference to the “expert feel of lawyers”²⁵⁸ suggests that a proposed case that is beyond that “expert” lawyer’s experience will not “feel” like a case. Yet every lawyer’s “feel” for a “case” will be a reflection of what “cases” courts have previously allowed to proceed. Judicially imposed restrictions on standing thus become a self-perpetuating meme: once the Supreme Court declares that a particular kind of plaintiff lacks standing—say lakes and trees, to use Justice Douglas’s example²⁵⁹—the next generation of lawyers will simply not recognize a lawsuit by a lake or a tree as a “case,” even while they may recognize a suit by a ship as a “case.”²⁶⁰ Reference to a “common understanding” of what a case is thus becomes a one-way ratchet to limiting justiciability to an ever smaller category of cases; as the Supreme Court declares a category of disputes to fall outside the definition of a “case,” such disputes stop being brought to the courts, and will never again “feel” like a case.

253. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

254. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

255. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, 56-70 (1980).

256. See, e.g., *Hein v. Freedom From Religion Found., Inc.*, 127 S.Ct. 2553 (2007); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479 (1998); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982).

257. Cf. ELY, *supra* note 255, at 69-70 (criticizing predictive, non-interpretive approaches to constitutional rights based on the normative and coercive effect of judicial rulings).

258. *Joint Anti-fascist Refugee Comm.*, 341 U.S. at 150 (Frankfurter, J., concurring).

259. *Sierra Club v. Morton*, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting).

260. *Id.* at 741-43.

In searching for a “common” understanding of the limits implicit in the “case or controversy” formulation, the Supreme Court has repeatedly referred to the role of the courts to determine claims of individual rights asserted by individuals. As stated by the Court in *Stark v. Wickard*,²⁶¹ this view is frankly hostile to public rights litigation per se:

This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. . . . This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people.²⁶²

Drawing on this language, Justice Scalia opined in *Lujan v. Defenders of Wildlife* that “[i]ndividual rights,” within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public.²⁶³ Under this view, “[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court’s judgment may benefit others collaterally.”²⁶⁴ Proponents of this view point to the passage in *Marbury v. Madison* positing that the “province of the court is, solely, to decide on the rights of individuals.”²⁶⁵ Distancing himself from this view, Justice Kennedy’s concurring opinion in *Lujan v. Defenders of Wildlife* noted that “[m]odern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission or Ogden seeking an injunction to halt Gibbons’s steamboat operations.”²⁶⁶

Though not stated explicitly in any *dicta* of the courts, the idea that the judicial function is limited to protection of minority interests not well represented in the more democratic branches of government was advanced by then-Judge Scalia in a 1983 article:

There is, I think, a functional relationship, which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself*. Thus, when an individual who is the very *object* of a law’s requirement or prohibition seeks to challenge it, he always has standing. That is the classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a “generalized” one.²⁶⁷

Judge Scalia draws on the argument that the judicial role is limited to protecting individual rights from majority action. According to this approach, where the individual rights are also majority rights, the more political branches are better suited

261. 321 U.S. 288 (1944).

262. *Id.* at 309-10.

263. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

264. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

265. 5 U.S. (1 Cranch) 137, 170 (1803).

266. 504 U.S. at 580 (Kennedy, J., concurring) (citations omitted).

267. Scalia, *supra* note 222, at 894.

to address them, and the courts should stay their hand lest they intrude on the roles assigned to the legislative and executive branches.

While this argument has not been articulated by the Supreme Court, Judge Scalia's understanding favoring standing for regulatory objects over regulatory beneficiaries underpins Justice Scalia's similar conclusion in *Lujan v. Defenders of Wildlife*:

[T]he nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it . . . [W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.²⁶⁸

This argument for a preference for standing for regulatory "objects" has been extensively criticized.²⁶⁹ Arguably, the Court has rejected this approach in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,²⁷⁰ which is discussed below.

Although the foregoing interests and boundaries of justiciability reflect the Court's and commentators' not entirely satisfactory attempts to give affirmative meaning to the Case or Controversy Clause of the Constitution, the Court has also sought to invoke negative limits on the scope of the judicial power by reference to powers explicitly granted to another branch. From time to time the Court has referred to the Article II specification that the Executive shall "take Care that the Laws are faithfully executed"²⁷¹ as a limit on the scope of standing. In *Allen v. Wright*, the Court quoted the Take Care Clause and reasoned that allowing parents of minority children to challenge the procedures for allowing tax exemptions to de facto segregated private schools would improperly involve the judiciary in the generalized enforcement of law: "We could not recognize respondents' standing in this case without running afoul of that structural principle."²⁷² Justice Scalia's opinion in *Lujan v. Defenders of Wildlife* spelled this argument out in greater detail:

If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."²⁷³

This view of the Take Care Clause as an implicit limit on judicial power has been criticized by Professor Sunstein, who characterized the Take Care Clause as a "duty,

268. 504 U.S. at 561-62 (citing *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

269. See generally, Sunstein, *What's Standing After Lujan?*, *supra* note 220; see also Robert V. Percival, "Greening" the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 827 (2002).

270. 528 U.S. 167 (2000).

271. U.S. CONST. art. II, § 3.

272. 468 U.S. 737, 761 (1984).

273. 504 U.S. at 577 (quoting U.S. CONST. art II, § 3).

not a license.²⁷⁴ As Professor Sunstein noted, reference to the Take Care Clause as a limit on Article III justiciability is inconsistent with current standing doctrine; if enforcement of statutory norms at the behest of citizens violates the structural provisions in the case of a plaintiff without sufficient individual interest, the violation of this structure would not disappear simply because the identity of the plaintiff changed to one who did establish standing.²⁷⁵ Justice Scalia's view of the Take Care Clause is also inconsistent with historical practice; prosecution of federal laws in the early republic was more likely to be commenced by state attorneys general than by the Federal Executive.²⁷⁶ Justice Scalia's view also conflicts with the Court's acceptance of non-executive prosecutions in *Morrison v. Olson*.²⁷⁷

3. *The Rule Against Advisory Opinions*

The Court frequently invokes its rule against giving advisory opinions as one of the underlying bases of standing doctrine. As stated by Chief Justice Warren in *Flast*:

When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.²⁷⁸

The way this justification is invoked is usually tautological: if there is no standing, there is thus no "case or controversy," and any opinion given by the court would of necessity be an "advisory" opinion; therefore, the plaintiff lacks standing. Thus, it is no surprise that the reference to advisory opinions appears quite often in dissenting and concurring opinions where the court has recognized standing. In such opinions, the dissent or concurrence usually accuses the majority of issuing an "advisory" opinion.²⁷⁹

If the preclusion against advisory opinions is meant to avoid judicial declarations concerning hypothetical states of facts,²⁸⁰ then it is not at all clear how the identity of the plaintiff renders any underlying factual premises either more or less hypothetical. It may be that the reference to the rule against "advisory opinions" is a form of shorthand for the individual rights enforcing model discussed above; that is, any opinion rendered other than in the context of enforcing an individual's right to specific relief from harm is being rendered for its advisory purpose rather than its adjudicative purposes, and is thus improper. As Judge Scalia stated in his *Suffolk Law Review*

274. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1471 (1988) (citations omitted).

275. Sunstein, *What's Standing After Lujan?*, *supra* note 220, at 211-13.

276. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 303-10 (1989).

277. 487 U.S. 654, 727 (1988); see Sunstein, *What's Standing After Lujan?*, *supra* note 220, at 211-12 (noting that Justice Scalia's reliance on the Take Care clause as a limit on Article III power is consistent with his view of the "unitary executive" as reflected in his dissenting opinion in *Morrison*).

278. 392 U.S. at 96 (citations omitted).

279. See, e.g., *Larson v. Valente*, 456 U.S. 228, 264 (1982) (Rehnquist, J., dissenting); *Duke Power Co. v. Carolina Envtl. Study Group Inc.*, 438 U.S. 59, 103 (1978) (Stevens, J., concurring).

280. See *Ashwander v. TVA*, 297 U.S. 288, 325 (1936) (citations omitted) ("By its terms, it applies to 'cases of actual controversy,' a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts.").

article, although the process of adjudication may have the effect of declaring the law and controlling the acts of the executive,

The point is not whether the courts *do* it [assure the regularity of executive action]; but whether the doing of it is alone sufficient justification to invoke their powers; whether the doing of it is itself “the judicial role,” or merely the incidental effect of what *Marbury v. Madison* took to be the judges’ proper business—“solely to decide the rights of individuals.”²⁸¹

This “incidental” view of the judiciary’s law-declaring role—indeed, this view of the *Marbury* opinion—seems quaint now, and may even have seemed naïve in 1803 when *Marbury* was decided.²⁸² Moreover, the “incidental” view of the judiciary’s law-declaring role is at complete odds with the Supreme Court’s own established criteria for accepting cases for certiorari review, favoring review where the Court’s advice is needed to settle unsettled questions of law, and eschewing review simply to do justice for the individual parties. The Supreme Court rules favor review of a case where “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.”²⁸³ The rules further state that a “petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”²⁸⁴

If the so-called rule against advisory opinions requires a live controversy between litigants with a personal stake in the outcome that can be redressed by the Court’s decision, then mootness doctrine stands as a glaring exception to this rule. The Supreme Court has described mootness doctrine as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”²⁸⁵ Yet, the Court routinely hears cases that have become moot under the rubric of cases “capable of repetition yet evading review.”²⁸⁶ The Court justifies this exception on the grounds that, otherwise, certain categories of controversies could repeat themselves without the judiciary ever being able to declare the applicable legal rule. The justification for this exception is a frank acknowledgement that, at least in some kinds of controversies, the law-declaring role of the judiciary for future controversies trumps whatever Article III concerns require a live case in the current controversy. The Supreme Court itself has acknowledged that “the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions” that serve competing “practicalities and prudential considerations.”²⁸⁷ Chief Justice Rehnquist expressed the

281. Scalia, *supra* note 222, at 884 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

282. *Cf.* THE FEDERALIST NO. 78 (Alexander Hamilton) (reciting that it is up to the judiciary to interpret and declare the laws).

283. SUP. CT. R. 10.

284. *Id.*

285. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

286. *E.g.*, *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

287. *U.S. Parole Comm’n*, 445 U.S. 388, 404-06 n.11.

view, based on this exception, that mootness doctrine is prudentially based rather than derived from the Article III case or controversy requirement: “If it were indeed Art. III which—by reason of its requirement of a case or controversy for the exercise of federal judicial power—underlies the mootness doctrine, the ‘capable of repetition, yet evading review’ exception relied upon by the Court . . . would be incomprehensible.”²⁸⁸

The earliest standing cases, including *Frothingham*, arose in the context of constitutional challenges to the validity of Congressional legislation. Asserting a reluctance to be drawn into the role of reviewing the wisdom of legislation, the Supreme Court has made reference to the fact that the role of such a “Council of Revision” was rejected by the framers of the Constitution.²⁸⁹ Like the rule against advisory opinions, this reasoning assumes that any opinion rendered outside the context of an individual asserting individual injury would constitute a naked assertion of judicial power of revision, inconsistent with the legislative powers granted exclusively to Congress by Article I of the Constitution. By its terms, this aspect of justiciability would seem to apply only to cases challenging the validity of legislation.

4. *The Need to Ensure Concreteness and Adversity*

While the foregoing justifications for standing and justiciability doctrine constitute an attempt to give meaning to the positive boundaries of the grant of the judicial power, and the negative boundaries established by the grant of the legislative and executive powers to other branches of government, other justifications are less overtly bound to the constitutional text and structure, and more bound to the practical administration of the adjudicative function. Among these more pragmatic considerations is the argument that a party with a genuine injury and a specific factual context for their claim will improve that adjudicatory process by providing “concreteness” and “adversity.” According to the Court in *Baker v. Carr*, this concrete adverseness is the “gist” of the standing inquiry.²⁹⁰ The *Baker* Court explained that “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.”²⁹¹

This “concrete adverseness” interest has two components: (1) to improve judicial decisionmaking by providing a specific factual context for the development of legal rules; and (2) to ensure sufficiently vigorous advocacy on the part of the litigants to provide the court with the best arguments on both sides of an issue. Both of these premises have been subject to some criticism.²⁹² As for vigorous advocacy, the Court

288. See *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring). This suggestion drew sharp disagreement from Justice Scalia. *Id.* at 339-42 (Scalia, J., dissenting). See generally, Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605 (1992); Gene R. Nichol, Jr., *Moot Cases, Chief Justice Rehnquist, and the Supreme Court*, 22 CONN. L. REV. 703, 705-06 (1990).

289. See, e.g., *Frothingham v. Mellon*, 262 U.S. 447, 481 (1923).

290. 369 U.S. 186, 204 (1962) (citation omitted).

291. *Id.*

292. Regarding the first component, one Scholar concluded that as a general rule, the specific factual context of litigation does not inform the courts ability to resolve issues. Daniel M. Driesen, *Standing for*

has recognized that organizational plaintiffs, in general, excel at providing vigorous advocacy.²⁹³ In his *Suffolk Law Review* article then-Judge Scalia opined 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.”²⁹⁴ He noted, “Often the 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.”²⁹⁵ Of course, as “an identifiable trifle” of an injury will suffice to establish standing, standing doctrine per se does nothing to ensure that an individual plaintiff’s injury is of sufficient magnitude to ensure adequate commitment to the expense of the litigation process.

5. Avoiding “Sham Suits” and Minding the Floodgates

Another functional justification for standing requirements is implicit, though rarely stated. By requiring a plaintiff to establish a genuine injury to herself in order to invoke the judicial forum, standing doctrine helps to weed out the sham plaintiff. The Court’s opinion in *Flast v. Cohen* suggests that the avoidance of friendly or collusive suits is “closely related to” standing doctrine,²⁹⁶ though this relation is not otherwise mentioned by the cases.

As with ensuring adverseness, the relatively low threshold for the magnitude of the requisite injury somewhat reduces standing’s effectiveness to avoid collusive suits. However, of all the interests protected by standing doctrine, this one, at least, goes directly to the identity of the plaintiff.

Early standing cases warned of floods of federal court litigation if certain kinds of public rights litigation were allowed to proceed. Thus, in *Frothingham*, the Court warned:

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do not same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.²⁹⁷

While the Court has not repeated this extra-constitutional rationale for limited standing, one cannot help get the sense that docket control in the broad sense of the term is part of the judicial reluctance to give broad access to federal courts.²⁹⁸

Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication, 89 CORNELL L. REV. 808, 890 (2004).

293. *United Auto Workers v. Brock*, 477 U.S. 274 (1986).

294. Scalia, *supra* note 222, at 891.

295. *Id.*

296. *Flast*, 392 U.S. at 101.

297. 262 U.S. at 487.

298. *Cf. Warth v. Seldin*, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting) (ruminating that Supreme Court justices were not working so hard that they could not afford to address a few more cases).

6. *Passive Virtues*

Standing doctrine has roots in docket micro-management as well. Alexander Bickel, in his magnum opus *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, identified standing doctrine as one of the malleable doctrines used by the Supreme Court *sub silentio* to avoid confrontation with the coordinate governmental branches and to defer judicial resolution of specific constitutional issues.²⁹⁹ Professor Bickel thus identifies “standing” among the “passive virtues” used by the Supreme Court to manage the timing of its consideration of constitutional questions as part of its ongoing dialogue with the more political branches.

Identification of standing doctrine with the “passive virtues” of the Supreme Court is more a legal reality of standing doctrine (and some of its inconsistencies) than it is a justification for the doctrine or a key to its application. For obvious reasons, no justice has openly espoused Bickelian passive virtues as a source of standing doctrine, though this view certainly has echoes in some of the standing opinions. For example, Justice Powell, concurring in *United States v. Richardson*,³⁰⁰ expounded that

repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.³⁰¹

This “passive virtues” view of the judiciary’s role may underlie the Court’s repeated reference to the judicial power as a remedy of last resort, and then only to be invoked by a “proper plaintiff” with an injury to be redressed.³⁰² It also underlies Judge Scalia’s reasoning in his *Standing as an Element of Separation of Powers* article: though Judge Scalia does not cite Bickel, he describes a passive role of the judiciary, addressing only those cases that come its way with a proper plaintiff asserting rights not addressable by the other branches.³⁰³

Perhaps Justice Douglas, concurring in *Flast*, gave the most frank acknowledgment that standing doctrine was born of a desire to avoid specific constitutional issues and had long since outlived this function:

Frothingham, decided in 1923, was in the heyday of substantive due process, when courts were sitting in judgment on the wisdom or reasonableness of legislation. The claim in *Frothingham* was that a federal regulatory Act dealing with maternity deprived the plaintiff of property without due process of law. When the Court used substantive due process to determine the wisdom or reasonableness of legislation, it was indeed transforming itself into the Council of Revision which was rejected by the Constitutional Convention. It was that judicial attitude, not the theory of standing to

299. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 119-25 (1962).

300. 418 U.S. 166 (1974).

301. *Id.* at 188 (Powell, J., concurring) (quoted in *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982)).

302. See *Valley Forge*, 454 U.S. at 471 (citing *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

303. See generally Scalia, *supra* note 222.

sue rejected in *Frothingham*, that involved “important hazards for the continued effectiveness of the federal judiciary,” to borrow a phrase from my Brother Harlan. A contrary result in *Frothingham* in that setting might well have accentuated an ominous trend to judicial supremacy.³⁰⁴

Whatever its validity may be as a means of managing the political legitimacy of the Supreme Court, as the Court addresses questions of constitutional magnitude, the “passive virtues” of discretionary constitutional adjudication in the Supreme Court do nothing to explain or justify a doctrine that has been used to shut the doors of all levels of the judiciary to organizational plaintiffs seeking to assure implementation of regulatory norms adopted by the legislative branch.

C. *The Mixed Success of Ideological Plaintiffs in Establishing Standing*

1. *The Idea of Constitutionally Limited Government*

Many of the Supreme Court’s standing cases have involved citizens seeking to enforce their vision of constitutional government. These citizen plaintiffs may be among the mostly purely ideologically motivated, as their efforts seek primarily to ensure that government follows their vision of the ideals established in the Constitution. Sometimes these plaintiffs are motivated by economic concerns, as when the challenged government action competes with their private economic activities. Often, however, these plaintiffs can’t point to any tangible benefit—in terms of individual property or “status” interests to be achieved in the litigation—other than their firmly held belief that they would be happier living in a society in which the government followed the Constitutional norm in question (or that they are deeply offended when the government does not). The first “standing” cases (although not phrased as such) involved citizens challenging governmental action that the plaintiffs strongly believed was unauthorized. As noted, in *Frothingham v. Mellon*, the Supreme Court rejected a challenge to the constitutionality of the Maternity Act.³⁰⁵ Mrs. Frothingham asserted no injury to herself other than the admittedly minuscule increase in her federal tax bill necessary to support federal expenditures under the Act—an amount too completely overwhelmed by the costs of litigation to justify the case as a rational response to an economic injury.³⁰⁶ Rather, Mrs. Frothingham’s only reason to bring the litigation was to protest and put an end to what she believed to be an unconstitutional meddling of the United States Congress in matters not explicitly authorized by Article I of the Constitution.³⁰⁷ With the rejection of her “taxpayer” interest as insufficient to support adjudication of her challenge, Mrs. Frothingham assured her place in generations of Constitutional Law and Civil Procedure casebooks as the grandmother of all disappointed ideological plaintiffs.

But *Frothingham* did not prove to be the absolute end to all ideological plaintiffs pinning their litigation hopes on taxpayer, or similarly dilute, status. In a series of

304. *Flast*, 392 U.S. at 107 (Douglas, J., concurring).

305. 262 U.S. 447 (1923).

306. *Id.* at 487.

307. *Id.* at 468. The claim that the Maternity Act unconstitutionally interfered with State sovereignty fared no better, even when asserted by the State of Massachusetts, in the companion case to *Frothingham*. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

cases beginning before, and continuing after, *Frothingham*, the Court recognized the right of individual voters to raise constitutional claims concerning vote dilution.³⁰⁸ This series of cases culminated in its decision in *Baker v. Carr*, which specifically affirmed the standing of Tennessee voters to assert an Equal Protection Clause challenge to disproportional state legislative districts.³⁰⁹

The Court engaged in a similar reversal of course when considering constitutional challenges to the electricity market participation of the Tennessee Valley Authority (TVA). In 1938, it rejected the justiciability of such a challenge, when brought by a competitor, in *Alabama Power Co. v. Ickes*.³¹⁰ Yet it considered (and rejected on the merits) a similar challenge when brought by a shareholder of the same Alabama Power Company in a shareholders' derivative action.³¹¹ If anything, the plaintiff in the latter case seems to have been more ideologically (and less economically) motivated than the former; Mr. Ashwander styled his shareholders' derivative action as one seeking to protect the company from losses from power purchase contracts entered into with the TVA, but it is altogether unclear just how the utility would suffer by purchasing the power.³¹²

Not even the bar against federal taxpayer suits proved ironclad. Half a century after *Frothingham*, the Supreme Court recognized an exception to the bar against taxpayer standing in *Flast*,³¹³ where it permitted suit by a taxpayer who asserted a First Amendment Establishment Clause challenge to direct federal aid to parochial schools.³¹⁴ The majority in *Flast* posited an alchemy that converted the lead weight of taxpayer status into gold: the so-called "double nexus" test.³¹⁵ Under this formula, an ideological plaintiff must establish both a connection between the status alleged as the basis for standing and the Congressional power exercised (such as a taxpayer challenging an exercise of the taxing and spending power) and a connection between the Constitutional limitation asserted and the Congressional power so invoked.³¹⁶ In *Flast*, the Court found that the Establishment Clause was a specific limit on the Taxing and Spending Clause, supporting standing.³¹⁷ But later Establishment Clause plaintiffs were to be less-than-successful in asserting taxpayer standing. In *Valley Forge*, the Court rejected a taxpayer lawsuit challenging the donation of surplus government property to a religious school, and in doing so, the Court again rejected any implicit right of every citizen to constitutional government.³¹⁸ The Court also rejected taxpayer standing in that case; finding insufficient nexus between taxpayer status and the Property Disposition Clause,³¹⁹ as opposed to the Taxing and Spending Clause.³²⁰

308. See, e.g., *Coleman v. Miller*, 307 U.S. 433 (1939); *Leser v. Garnett*, 258 U.S. 130 (1922).

309. *Baker*, 369 U.S. at 206-08.

310. 302 U.S. 464, 479-80 (1938).

311. *Ashwander v. TVA*, 297 U.S. 288, 318 (1936).

312. *Id.*

313. 392 U.S. at 106.

314. *Id.* at 103-06.

315. *Id.* at 102-03.

316. *Id.*

317. *Id.* at 105.

318. *Valley Forge*, 454 U.S. at 483-84.

319. U.S. CONST. art. IV, § 3, cl. 2.

320. *Valley Forge*, 454 U.S. at 479-80.

Other attempts to invoke the double-nexus test to assert constitutional claims have likewise been unsuccessful in the Supreme Court, even where the plaintiff relied on constitutional limitations on Congressional government action at least as explicit as the Establishment Clause.³²¹

At the end of the day, it is hard to reconcile the constitutional government cases from *Frothingham* to *Flast*. If *Frothingham* stood for the principle that a federal taxpayer's interest in her tax bill was just too miniscule to be an injury that creates a genuine controversy, then *Flast* would seem to have reversed that part of *Frothingham*. But *Valley Forge* and other cases, in turn, reject that reading of *Flast*.³²² The Court in *Richardson*, *Schlesinger*, and *Valley Forge* rejected an attempt to read *Flast*, alternatively, as implying some greater constitutionally recognizable (and litigable) interest for claims based on specific constitutional prohibitions. Nevertheless, the voting apportionment cases imply that the Court recognizes at least some abstract constitutional interests (e.g., the weight given to an individual vote) as sufficiently concrete to support standing, whereas others are not (e.g., the right to a government that does not provide economic support to religious institutions). Ultimately, it may be easier to explain the Court's shifting recognition of standing to raise ideologically-based constitutional challenges based on changes in the identities of the justices than by taking the doctrinal statements at face value.

2. A Pristine Environment

Environmental cases have been responsible for much of the recent contours of Article III standing. Like the constitutional-government plaintiffs, environmental plaintiffs are often motivated by pure ideas—the idea of a pristine, unpolluted environment, the idea that wilderness still exists in some places on the planet, or the idea that polar bears or tigers or elephants still roam in the wild somewhere. Many such plaintiffs assert tangible, although untraditional, personal interests as well. Obviously, an individual who can no longer swim or fish in a river because of water pollution has suffered a loss of freedom of action, not merely the loss of the idea of clean water. Similarly, an individual whose forest hiking trail has been clearcut or mined has suffered more than a pure ideological loss. Yet the vast majority of the litigation brought to redress these individual interests has nevertheless been brought by organizational plaintiffs whose organizational purposes are more ideological than individualistic.

The Supreme Court's first environmental standing case was a nominal loss for the environmental plaintiffs but a long-term win for the recognition of environmental values as supporting standing. In *Sierra Club v. Morton*,³²³ the Sierra Club sued the

321. See, e.g., *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (rejecting taxpayer standing to invoke the Account Clause of Art. I, § 9, cl. 7—insofar as that clause requires a regular statement and account of public funds—to require disclosure of the Central Intelligence Agency budget); *Schlesinger v. Reservists Comm. To Stop The War*, 418 U.S. 208, 227-28 (1974) (rejecting standing of citizens and taxpayers to enforce the Incompatibility Clause of Art. I, § 6, cl. 2—providing that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in office”).

322. See *Richardson*, 418 U.S. at 171-74; *Schlesinger*, 418 U.S. at 227-28; *ASARCO*, 490 U.S. at 613-14 (1989); *Daimlerchrysler Corp. v. Cuno*, 547 U.S. 332, 343-45 (2006).

323. 405 U.S. 727 (1972).

United States Forest Service to prevent its approval of an extensive ski development in the Mineral King Valley in the Sequoia National Forest.³²⁴ The Sierra Club asserted only its own organizational interest in preserving the environment of the Sierra Nevada Mountains, and not the interest of any of its individual members who used the resources of the Mineral King area.³²⁵ The Court specifically acknowledged that environmental values such as recreational or aesthetic interests could constitute sufficient injury-in-fact to support standing.³²⁶ This represented a significant broadening of the law of standing, moving far beyond the traditional notion of the “Hohfeldian” plaintiffs.³²⁷ At the same time, however, the Court specifically rejected the Sierra Club’s capacity to sue to enforce these values in its own right; rather, it could only seek to enforce the interest of specific members.³²⁸ As noted earlier, this decision established the paradigm for ideological representational standing that persists to this date.

The Supreme Court’s environmental injury-in-fact doctrine has since vacillated between extremes of requiring specific tangible injury to specific identified activities by the plaintiff, at one extreme, and of accepting almost purely ideological harms to environmental well-being, at the other. As an example of the former, in *Lujan v. Defenders of Wildlife*, the Court rejected Defenders of Wildlife’s standing to challenge an EPA regulation that exempted U.S.-funded projects abroad from the consultation requirements of Section 7 of the Endangered Species Act.³²⁹ Although Defenders of Wildlife (DOW) identified members who had previously visited the habitats of specific animal species endangered by international development projects, as well as members with professional interests in the study of the same endangered animals, it identified no members who habitually visited the endangered habitats or who had specific plans to return.³³⁰ The Supreme Court rejected DOW’s standing under these circumstances, characterizing as “speculation and fantasy” any claim that persons specifically interested in a particular species would be injured by the loss of individual members of that species in other parts of the world.³³¹ DOW and its members are classically-pure ideological plaintiffs; they felt deeply and strongly about an idea—the preservation of the endangered Asian Elephant and Nile Crocodile—but had trouble identifying how the disappearance of those species in the wild would affect their lives in any tangible way other than their own deeply felt loss.

Eight years later, the Court accepted exactly such an ideological interest in an undisturbed environment as a sufficient injury-in-fact to establish standing. It effectively recognized that the loss of the *idea* of a clean environment could itself support standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*,

324. *Id.* at 730.

325. *Id.*

326. *Id.* at 734.

327. In recognizing these values as sufficient to support standing, the Supreme Court followed the Second Circuit, which recognized similar values in *Scenic Hudson Preservation Conference v. Federal Power Comm’n*, 354 F.2d 608 (2d Cir. 1965).

328. *Sierra Club*, 405 U.S., at 740-41.

329. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

330. *Id.* at 563-64.

331. *Id.* at 567.

*Inc.*³³² In *Friends of the Earth*, citizen plaintiffs commenced an enforcement action under the Citizen Suit provision of the Clean Water Act,³³³ alleging that the defendant's hazardous waste disposal facility had exceeded its permit limits for mercury discharges.³³⁴ The district court granted summary judgment in favor of the plaintiffs on liability, and after a trial to determine the amount of penalties, the District Court determined that the mercury discharges, although in violation of permit limits, had not caused any perceptible impact on the environment.³³⁵ On appeal to the Supreme Court, the Court first upheld plaintiffs' standing on the basis of affidavits submitted by the plaintiffs establishing that some of them resided near the Tyger River, had previously used the river recreationally, and that they currently refrained from using the Tyger River because the river "looked and smelled polluted."³³⁶ Despite the undisturbed factual finding that the discharges in question had no perceivable impact on the environment, a majority of the Court held that injury-in-fact meant "not injury to the environment but injury to the plaintiff."³³⁷

Just as *Flast*, *Frothingham*, and *Valley Forge* are irreconcilable on doctrinal grounds, *Friends of the Earth* and *Defenders of Wildlife* seem contradictory by their terms. In *Friends of the Earth*, the Court recognized that environmental injury can consist of an injury that is completely internal to the spiritual well-being of the plaintiff—a purely ideological injury. In *Defenders of Wildlife*, the Court rejected even a deeply felt spiritual connection to a distant endangered species as the basis for injury-in-fact. On their facts, these two cases can be reconciled on the basis of simple physical proximity—the individual plaintiffs in *Friends of the Earth* resided near to the affected river, while the plaintiffs in *Defenders of Wildlife* were quite far from the natural habitats of the species they cared about.³³⁸ However, this distinction does not change the nature of the injury recognized in *Friends of the Earth*—an injury to the plaintiffs' feeling of well being, without any provable physical manifestation. This was not the first time that the Court recognized environmental well-being as the basis for standing. In *Carolina Environmental Study Group v. Duke Power*,³³⁹ the Court found sufficient injury on the part of neighbors to a proposed nuclear power plant to allow a constitutional challenge to the Price-Anderson Act's³⁴⁰ limitation of nuclear power plant liability.³⁴¹ In doing so, the Court grounded its holding in part on the inchoate and unprovable effects of nuclear radiation: "The emission of non-natural radiation

332. 528 U.S. 167 (2000).

333. Clean Water Act § 505, 33 U.S.C. § 1365 (2006).

334. *Friends of the Earth*, 528 U.S. at 177.

335. *Foe v. Laidlaw*, 956 F. Supp. 588, 600-01 (D.S.C. 1997). The district court assessed penalties, as the Clean Water Act is a strict liability statute, and the plaintiffs established that the defendant had saved money by failing to install the necessary pollution control equipment. *Id.* at 601-12.

336. *Friends of the Earth*, 528 U.S. at 181.

337. *Id.*

338. Indeed, it was the physical proximity factor that Justice Scalia used in his *Lujan v. Defenders of Wildlife* opinion to explain the Court's earlier recognition of standing on the part of whale watchers to challenge the Department of Commerce's failure to impose trade sanctions on Japan for continued whaling violations. 504 U.S. at 566-67 (citing *Japan Whaling Assn. v. Am. Cetacean Soc'y*, 478 U.S. 221, 231 n.4 (1986)).

339. 438 U.S. 59 (1978).

340. Price-Anderson Act, 42 U.S.C. § 2210 (2006).

341. 438 U.S. at 77.

into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.³⁴²

3. *Equal Access to Housing, Education, and Benefits*

Cases involving equal access to housing, education, medical care, and other government benefits form another category of standing cases. Individual plaintiffs may be hoping for individual redress that would improve their options for these resources, but as with the environmental cases, these cases are often commenced and supported by associations organized around the idea of improving the equality of access. As in the category of environmental interests, plaintiffs asserting the idea of equal access have had mixed success, often failing to clear the hurdles of causation or redressibility.

a. *Housing Inequality Cases*

The discriminatory zoning cases exemplify the mixed success of equality-oriented plaintiffs. In the 1975 case, *Warth v. Seldin*,³⁴³ the Court denied standing to plaintiffs who challenged allegedly discriminatory zoning practices in Penfield, New York, which had the result of denying the availability of low-income housing.³⁴⁴ The would-be low-income residents and affordable housing developer plaintiffs failed to meet the causation element of standing, as they could not point to a specific project that would be built if the zoning requirements were relaxed.³⁴⁵ Rochester taxpayers, who paid more taxes to shoulder the increased burden of providing affordable housing regionally, were held ineligible to assert the constitutional interests of the would-be residents.³⁴⁶

Two years later, in *Village of Arlington Heights v. Metropolitan Housing Development Council*,³⁴⁷ the Court reached the merits of the discriminatory zoning claim in a case where the plaintiffs included an affordable housing developer whose specific project had been denied a permit, as well as would be residents of that specific development.³⁴⁸ The *Arlington Heights* plaintiffs thus surmounted the causation hurdle that foiled the plaintiffs in *Warth*. Justice Brennan's discussion of the organizational interest in developing affordable housing seems to recognize that a not-for-profit organization could have a legitimate, judicially cognizable interest in its ideological organizational goals:

It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing. MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an

342. *Id.* at 74.

343. 422 U.S. 490 (1975).

344. *Id.* at 510.

345. *Id.* at 507.

346. *Id.* at 509.

347. 429 U.S. 252 (1977).

348. *Id.* at 264.

interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest. The specific project MHDC intends to build, whether or not it will generate profits, provides that “essential dimension of specificity” that informs judicial decision-making.³⁴⁹

Thus, the Court seemed to suggest that an organizational interest in an idea—here, the idea of affordable housing opportunities—might suffice to establish injury-in-fact for standing.

The Supreme Court would later recognize an even more frankly ideological injury as sufficient for standing to challenge housing discrimination in two cases, *Trafficante v. Metropolitan Life Insurance Co.*³⁵⁰ and *Gladstone Realtors v. Village of Bellwood*.³⁵¹ In both of these cases the Court recognized the plaintiffs’ interest in residing in an integrated community, and the “social and professional advantages” flowing therefrom to allow existing residents to challenge racial discrimination in housing.³⁵² Similarly, in *Havens Realty v. Coleman*,³⁵³ the Court allowed a suit under the Fair Housing Act³⁵⁴ to proceed on behalf of “checkers” who posed as apartment seekers and were subject to racial steering by real estate agents.³⁵⁵ The Court avoided the objection to assertion of third-party rights (controlling in *Warth*) by redefining the injury as an injury to a congressionally-granted informational interest in accurate information about housing, one that could be asserted both by the checkers and by the fair housing organization they worked for.³⁵⁶

b. Equal Access to Health Care and Education

As with the housing plaintiffs, ideological plaintiffs seeking equal access to education and health care opportunities have had mixed success in establishing their standing. Like the housing plaintiffs who could not point to a specific housing project in *Warth*, plaintiffs seeking to challenge government policies that tended to encourage the denial of equal educational or health care opportunities have been precluded by the causation element of standing.

In *Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO)*,³⁵⁷ the Court rejected the standing of indigent individuals and an organization representing their interests to challenge the Internal Revenue Service’s change in policy allowing

349. *Id.* at 262-63 (citations omitted). The Court’s holding in *Arlington Heights* did not rest solely upon the interest of the not-for-profit housing developer, as the Court found that the would-be resident had sufficient standing in his own right. *Id.* at 264.

350. 409 U.S. 205 (1972).

351. 441 U.S. 91 (1979).

352. *Accord Bellwood*, 441 U.S. at 112; *Trafficante*, 409 U.S. at 208.

353. 455 U.S. 363 (1982).

354. Title VIII of the Civil Rights Act of 1968, 82 Stat. 81 (currently codified at 42 U.S.C. §§ 3601-31 (2006)).

355. *Havens*, 455 U.S. at 374.

356. *Id.* at 373 (pointing to *Havens* and *Trafficante* as examples of cases where the Court manipulated the “injury-in-fact” and “causation” requirements of standing doctrine by redefining the injury).

357. 426 U.S. 26 (1976).

charitable status to hospitals that did not provide services to indigent patients.³⁵⁸ The Court held that the redressibility of the plaintiffs' injuries depended on the actions of independent actors not before the Court (the hospitals in question), who might well choose to forego charitable tax status rather than provide free services to the indigent.³⁵⁹ Similarly, in *Allen v. Wright*,³⁶⁰ the Court rejected the standing of minority parents of public school children in desegregating school districts to challenge the IRS regulations that had the effect of allowing charitable tax status to competing private schools organized specifically to siphon white students from the desegregating school districts.³⁶¹ As in *EKWRO*, the Court reasoned that the private schools might choose to forego tax status rather than admit minority students on an equal basis, so that "redressibility" was lacking.³⁶²

Contrast these two cases with *Duke Power Co. v. Carolina Environmental Study Group Inc.*,³⁶³ where the Court accepted the standing of an environmental organization to challenge the constitutionality of the Price-Anderson Act, limiting the liability of the nuclear power industry for nuclear accidents.³⁶⁴ The Court accepted the plaintiffs' claims of environmental harms that would flow from a specific nuclear power plant as sufficient for standing purposes, and did not, à la *EKWRO* and *Allen*, dismiss the causation of these claims on the grounds that the power company might choose to build the same plant even without the incentives of the Price-Anderson Act.³⁶⁵

The result in *Duke Power* might be explained as a "standing to lose" case.³⁶⁶ Justice Stevens, concurring in the judgment, argued as much by pointing out that, in his view, the Court had ignored the standing rules established in *EKWRO* and *Allen* in order to give an "advisory opinion" upholding the Price-Anderson Act so as to provide necessary assurances to the nuclear power industry.³⁶⁷ Had the Court denied standing and vacated the decision below, the industry would be left with a decision declaring Price-Anderson invalid, vacated on other grounds. If avoiding this outcome was the *Duke Power* majority's motivation, then the Court felt (implicitly) that the importance of upholding the constitutional validity of the Price-Anderson Act was a factor outweighing the restraints imposed by standing doctrine as expressed in *EKWRO* and *Allen*. Thus, the "standing to lose" explanation suggests that standing doctrine and the "rule" against advisory opinions is subject to exceptions based on counterbalancing concerns.³⁶⁸

358. *Id.* at 45.

359. *Id.* at 42-43.

360. 468 U.S. 737 (1984).

361. *Id.* at 753-56.

362. *Id.* at 757.

363. 438 U.S. 59 (1978).

364. *Id.* at 72-81.

365. *See id.* at 102-03 (Stevens, J., concurring). The tax policies challenged in *EKWRO* and *Allen v. Wright* provided economic incentives for the challenged conduct every bit as surely as the liability limitation of the Price-Anderson Act provided incentives to develop nuclear power.

366. *See* Robert C. Fellmeth et al., *Court Strategy*, 40 SAN DIEGO L. REV. 115, 149 (2003).

367. *Duke Power*, 438 U.S. at 102-03 (Stevens, J., concurring).

368. *Heckler v. Mathews* and *Arlington Heights* might also be described as "standing to lose" cases. In both cases, the plaintiffs had prevailed below in constitutional challenges to government action. *Heckler v. Mathews*, 465 U.S. 728 (1984); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

In *Allen*, the plaintiffs also asserted, without success, that the persistence of de-facto segregated tax-exempt private schools imposed a stigma injury on them.³⁶⁹ The Court summarily rejected this ground for standing.³⁷⁰ Compare this rejection of stigma injury to the Court's acceptance, during the same term, of a challenge to gender-differential requirements for spousal retirement benefits from the Postal Service in *Heckler v. Mathews*.³⁷¹ In *Heckler*, the Court accepted the purely ideological injury it characterized as "the right to receive 'benefits . . . distributed according to classifications which do not without sufficient justification differentiate among covered [applicants] solely on the basis of sex,'"³⁷² even though the plaintiff's success in the case would result in no additional pension payments to him,³⁷³ and even though the "stigma" complained of by Mathews could not fairly be characterized as a stigma suffered by him.³⁷⁴ This contrast illustrates that, at least in some cases, a plaintiff's ideological vision of the good society (i.e., one without gender discrimination) suffices to establish standing.

The Court has similarly characterized the plaintiff's interest in challenging affirmative action in school admissions as an interest in "competing on a level playing field" to avoid the obvious redressibility problems of the plaintiff applicant who might fail to gain admission even in the absence of racial preferences for minorities.³⁷⁵ This interest in a "level playing field," decoupled from actual admission to the educational program, is every bit an ideological interest in a vision of good society as an interest in a world where African elephants still roam, or where religious schools do not receive free real property from the government.

4. Freedom From Risk of Future Harm

This last category of cases I will discuss brings us back to the central topic of this Article: the standing of people interested in minimizing future risk of harm to themselves, who often form the core constituency for enforcement of regulatory statutes. These plaintiffs may seek peace of mind, but like other ideological plaintiffs, they cannot necessarily point to a specific activity, right, or privilege of which they have been deprived.

Vacating the decisions below on standing grounds would leave undisturbed the substantive declarations of unconstitutionality by the lower court, though it would not be entitled to precedential effect. In these two cases, the Court may as well have implicitly balanced the losing parties' interest in vindication on the law against Article III standing concerns, and drawn the balance in favor of having a judicial declaration of the applicable substantive constitutional principles.

369. 468 U.S. at 755.

370. *Id.*

371. 465 U.S. 728 (1984).

372. *Id.* at 737 (alteration in original) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 647 (1975)).

373. *Id.*

374. The statutory distinction in question created a presumption that women were dependent on their husbands for financial support. *Id.* at 731. Any stigma associated with that presumption would appear to inure to Mathews's wife, not to Mathews.

375. See *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978); see also Sunstein, *What's Standing After Lujan?*, *supra* note 220, at 20 (noting that the Court avoided injury-in-fact problems in *Bakke* by redefining the injury).

The Supreme Court has not been particularly accommodating to such plaintiffs seeking to avoid future risk. In the leading case of *Los Angeles v. Lyons*,³⁷⁶ the Court vacated an injunction against continued use of chokeholds by the Los Angeles Police Department.³⁷⁷ The suit had been prosecuted successfully in the lower courts by a man who had been subjected to a police chokehold, rendering him unconscious, during a traffic stop.³⁷⁸ The Supreme Court held that the plaintiff lacked standing to obtain an injunction against future use of chokeholds during arrests, reasoning that it was extremely unlikely that the same plaintiff would again be arrested, resist arrest, and be subject to a chokehold.³⁷⁹ According to the Court, Lyons would have to show that the Los Angeles Police, as official policy, always used chokeholds in all encounters with citizens, or that Lyons planned to break the law in the future and resist arrest.³⁸⁰ The Court specifically rejected Lyons's claim that his reasonable fear of being subjected to a chokehold again in the future was sufficient injury-in-fact to support standing: "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."³⁸¹ The Court has just recently relied on *Lyons* to reject a claim of standing based on probabilistic future procedural harms in *Summers v. Earth Island Institute*.³⁸²

The Court's dismissal of probabilistic and well-being harms in *Summers* and *Lyons* contrasts sharply with its holding in *Friends of the Earth Inc.*, that it is "not injury to the environment, but injury to the plaintiff" that counts for injury-in-fact, implicitly acknowledging that a plaintiff's reasonable fears of environmental contamination suffice for standing purposes even in the absence of objectively demonstrable harm to the environment.³⁸³ *Lyons* contrasts even more sharply with the Court's explicit acceptance of apprehension for one's health as a sufficient injury-in-fact in *Duke Power*: "The emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants."³⁸⁴ The stark contrast between the Court's willingness to accept subjective injury to well-being as sufficient in environmental cases and insufficient in law enforcement cases has led more than one commentator to suggest that the Court's standing jurisprudence is influenced by the upper-class values of its personnel.³⁸⁵

In summary, the Supreme Court's rhetoric is hostile to ideological plaintiffs seeking vindication of ideological visions of better government or better protection of

376. 461 U.S. 95 (1983).

377. *Id.* at 113.

378. *Id.* at 97-98.

379. *Id.* at 105-10.

380. *Id.* at 105-06.

381. *Id.* at 107 n.8.

382. 129 S.Ct. 1142, 1150 (2009).

383. *Friends of the Earth*, 528 U.S. at 181.

384. *Duke Power*, 438 U.S. at 74.

385. See Mary D. Fan, *Risk Magnified: Standing Under the Statist Lens*, 112 YALE L.J. 1633, 1633 (2003); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002).

their interests in a particular ordering of civil society or environmental or cultural norms. Despite this rhetoric, the Court has from time to time allowed purely ideological claims to proceed, simply by recasting the claimed injury in ideological terms it was willing to accept. Thus, Lyon's fear of being once again subject to an unjustified chokehold was remote and speculative, while the environmentalist plaintiffs in *Duke Power* had a "direct and present" injury due to an "apprehension flowing from the uncertainty about health and genetic consequences" of radiation.³⁸⁶ Recreational users of the Tyger River in *Friends of the Earth* were allowed to assert damage to their sense of environmental well-being without showing perceptible harm to the environment.³⁸⁷ Mr. Mathews was allowed to assert an ideological interest in gender neutral rules for distribution of pension benefits even if he stood to gain not a penny more in benefits.³⁸⁸ Mr. Bakke could assert an interest in race neutral admissions procedures even if he still would not get into medical school,³⁸⁹ and Mr. Trafficante could assert an interest in the social benefits of living in an integrated community.³⁹⁰ These plaintiffs were heard even while challenges to tax policies encouraging segregated schools³⁹¹ and refusal of medical services to indigents³⁹² were not heard because the harms alleged were too speculative or unredressible.

The Supreme Court justifies standing doctrine by emphatically denying that "the federal courts [are] . . . publicly funded forums for the ventilation of public grievances."³⁹³ But what if, after the adoption of Article III of the Constitution from which the standing limits are said to derive, the Constitution had been amended to guarantee a right of the people to assemble into groups and petition the judiciary for redress of their shared grievances? Would that amendment affect the analysis of the standing of public interest groups who had associated specifically for the purpose of asserting their shared grievances before the courts?

VI. THE PETITION CLAUSE AND ITS RELATION TO THE JUDICIAL FUNCTION

The First Amendment to the United States Constitution provides, *inter alia*, that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."³⁹⁴ As a matter of text, drafting history, and interpretation, this right of petition includes the right to petition the judiciary for a redress of grievances as well as the other branches of government. Also as a matter of text, drafting history, history of practice, and interpretation, the right to petition so guaranteed is linked, though not necessarily limited, to the right of assembly; the Petition Clause specifically addresses group action to seek redress of shared grievances. Although the Petition Clause has enjoyed renewed attention by academic commentators in the last decade, commentators

386. *Duke Power*, 438 U.S. at 74.

387. *Friends of the Earth*, 528 U.S. at 182-83.

388. *Heckler v. Mathews*, 465 U.S. 728, 737-40 (1984).

389. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281-84 (1978).

390. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208 (1972).

391. *Allen v. Wright*, 468 U.S. 737, 739-40 (1984).

392. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 28 (1976).

393. *Valley Forge*, 454 U.S. at 473.

394. U.S. CONST. amend. I.

disagree about the extent the Petition Clause can be read to modify the scope of justiciability and jurisdictional doctrines.³⁹⁵ Advocates of a “strong” Petition Clause—most prominently Professor Pfander—have argued, for instance, that the Petition Clause guarantee defeats the doctrine of federal sovereign immunity.³⁹⁶ Advocates of a “weak” Petition Clause, on the other hand, suggest that the Petition Clause adds barely anything to the protections afforded by due process and a limited protection against punishment for seeking judicial redress.³⁹⁷ However, if the right to petition is anything more than surplusage, duplicative of the Fifth Amendment right to due process and the free speech guarantees elsewhere in the First Amendment, it must establish an interest in having shared grievances heard by each of the three branches of government on neutral terms.

*A. The Right to Petition Includes the Right to Petition the
Judiciary for Redress of Grievances*

The Supreme Court has relatively recently recognized and affirmed that the right to petition includes a right to petition the federal courts for redress. The Court’s first mention of the right to petition in the context of access to courts and the litigation process was somewhat oblique, and like the Court’s later petition analysis, came in the mixed context of First Amendment expressive rights. In *NAACP v. Button*,³⁹⁸ the Court struck down an Alabama statute that criminalized, as a form of improper solicitation, the NAACP’s practice of recruiting potential clients as part of its program of providing free representation to victims of racial discrimination.³⁹⁹ The Court’s rationale recognized the importance of associational interests, litigation as an expressive activity, and, incidentally, as a petitioning activity:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930’s, for example, no less is it true of the Negro minority today. And under the conditions

395. See, e.g., Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2155 n.3 (1998) (survey of literature); Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154-70 (1986); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993); John E. Wolfgram, *How the Judiciary Stole the Right to Petition*, 31 UWLAX L. REV. 257 (2000).

396. Pfander, *supra* note 249, at 962-73.

397. Andrews, *supra* note 395, at 625-68; Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 766 (1999).

398. 371 U.S. 415 (1964).

399. *Id.* at 428.

of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.⁴⁰⁰

The *Button* case arose in the aftermath of *Brown v. Board of Education*,⁴⁰¹ from Virginia's efforts to quash the NAACP's substantial litigation efforts to implement the school desegregation requirements.⁴⁰² Significantly, Justice Harlan's dissent in *Button* relied on the fact that the anti-solicitation rules did not on their face discriminate on the basis of viewpoint—pro-segregation groups were equally precluded from soliciting clients as anti-segregation groups.⁴⁰³

The *Button* opinion is less than explicit in holding that the First Amendment right to petition includes a right of access to courts. However, one year later in *Brotherhood of Railroad Trainmen v. Virginia*,⁴⁰⁴ the Court made this connection more explicit in striking down a state regulation that prohibited a union from providing group legal services to its members.⁴⁰⁵ The Court held, "The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped."⁴⁰⁶ Thus the Court recognized that the First Amendment right to petition is a right to "petition the courts."⁴⁰⁷ The Court subsequently reaffirmed that holding in later cases involving union legal service plans that states sought to restrict under attorney regulation rules. In *United Transportation Union v. State Bar of Michigan*,⁴⁰⁸ the Court stated that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."⁴⁰⁹ Additionally, in *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n*,⁴¹⁰ the Court similarly asserted that "the freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gives [the union] the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."⁴¹¹

The Supreme Court also applied the right to petition to include the right to petition courts in developing the petition exceptions to the Sherman Antitrust Act⁴¹² and the National Labor Relations Act (NLRA).⁴¹³ In *Eastern Railroad Presidents Conference*

400. *Id.* at 429-30.

401. 347 U.S. 483 (1954).

402. For an excellent discussion of the context of *Button*, as well as discussion of its implications for group access to courts, see Robert H. Birkby & Walter F. Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts*, 42 TEX. L. REV. 1018 (1964).

403. *Button*, 371 U.S. at 465-68 (Harlan, J., dissenting).

404. 377 U.S. 1 (1964).

405. *Id.* at 8.

406. *Id.* at 7.

407. *Id.*

408. 401 U.S. 576 (1971).

409. *Id.* at 589.

410. 389 U.S. 217 (1967).

411. *Id.* at 221.

412. Originally passed in 1890, the Sherman Antitrust Act is currently codified at 15 U.S.C. §§ 1-38 (2006).

413. The NLRA is currently codified at 29 U.S.C. §§ 151-169 (2006).

v. *Noerr Motor Freight, Inc.*,⁴¹⁴ the Court first recognized that joint lobbying efforts, although literally within the antitrust prohibition against any combination agreement in restraint of trade, could not be punished under the Sherman Act because such petitioning activities were subject to First Amendment protection.⁴¹⁵ According to the Court, the “right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”⁴¹⁶ The Court explicitly extended this antitrust immunity to petitions directed at the judicial system as well in *California Motor Transport Co. v. Trucking Unlimited*,⁴¹⁷ where the Court held that “[c]ertainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.”⁴¹⁸

Some courts and commentators read the Court’s *Noerr* and *California Motor Transport* holdings as based on statutory interpretation rather than constitutional grounds.⁴¹⁹ However, the Supreme Court made clear the constitutional underpinnings of this statutory construction by applying a similar exception to the NLRA in *Bill Johnson’s Restaurants, Inc. v. NLRB*.⁴²⁰ In *Bill Johnson’s*, the Court held that the NLRB could not enjoin an employer’s defamation and harassment suit against picketing employees as an unfair labor practice.⁴²¹ Though interpreting the NLRA, the Court couched its holding explicitly in terms of a First Amendment right of access to courts: “Considering the First Amendment right of access to the courts . . . we conclude that the Board’s interpretation of the Act is untenable.”⁴²² Although the Court has not suggested that this right is absolute, *Bill Johnson’s* and subsequent cases discuss the circumstances where baseless, malicious, or sham litigation may be punished.⁴²³

*B. The Right to Petition Is Both Individual and Collective,
But Is Strongest in the Context of Collective Political Action*

Textually, the Petition Clause combines the rights to assembly and petition. There remains some debate about the extent that the right to petition is properly paired with the right to assembly—and is thus a group right—as well as the extent to which the right to petition extends to “non-political” individual redress and political concerns.

414. 365 U.S. 127 (1961).

415. *Id.* at 136.

416. *Id.* at 138.

417. 404 U.S. 508 (1972).

418. *Id.* at 510.

419. See *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1364-65 (5th Cir. 1983); *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 471 (7th Cir. 1982); C. Douglas Floyd, *Antitrust Liability for the Anticompetitive Effects of Governmental Action Induced by Fraud*, 69 ANTITRUST L.J. 403, 426 (2001); Robert A. Zauzmer, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, STAN. L. REV. 1243, 1250 (1984).

420. 461 U.S. 731 (1983).

421. *Id.* at 740-43.

422. *Id.* at 742-43.

423. *Id.* at 744-47; see also *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) (holding that litigation activity can be sanctioned under the antitrust laws only where it both lacks “probable cause” and is brought with a subjective intent to injure the defendant competitively, rather than to obtain judicial relief).

In my perspective, the right to petition extends to individuals as well as groups and to individual concerns as well as to political issues of general concern; however, as is the case in First Amendment expressive rights, the weight accorded to the petition interest may vary depending on whether it is a group petition and whether the petition goes to “political” issues of self-governance.

Literally read, the Petition Clause combines the rights of assembly and petition into one right of the people. The First Amendment provides, in full: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁴²⁴ Parsing the text, the Petition Clause guarantees “the right” (singular) “peaceably to assemble, and to petition the Government for redress of grievances.”⁴²⁵ In addition, the use of a comma to separate the word “assemble” from the phrase “to petition,” as opposed to the semicolons used between the Religion and Speech Clauses, likewise suggests a connection between the rights of assembly and petition. The practical history of petitioning activities provides some support to this connection between the rights of assembly and petition: in a pre-Internet and direct-mail age, the only practical way for citizens of like views to combine and produce a petition was to assemble in one place for that purpose. Indeed, in the debates over the First Amendment, the framers specifically linked the right to assemble and “consult for the common good” as a necessary predicate to the right to formulate and present petitions for redress.

During the debates on the First Amendment, there was a motion to strike the reference to the right of assembly, and although this motion was defeated, there was no suggestion that the rights to assembly and petition were inextricably linked. An individual right to petition also draws support from the petition practice at the time of the founding: though many petitions were group petitions that were political in nature, many more petitions were individual petitions for individual relief (often in the nature of judicial relief).⁴²⁶

The dependence of the petition right on political concerns evokes a similar tension. The Court decided *Button* in the context of a highly political campaign by the NAACP to implement school desegregation.⁴²⁷ This led some courts to hold that the right to petition the judiciary there recognized was limited to public or political concerns, or that the right to petition drew life only when combined with some other First Amendment interest such as the right to assembly.⁴²⁸ These decisions are in tension with the Supreme Court’s recognition of the petition right in *Bill Johnson’s*, well outside the context of group activity or political concerns.

One need not resolve these tensions for the purposes of this Article. As discussed in more detail below, First Amendment doctrine has moved beyond Justice Black’s

424. U.S. CONST. amend. I.

425. *Id.*

426. Pfander, *supra* note 249, at 960.

427. 371 U.S. at 417-26.

428. *See, e.g.*, Gray v. Lacke, 885 F.2d 399, 412 (7th Cir. 1989); Belk v. Town of Minocqua, 858 F.2d 1258, 1261-62 (7th Cir. 1988); Phares v. Gustafsson, 856 F.2d 1003, 1009 (7th Cir. 1988); Day v. S. Park Indep. Sch. Dist., 768 F.2d 696, 700-01 (5th Cir. 1985); Altman v. Hurst, 734 F.2d 1240, 1244 (7th Cir. 1984); Renfroe v. Kirkpatrick, 722 F.2d 714, 715 (11th Cir. 1984).

bright-line tests of absolute protection or absolute un-protection,⁴²⁹ rather, the Court and most commentators recognize that First Amendment interests invoke balancing tests and heightened scrutiny according to the perceived value of the expressive conduct involved. Political speech continues to be recognized as the First Amendment's core value, deserving of the highest protection. It would follow that petitions for judicial redress that involve political and public issues of broad application should likewise deserve the highest protection under the First Amendment. This category should necessarily include those petitions at the heart of self-government: the process of generating rules governing conduct in our complex society. Likewise, although the right to petition the judiciary may not be dependent on the related right of assembly, these rights are synergistic, and it is fair to say that as a matter of grammar and drafting history, group petitioning activities lie at the heart of the Petition Clause in the same manner that political speech lies at the heart of the Speech Clause.

C. The Petition Clause and the Scope of Article III Justiciability

Does the Petition Clause of the First Amendment affect the scope of justiciability under Article III of the Constitution? The simple answer might seem to be “no.” Under this view, the Petition Clause, as applied to the judicial branch, simply guarantees a right to invoke judicial process that is otherwise within the court's jurisdiction. Under this view, the Petition Clause does not by its terms alter or amend the jurisdictional terms of Article III of the Constitution. Indeed, by its terms, the Petition Clause does not speak to Constitutional or judicial doctrines at all, but only to restrictions imposed by Congress.

There are reasons this simple answer is wrong. If Article III justiciability limits were all clearly defined, then the argument that the Petition Clause does no more than provide for such access to courts as is spelled out in Article III might make sense. Certainly, the Petition Clause would not be an argument for federal court jurisdiction over a common law claim asserted by the resident of one state against another resident of the same state, as such a claim would not fall within either “arising under” or diversity jurisdiction under Article III. But when it comes to the justiciability limits of Article III, such as standing doctrine, the limits are not sufficiently well defined to make the tautological answer—that the Petition Clause simply affords whatever court access that is already granted in Article III—a satisfactory one. The Court acknowledged that “the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions” that serve competing “practicalities and prudential considerations.”⁴³⁰ As long as the justiciability doctrine balances competing interests, it ought to consider the constitutional interest to petition all branches for redress of grievances, which is enshrined in the First Amendment and reflects centuries of history.

429. See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting); *Braden v. United States*, 365 U.S. 431, 445 (1961) (Black, J., dissenting); *Wilkinson v. United States*, 365 U.S. 399, 422 (1961) (Black, J., dissenting); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825 (1962).

430. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 406 n.11 (1980).

This is not to say that the right to petition trumps justiciability concerns in all cases. The Supreme Court has rejected the idea of an “absolute” right to petition just as it has rejected the notion of absolute First Amendment freedom of speech rights. In *McDonald v. Smith*,⁴³¹ the Court held that the right to petition did not shield a defamation suit brought by a rejected nominee for attorney general against a citizen who wrote a letter to President Nixon claiming that the nominee was unsuitable for the post.⁴³² Rather, the Court held that the defamation action was subject to the same “actual malice” standard it had adopted in *New York Times Co. v. Sullivan*⁴³³ for First Amendment speech analysis of public figure defamation actions generally.⁴³⁴

New York Times provides an answer, also, to the question of whether the Petition Clause should extend beyond its literal application to limit Congressional action. In *New York Times*, the Court extended First Amendment freedom of speech protections to limit the scope of recovery in a state common law defamation action despite the lack of Congressional or state legislative action.⁴³⁵ *New York Times* rejected the argument that judicially created common law rules of libel recovery failed to invoke sufficient state action to justify application of the First Amendment press freedoms through incorporation by the Fourteenth Amendment’s Due Process Clause.⁴³⁶ The Fifth Amendment’s Due Process Clause likewise incorporates the Petition Clause as a restriction on all government actions restricting access to courts, not just Congressional action.⁴³⁷

New York Times, like other Supreme Court cases, recognized that the highest First Amendment values apply to First Amendment protected activities that affect the process of self-governance. These values are accorded the highest weight when balanced against government interests supporting regulation of First Amendment protected activities. Though *New York Times* and its progeny considered political speech directed towards electoral and legislative politics, likewise its reasoning should apply to judicial petitioning activities that directly affect the law making process—the final judicial step in review of administrative rulemaking activity. In *United States v. Cruikshank*,⁴³⁸ the Court stated that “[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.”⁴³⁹

Standing doctrine, throughout its existence, has consisted of a balancing of competing interests, and the Petition Clause created an interest in access to courts by all sides of an issue to be heard in the judicial consideration of administrative rulemaking. Heretofore, this Petition Clause interest has not been considered in standing analysis. In the next section of this Article, the application of First

431. 472 U.S. 479 (1985).

432. *Id.* at 485.

433. 376 U.S. 254 (1964).

434. *McDonald*, 472 U.S. at 485.

435. 376 U.S. at 265.

436. *Id.*

437. See *Andrews*, *supra* note 395, at 676-80 (although rejecting idea that Petition Clause expands jurisdiction, arguing for strict scrutiny of governmental rules restricting court access, including pleading rules).

438. 92 U.S. 542 (1875).

439. *Id.* at 552.

Amendment functional self-governance analysis to standing doctrine shall be considered, particularly in the case of standing to review government rulemaking.

VII. A FUNCTIONAL FIRST AMENDMENT ANALYSIS OF STANDING BY IDEOLOGICAL PLAINTIFFS

In *McDonald v. Smith*, the Supreme Court declared that the Petition Clause is “cut from the same cloth” as the Speech and Press Clauses of the First Amendment, and applied the same balancing of First Amendment interests that it adopted for the press, in *New York Times*, to petitioning activity.⁴⁴⁰ The *New York Times* decision accorded the press protection specifically to protect the functional role of First Amendment freedoms in promoting republican self-government and protecting political speech actually related to public officials in a defamation claim. First Amendment speech theory has long articulated both the functional benefits of free speech in the search for political truth in a system of self-government, as well as the more individual speech benefits of self-expression and autonomy. Although courts have yet to recognize it, judicial petitioning activity also lends itself to analysis both as an aspect of individual autonomy and a functional part of self-government. With recognition of the dispositive role the judiciary plays in the “marketplace” of certain ideas, a functional analysis of judicial petitioning activity should lead to more judicial receptivity for standing for ideological plaintiffs seeking to assert these ideas. Although courthouses may not be a “public forum” for speech purposes, courts are the exclusive public forum for petitioning the judicial branch for redress. At a minimum, current standing doctrine should be subject to scrutiny for the substantiality of the government interests served by standing doctrine and the efficacy of standing doctrine in meeting those interests.

A. Foundational Interests in First Amendment Analysis

The twentieth century saw extensive development, both academically and judicially, of a foundational theory of interests protected by the Speech and Press Clauses of the First Amendment.⁴⁴¹ Academic theory has progressed over this time period from positing the First Amendment’s fundamental role as creating a free and open marketplace of ideas in a search for truth in aid of self-government, to recognition of the direct role of speech and the press in self government, to free speech as an essential aspect of autonomy and self-expression independent of its relation to self-government, and to retrenchment as the self-expressive theory of speech seemed limitless. Academic pursuit of a “Grand Theory” of the First Amendment seems to be gaining on theoretical physicists’ pursuit of a unified theory of matter in terms of academic energy expended. However, judicial doctrine has not quite kept up with the academic theorists, and continues to recognize the “marketplace of ideas,” self-government, and self-realization interests protected by the First Amendment Speech and Press Clauses.

440. *McDonald*, 472 U.S. at 482.

441. An excellent history of the intellectual and judicial development of First Amendment doctrine over the course of the twentieth century appears in G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299 (1996). The discussion that follows is indebted to Professor White’s cogent analysis.

1. The “Marketplace of Ideas”

Professor Zechariah Chafee is credited with positing the foundational functional role of Free Speech as one of ensuring an open “marketplace of ideas” in which free expression of competing and conflicting viewpoints will ultimately lead to the societal discovery and acceptance of truth, essential to intelligent self-government in a republic.⁴⁴² Professor Chafee posited that the value of the First Amendment’s protection of speech lay not in its protection of an individual “right,” which leads only to deadlock in conflicts with communitarian and government “rights” to protect civil government from insurrection and to wage war.⁴⁴³ Professor Chafee’s fundamental insight was that the First Amendment’s Speech Clause advanced not just individual interests, but advanced a functional self-governance interest in vigorous debate on public issues in order to better inform and educate decisionmakers. Chafee suggested a balancing of the communitarian interests in both order and stability against the functional First Amendment “social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.”⁴⁴⁴ Additionally, his suggestion of a marketplace of ideas drew on capitalist economic theory and posited that, just as a free market in goods is assumed to allocate economic resources with the greatest efficiency, a free market of ideas will yield “truth.”

Professor Chafee’s marketplace of ideas theory of the Speech Clause first found judicial acceptance in Justice Holmes’s famous dissent in *Abrams v. United States*,⁴⁴⁵ a prosecution for violations of the Espionage Act that the Supreme Court ultimately affirmed when confronted with a First Amendment challenge.⁴⁴⁶ Justice Holmes took Professor Chafee’s marketplace of ideas metaphor and attributed it to the framers of the First Amendment as their fundamental assumption:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.⁴⁴⁷

While originally adopted in a dissent, this “marketplace of ideas” metaphor has become part of the judicial vernacular for assessing First Amendment issues. In *Thornhill v. Alabama*,⁴⁴⁸ the Court explicitly adopted the public’s interest in the free flow of information as the foundational rationale for the First Amendment’s communicative freedoms: “Abridgment of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise

442. See generally ZECHARIAH CHAFFEE, JR., FREEDOM OF SPEECH (1920).

443. *Id.* at 34.

444. *Id.* at 36.

445. 250 U.S. 616 (1919).

446. *Id.* at 630 (Holmes, J., dissenting).

447. *Id.*

448. 310 U.S. 88 (1940).

of the power of correcting error through the processes of popular government.⁴⁴⁹ Subsequently the Court described the “purpose of the First Amendment” as “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”⁴⁵⁰ Supreme Court opinions continue to make routine references to the public interest in the “marketplace of ideas” as a foundational element of First Amendment doctrine.⁴⁵¹

Professor Chafee and Justice Holmes promoted the metaphor of a marketplace of ideas, and it eventually stuck. Its importance lies not just as a means of assigning weight to First Amendment interests, but also in its foundational recognition that First Amendment interests are not those of the speaker alone, but include those of the public, and our system of self-government, in hearing every side of contested issues.

2. *Speech as Self-Government*

The development of the functional values of First Amendment communication took a step beyond the marketplace of ideas by incorporating the direct role of speech in the process of self-governance. Justice Brandeis is credited with first identifying the direct self-government role played by speech, in a concurring opinion in *California v. Whitney*.⁴⁵² Although Justice Brandeis concurred in the judgment upholding a conviction for associating with the Communist Party, he wrote that the framers “believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”⁴⁵³ Justice Holmes added that the “greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”⁴⁵⁴

Professor Alexander Meiklejohn expanded this principle to posit a theory of the First Amendment based exclusively on the values of speech to self-government.⁴⁵⁵ This view eschewed the marketplace of ideas as an end or good in itself.⁴⁵⁶ Rather, it posited that freedom of speech was valuable not because it leads to political truth, but because speech is essential to the process of self-government itself.⁴⁵⁷ Public political speech *is* self-government, and as such, in Professor Meiklejohn’s view, it is absolutely

449. *Id.* at 95.

450. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

451. *E.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 883 (2005) (O’Connor, J., concurring); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341 (1995); *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Leathers v. Medlock*, 499 U.S. 439, 448 (1991); *Pac. Gas & Elec. v. Pub. Util. Comm’n*, 475 U.S. 1, 8 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

452. 274 U.S. 357, 379 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *see generally* White, *supra* note 441, at 325; Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988); HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 156-66 (Jamie Kalven ed., 1988).

453. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

454. *Id.*

455. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 93-94 (1948).

456. *Id.* at 88.

457. *Id.*

protected from government interference.⁴⁵⁸ Other forms of speech—commercial or “private speech” in particular—do not merit the absolute protection Professor Meiklejohn would afford to public political speech; rather, such lesser value speech interests should be subject to balancing like other liberty interests under a due process analysis.⁴⁵⁹

Professor Meiklejohn’s paradigm of speech as self-government itself has also received Supreme Court endorsement. Justice Brennan’s majority opinion in *New York Times*, which imposed an actual malice standard for defamation actions brought by public figures,⁴⁶⁰ owed a debt to Meiklejohn’s theory in placing political speech and its role in self-government at the center of First Amendment analysis.⁴⁶¹ A few years later, in *Garrison v. Louisiana*,⁴⁶² the Court more explicitly adopted Professor Meiklejohn’s approach, holding that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”⁴⁶³

Professor Meiklejohn’s position that First Amendment speech, as limited to speech of political value, was absolutely protected from government sanction or interference never garnered a majority of the Supreme Court, and was ultimately rejected.⁴⁶⁴ Nevertheless, his placement of public political speech, and its role in self-government, at the center of First Amendment free speech continues to influence First Amendment doctrine. The Supreme Court continues to hold that political speech, and speech on political issues, “has always rested on the highest rung of the hierarchy of First Amendment values.”⁴⁶⁵

3. *Speech as Self-Realization*

Central to Professor Meiklejohn’s theory of First Amendment values is the distinction between public, political speech, to be absolutely protected,⁴⁶⁶ and private speech, which is to be protected, if at all, under a due process balancing analysis.⁴⁶⁷ This distinction itself contained the seeds of its own demise, as it became impossible to deny any self-governance values to whole categories of speech Professor Meiklejohn would have excluded from protection—such as commercial advertising, literature, and art. While he initially excluded it from his category of absolutely protected speech, Professor Meiklejohn himself would ultimately recognize the potential political value

458. *Id.* at 91.

459. *Id.* at 94.

460. 376 U.S. at 279-80.

461. Justice Brennan would later acknowledge Professor Meiklejohn’s influence on Warren Court First Amendment doctrine. See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Justice Black’s concurring opinion in *New York Times* more completely and explicitly adopted Professor Meiklejohn’s premise that public political speech was central to the First Amendment and therefore absolutely protected against state sanction. 376 U.S. at 293, 297 n.6 (Black, J., concurring). Thus, he would have prohibited defamation damages in favor of a public official even if “actual malice” existed. *Id.*

462. 379 U.S. 64 (1964).

463. *Id.* at 74-75.

464. *Konigsburg v. State Bar*, 366 U.S. 36, 49-51 (1961).

465. *Carey v. Brown*, 447 U.S. 455, 467 (1980).

466. MEIKLEJOHN, *supra* note 455, at 91.

467. *Id.* at 94.

of art and literature, and would expand his definition of public speech to include the arts.⁴⁶⁸ Meanwhile, the Supreme Court had not joined Meiklejohn in abandoning the marketplace of ideas metaphor in this context. The Court would recognize that, although entitled to perhaps less protection than “pure” political speech, commercial speech—even paid advertising—added to the marketplace of ideas and deserved some measure of First Amendment protection.⁴⁶⁹

As the categories of protected speech grew according to intuitive notions of what should be included in the scope of First Amendment theory, Professor Meiklejohn’s focus on political self-governance as the sole unifying First Amendment value broke down. Other First Amendment theorists, most notably Thomas Emerson and Martin H. Redish, posited a broader system of values protected by the First Amendment.⁴⁷⁰ Central among these non-political values was the libertarian value of self-realization: expression was an essential aspect of autonomy and this self-development that should not be restricted by the state. Professor Emerson posited that this self-realization value was part of a multicentric system of First Amendment values;⁴⁷¹ Professor Redish posited that this self-realization value was the core value of the First Amendment.⁴⁷²

The Supreme Court accepted, at least implicitly, the self-realization value inherent in the First Amendment in its decision in *Stanley v. Georgia*,⁴⁷³ which struck down a conviction for solely private possession and viewing of obscene materials. In *Stanley*, Justice Marshall’s opinion for the Court summed up the First Amendment interest in terms of individual autonomy without reference to self-governance: “Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”⁴⁷⁴

4. Current Judicial Doctrine

The Court continues to adhere to Professor Meiklejohn’s notion that speech related to politics and self-government merits the highest degree of protection. Indeed, in a recent term, the Court struck down application of the McCain-Feingold campaign finance law to issue-related advertising naming specific candidates immediately before an election.⁴⁷⁵

Current free speech doctrine places the foundation of First Amendment speech guarantees in the systemic values of speech to a self-governing citizenry. In *Thornhill v. Alabama*,⁴⁷⁶ the Court continued to rely on this rationale:

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of

468. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57.

469. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-73 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 818-21 (1975).

470. See Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

471. Emerson, *supra* note 470, at 878-79.

472. Redish, *supra* note 470, at 593.

473. 394 U.S. 557 (1969).

474. *Id.* at 565.

475. *FEC v. Wis. Right to Life, Inc.*, 127 S.Ct. 2652 (2007).

476. 310 U.S. 88 (1940).

education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.⁴⁷⁷

Thus, First Amendment overbreadth doctrine is justified not based on the individual's right to speak, but the loss to a deliberative citizenry of the opportunity to hear what its members would have said: "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."⁴⁷⁸

This recognition of the systemic value of protected speech also underlies the Court's stratification of speech categories for protection, with political speech receiving the highest protection, and merely self-expressive and commercial speech receiving the lowest protection. According to the Court, "not all speech is of equal First Amendment importance," rather "[i]t is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'"⁴⁷⁹ Thus, the Court "reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."⁴⁸⁰

The weight of Supreme Court doctrine as well as the weight of academic commentary thus continues to place the foundational core of the Free Speech Clause of the First Amendment in the societal and systemic values of how speech advances self-government and analyzes restrictions on speech in terms of how those restrictions impede the free flow of information essential to self-government.

B. First Amendment Doctrine and Judicial Standing

Contrast the Court's approach to the Free Speech Clause—which emphasizes the systemic values of speech to a system of self-government over individual autonomy values—with the Court's approach to standing doctrine, which emphasizes individual values of injury-in-fact over consideration of the systemic value of access to court for judicial review. Yet the Court has acknowledged that the Petition Clause guarantee of the First Amendment includes petitions to the judicial branch for redress and has suggested that the Petition and Speech Clauses are "cut from the same cloth."⁴⁸¹ If anything, the Petition Clause is textually more firmly anchored to the system of representative self-government—and the relationship between citizen and state—than

477. *Id.* at 95.

478. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted).

479. *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

480. *Id.* at 759 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

481. *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

the Free Speech Clause. After all, the Petition Clause directly guarantees the right to “petition *Government* for the *redress of grievances*.”⁴⁸² Should the restrictions on Petition Clause interests—“cut from the same cloth” as the Free Speech and Press Clauses—not be subject to a functional analysis that is at least analogous to the rigorous scrutiny afforded to restrictions on speech interests? Does the ideological plaintiff have a constitutional interest in access to the judicial marketplace of ideas?

Like political speech, judicial review of administrative action serves important systemic interests that go well beyond the vindication of the rights of individual litigants before the courts. Such review helps ensure that the decisions of the most democratically responsive branch of government are in fact carried out and serves as an ultimate check on arbitrary executive action nullifying congressional action. As the Free Speech Clause implicitly ensures the free flow of information to the electorate, the Petition Clause explicitly ensures the free flow of communication from the citizenry to the organs of government, including the judicial organ.

Based on the functional values of speech, First Amendment doctrine invokes heightened judicial scrutiny of limitations on access to public forums and of limitations that have content-discriminatory or viewpoint-discriminatory effects, even if such limitations are facially neutral. The Court has applied this Free Speech Clause scrutiny to judicially crafted doctrines and remedies, and it has applied this scrutiny even to restrictions designed to accommodate competing constitutional values, such as the Establishment Clause. The Court has also noted that Petition Clause interests should be subject to analysis similar to Free Speech Clause interests: “Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.”⁴⁸³

A functional analysis of standing doctrine would recognize that the judicial system is not only *a* First Amendment public forum for the purpose of judicial petitioning rights, but also that it is *the only* judicial public forum for petitioning rights. The disparate access to such a forum should be subject to heightened scrutiny and should be upheld only where the distinctions are substantially related to an important governmental interest. Similarly, as current standing doctrine has the effect of favoring one viewpoint (i.e., challenges to overregulation brought by regulated industry) over another viewpoint (i.e., challenges to underregulation brought by regulatory beneficiaries), this viewpoint-discriminatory effect should invoke heightened scrutiny under a First Amendment analysis. Under such analysis, the rationales for a restrictive standing doctrine offered by the Supreme Court fail, as they fall short of the sort of governmental interests that justify restrictions on First Amendment interests or can be achieved with a less restrictive version of standing doctrine.

1. The Judicial Forum as a Petition Clause Public Forum

The Supreme Court has suggested that the courthouse itself is not a public forum for freedom of speech purposes.⁴⁸⁴ This holding cannot be determinative of the question whether the courts should be considered a public forum for the purpose of

482. U.S. CONST. amend. I (emphasis added).

483. *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985).

484. *United States v. Grace*, 461 U.S. 171, 178 (1983).

Petition Clause rights. There is a world of difference between a claimed right to carry placards across the literal threshold of the courthouse and assertion of the Petition Clause interest in access to the only forum available for prosecution of judicial petitions. Though the Free Speech and Petition Clauses may be “cut from the same cloth” in their relation to self government, that does not mean that they are identical. Otherwise the Petition Clause would be mere surplusage.

The Supreme Court has recognized that for Free Speech Clause purposes, some locales, such as streets and parks, have been associated with freedom of expression since the founding and as such are invariably given public forum status for First Amendment purposes. As Justice Roberts wrote, “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁴⁸⁵ For judicial petitioning purposes, the court system has analogous status as an irreducible public forum, indeed the only forum available.

The Court has also recognized that some institutions are uniquely suited to debate of diverse viewpoints and must accordingly be treated as public forums: “The college classroom with its surrounding environs is peculiarly ‘the marketplace of ideas.’”⁴⁸⁶ Whatever validity the marketplace of ideas metaphor holds for the functional role of political speech to influence government policy, this metaphor is undoubtedly valid as a description of the role of the judicial function in our adversary system. The marketplace of ideas metaphor itself supports recognition of the judicial forum as an irreducible public forum for petitioning activity. Furthermore, even if the judicial forum were not considered to be an obligatory public forum for petitioning purposes, once this forum has been opened up to one viewpoint—that of regulated entities—access by another viewpoint—regulatory beneficiaries—should not be restricted. The Supreme Court has held that once a government institution voluntarily opens a public forum for use by some groups, it cannot exclude other groups based on the content of their speech.⁴⁸⁷

In this explicit marketplace of ideas, the functional value of standing for ideologically-motivated regulatory beneficiaries is evident. If judicial decisionmaking benefits from sharp presentation of the issues and vigorous advocacy, the judicial process and our system of checks and balances suffer from preferential access to the judicial forum for one side (the regulated side) of the debate. Just as the functioning of the political branches of government benefit from more speech and the airing of diverse viewpoints, so too is the proper judicial function in an adversary system absolutely dependent on equal access by both sides of the regulatory debate. The judiciary’s hostility to ideological plaintiffs stands in marked contrast to its receptivity to the “marketplace” of ideas in other First Amendment contexts.

485. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

486. *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

487. *Widmar v. Vincent*, 454 U.S. 263 (1981).

Rules limiting access to First Amendment public forums are subject to heightened scrutiny.⁴⁸⁸ The Supreme Court has applied a general four-part test to government regulation of public fora:

[G]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an interest that is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest.⁴⁸⁹

In an alternative formulation, such restrictions must be “content-neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative means of communication.”⁴⁹⁰

The lack of any equivalent alternative to the judicial forum for First Amendment petitioning activity argues for careful scrutiny of standing rules that restrict access to court. Such scrutiny would require an examination of the governmental interests served by a restrictive standing doctrine and the tightness of the fit between standing rules and these government means.

2. *Standing Doctrine as an Incidental Restriction of First Amendment Activity*

Although standing doctrine is thus a limit on access to the exclusive federal judicial petitioning forum, even if the courts were not a public forum for this purpose, standing doctrine would merit heightened scrutiny as limitation of First Amendment protected petitioning activity.

In *United States v. O'Brien*,⁴⁹¹ the Supreme Court established the test for the analysis of government regulation that incidentally burdens First Amendment protected activities.⁴⁹² In *O'Brien*, the Court rejected a challenge to a Selective Service law amendment that criminalized the destruction of draft registration cards.⁴⁹³ O'Brien was prosecuted under the statute for publicly burning his draft card in protest of the Vietnam War. In upholding O'Brien's conviction, the Court established the same four-part test for government regulation of conduct that incidentally burdens speech that has subsequently been used to analyze time, place, and manner restrictions governing access to public fora.⁴⁹⁴ In applying this test, the Court refused to look to the subjective motivation of the legislature in enacting the prohibition to determine whether the legislature in fact sought to suppress free expression; rather, it was the stated purpose alone of the legislature (i.e., to administer the draft registration program) that was accepted as one unrelated to the suppression of speech.

488. See RONALD ROTUNDA & JOHN NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.47(a), at 578 (1999).

489. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

490. *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983)).

491. 391 U.S. 367 (1968).

492. *Id.* at 377.

493. *Universal Military Training and Service Act*, ch.144, § 462(b), 65 Stat. 75, 86 (1951).

494. *O'Brien*, 391 U.S. at 377.

In *O'Brien*, the Court addressed a statute that regulated conduct, albeit conduct with a politically expressive element. The Court found that the governmental interest in regulating the “conduct” aspect of O’Brien’s activities justified the incidental restriction on the First Amendment protected expressive elements. Though standing analysis might be analyzed in a similar framework, searching for non-suppressive justifications for restrictions on Court access, standing restrictions on judicial petitioning activity are distinct from the symbolic speech activity considered in *O'Brien*. The judicial access interests compromised by standing barriers are “pure” First Amendment interests that are not intermingled with “unprotected” conduct.

The *O'Brien* test has been characterized as “intermediate” First Amendment scrutiny. Although such scrutiny purports to be more searching than the “rational basis” scrutiny applied to governmental action generally under the Equal Protection and Due Process Clauses, some commentators have noted that “intermediate scrutiny” is nearly as deferential as rational basis review, and almost unfailingly results in rejection of the First Amendment challenge.⁴⁹⁵

3. Heightened Scrutiny for Viewpoint Discriminatory Impacts

As I have described in some detail earlier in this Article, the presumption of standing for regulatory “objects” and the associated “heavy burden” to establish standing for those challenging under-regulation is viewpoint discriminatory in its effect.

Under current First Amendment doctrine, forum access restrictions that draw *explicit* viewpoint-based distinctions are almost universally invalid.⁴⁹⁶ However, the Supreme Court has been less consistent in the level of scrutiny applied to access restrictions, like standing rules, that have viewpoint discriminatory *effects* despite being facially neutral. In some cases, the Supreme Court has struck down regulations, such as ballot access deadlines, that disproportionately impacted minor party candidates, while in other cases the Supreme Court has upheld practices, such as the passive enforcement of draft registration rules, which disproportionately affect political dissidents. Review of these cases suggests that standing doctrine, as a rule limiting court access, should be subject to heightened scrutiny since it limits access to the only available forum for judicial petitioning activity, and do so in a way that is highly discretionary and starkly discriminatory in effect.

At times, the Supreme Court has been quite solicitous of dissenting voices effectively silenced by regulations that, though neutral on their face, have the effect of eliminating access to the processes of government by a particular social segment or viewpoint. Thus, in *Anderson v. Celebrezze*,⁴⁹⁷ the Court struck down a statutory deadline for candidate petitions to be included on a state ballot for presidential

495. See generally Susan Ross, *Reconstructing First Amendment Doctrine: The 1990s Revolution of the Central Hudson and O'Brien Tests*, 23 HASTINGS COMM. & ENT. L.J. 723 (2001).

496. See *Boos v. Barry*, 485 U.S. 312, 334 (1988); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Schacht v. U.S.*, 398 U.S. 58, 63 (1970); see also Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 72-77 (1987) (discussing the “fortress-like” protection of speech against content-based discrimination).

497. 460 U.S. 780 (1983).

elections.⁴⁹⁸ According to the Court, the filing deadline invoked close judicial scrutiny under the First Amendment because of its disparate impact on minor party candidates:

It is clear, then, that the March filing deadline places a particular burden on an identifiable segment of Ohio's independent-minded voters. . . . As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. "Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'"⁴⁹⁹

In striking down the ballot petition deadline, the Court specifically relied on the systemic value of minor party candidate participation in the electoral marketplace of ideas,⁵⁰⁰ and rejected the "equality of treatment" of major and minor party candidates as an adequate justification for the disparate impact on minor party candidates.⁵⁰¹

Similarly, the Court struck down bans on door to door leafletting on the grounds that such means of communication was "essential to the poorly financed causes of little people."⁵⁰² The Court also struck down street demonstration permit fees that gave too much discretion to the municipal official and might be used to favor one viewpoint over another.⁵⁰³

Lower courts have also expressed heightened solicitude for dissenting viewpoints when considering regulations with viewpoint differential effects.⁵⁰⁴ Viewpoint discriminatory regulations, whether by purpose or effect, are suspect under the First Amendment because such regulations distort the free market of ideas about politics and government that has been accepted as foundational in First Amendment political freedoms.⁵⁰⁵ The Supreme Court explicitly relied on this distorting effect when it struck down an order requiring a public utility to include a consumer group's newsletter in its billing envelopes: such an order "does not equally constrain both sides of the debate about utility regulation."⁵⁰⁶ The Supreme Court also relied on this

498. *Id.* at 792.

499. *Id.* at 783 (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982)).

500. *Id.* at 794.

501. *Id.* at 799.

502. *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

503. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992).

504. See *NAACP v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) ("Within that framework of facial neutrality, however, we must examine restrictions on speech with particular care when their effects fall unevenly on different viewpoints and groups in society."); accord *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186, 1204 (D. Wyo. 2002) ("The Court would obviously be concerned about Grace United's free speech and associational rights if Cheyenne enacted a zoning regulation that: (1) was content-based; (2) had a disparate impact on certain religious viewpoints; or (3) although facially neutral, was applied in a discriminatory manner."); *aff'd*, 427 F.3d 775 (10th Cir. 2005); *Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir. 1996) ("We obviously would be concerned about free speech and freedom-of-association rights were a state to enact initiative regulations that were content based or had a disparate impact on certain political viewpoints.").

505. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 217-27 (1983).

506. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n.*, 475 U.S. 1, 14 (1986).

process-distorting effect, in the specific context of advocacy before the courts, to strike down restrictions on the scope of arguments permitted to publicly-funded legal services attorneys.⁵⁰⁷ As in the utility case, standing doctrine “does not equally constrain both sides of the debate about . . . regulation.”

The approach in these cases contrasts with Court’s approach in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,⁵⁰⁸ where the Supreme Court upheld a local school district regulation that allowed the recognized teachers’ union to distribute materials in teachers’ mailboxes, but did not allow the competing (unrecognized) union the same access.⁵⁰⁹ The dissident union characterized the restriction as one with a viewpoint-discriminatory effect.⁵¹⁰ The Supreme Court rejected this characterization, preferring to characterize the distinction as being one based on “status.”⁵¹¹ Its reasoning has some bearing on a First Amendment analysis of standing restrictions:

In the Court of Appeals’ view, however, the access policy adopted by the Perry schools favors a particular viewpoint, that of PEA, on labor relations, and consequently must be strictly scrutinized regardless of whether a public forum is involved. There is, however, no indication that the School Board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.⁵¹²

Like the mailbox access restriction in *Perry*, standing requirements might be characterized as turning on the “status” of the judicial petitioner. Indeed, “status” is a synonym for the word “standing.”⁵¹³ Should standing restrictions be analyzed, as against a First Amendment Petition Clause challenge, solely on the basis of their “reasonableness,” the least inquisitive mode of constitutional scrutiny?

The level of scrutiny afforded to standing restrictions under *Perry* turns on the question whether the judicial forum is considered analogous to a Speech Clause “public forum” for judicial petitioning activity. According to the *Perry* Court, “subject matter” and “speaker identity” distinctions that would be impermissible in a public forum are subject to only a reasonableness inquiry in the case of a non-public forum, where activities may properly be limited to the “intended purpose” of the forum.⁵¹⁴ Does this describe the judicial forum, in which participation may be limited to those

507. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001).

508. 460 U.S. 37 (1983).

509. *Id.* at 44-55.

510. *See id.* at 47.

511. *Id.* at 49.

512. *Id.* at 48-49.

513. Status is a synonym for “standing” at least in the sense of one’s “standing in the community.” *See THE OXFORD AMERICAN DESK DICTIONARY AND THESAURUS* 815 (2d ed. 2002) (defining “standing” as “esteem or repute, esp. high; status; position”).

514. 460 U.S. at 46.

parties with the “status” of traditional Article III litigants asserting a personalized interest to remedy a discrete injury?

Applying the *Perry* paradigm to the judicial forum returns us to the circularity that plagues standing doctrine in the first place. To argue *Perry* is to argue that the courthouse is a limited non-public forum, open only to those who have “status” in the form of “judicial standing” to assert their claims; this status, in turn depends on whether the courthouse has traditionally been open to such claimants in the first place. Such an argument reads the Petition Clause out of the First Amendment. Though the Petition and Speech Clauses may be cut from the same cloth, they are not identical, and the Petition Clause must add something to First Amendment analysis of judicial access claims.

A better approach would be to read the Petition Clause to create a “public forum” equivalent, for judicial petitioning purposes. As the irreducible public forum for judicial petitioning activities, restrictions on judicial access based on “status” and restrictions with viewpoint discriminatory effects should be subject to strict First Amendment scrutiny to determine whether they achieve a compelling governmental interest through narrowly tailored means. Such an approach is far more consonant with the systemic values of having all sides of public issues aired in petitioning activity directed towards each of the branches of government: “There is an ‘equality of status in the field of ideas,’ and government must afford all points of view an equal opportunity to be heard.”⁵¹⁵

4. *First Amendment Scrutiny of Judicially-Crafted and Constitutionally-Based Distinctions*

There are two ways in which the restrictions of standing doctrine differ from the sorts of government actions most commonly analyzed under the First Amendment. Unlike the statutory and administrative actions typically subject to First Amendment scrutiny for their limiting effects on First Amendment activities, standing doctrine is judicially created and administered. Standing doctrine also roots itself in the case or controversy provisions of Article III of the Constitution. There is precedent for First Amendment scrutiny of both judicially crafted restrictions of First Amendment activities and for distinctions based on other constitutional values. Neither of these factors should shield standing doctrine from a First Amendment analysis.

The Supreme Court has reviewed judicially-crafted injunctions for consistency with First Amendment protections as a matter of course. Thus, in *Madsen v. Women’s Health Center, Inc.*,⁵¹⁶ the Court subjected a judicial injunction barring abortion protesters from interfering with patients at a reproductive health clinic to First Amendment analysis, upholding the injunction in part, and striking it down in part.⁵¹⁷ The majority applied a “somewhat more stringent application of general First Amendment principles” than would be applied to a statute, reasoning that the risk of censorship was greater in the case of a judicial order that was not subject to the

515. *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972) (footnote omitted).

516. 512 U.S. 753 (1994).

517. *Id.* at 764-66.

legislative process.⁵¹⁸ The Court declined to treat the injunction as a viewpoint-discriminatory provision simply because a specified class of people who shared a point of view were subject to it, reasoning that such discrimination was inherent in the nature of an order issued in the context of a specific controversy.⁵¹⁹ Nevertheless, the Court examined the injunction to determine whether the challenged provisions burdened “no more speech than necessary” to achieve its “pin-pointed objectives.”⁵²⁰

Unlike the case-specific injunctions involved in the abortion protest cases, judicially-created standing doctrine applies across many kinds of cases and thus, may be more susceptible to analysis as a viewpoint-discriminatory regulation of court access. In any event, *Madsen* suggests that the scrutiny accorded to such judicially-created doctrines should be stricter scrutiny than that applied to statutes and regulations that have undergone the give-and-take of the legislative process. Thus, although the Court has elsewhere rejected the “least restrictive means” analysis for content-neutral time, place, and manner restrictions,⁵²¹ the *Madsen* Court’s “no more speech than necessary” test for judicially-crafted doctrines affecting substantive speech suggests continued vitality for the “least restrictive means” analysis in this context.

Furthermore, the constitutional nature of the interests advanced for standing doctrine does not immunize it from First Amendment review. The Supreme Court has more than once struck down differential access rules that excluded religious organizations from use of “voluntary public forums,” despite the justification that such rules were necessary to avoid governmental endorsement of religion in violation of the Establishment Clause. In *Widmar v. Vincent*,⁵²² the Court acknowledged that compliance with First Amendment Establishment Clause doctrine would constitute a sufficiently “compelling” governmental interest to justify narrowly drawn content-based limits on access to a public forum.⁵²³ Avoiding a direct conflict between constitutional values, the Court determined that equal access to the state university campus facilities for religious student organizations would not violate the Establishment Clause, and, a fortiori, could not be used to justify the content discrimination.⁵²⁴ However, the Court went on to suggest that even if the distinction were based on a more restrictive state constitution provision analogous to the Establishment Clause, any such state constitutional interest would not overcome the First Amendment equal access values at stake.⁵²⁵ The Court reaffirmed its holding in *Widmar v. Vincent* in *Lamb’s Chapel v. Center Moriches Union Free School District*⁵²⁶ in the context of differential public access to public school facilities, and in *Rosenberger v. Rector & Visitors of University of Virginia*⁵²⁷ in the context of state university financial assistance to student publications.

518. *Id.* at 765.

519. *Id.* at 762.

520. *Id.* at 767 (citing *Carrol v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968)); accord *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 382-83 (1997).

521. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

522. 454 U.S. 263 (1981).

523. *Id.* at 270-71.

524. *Id.* at 273-75.

525. *Id.* at 275-76.

526. 508 U.S. 384, 294-95 (1993).

527. 515 U.S. 819, 833 (1995).

Arguably, the First Amendment guarantees of a right to petition all branches of government would trump justiciability concerns implicit in the body of the Constitution, the document that the First Amendment modified. The Court found that First Amendment speech interests overcame competing property interests of constitutional dimension when it held that the streets of a company-owned town constituted a public forum open to solicitation by Jehovah's Witnesses.⁵²⁸ But even if the Petition Clause is not read as a modification of Article III justiciability notions, it is at the very least a source of competing constitutional values that must be considered by the courts as they engage in the balancing of interests underlying standing doctrine. The Court has recognized the internal conflict between the First Amendment Expression and Free Exercise Clauses and the need to balance the underlying constitutional values to resolve the conflict.⁵²⁹

The Court's freedom of expression cases—particularly its cases concerning access to public forums—suggest a roadmap to the process of balancing these competing interests. These cases suggest that a high value should be placed on petitioning activity that adds to the diversity of viewpoints represented in the judicial forum to the extent that that forum has become an element of the process of self-governance. The Court's speech cases also suggest heightened scrutiny of restrictions that tend to eliminate an identifiable viewpoint from the public debate and that eliminate access to a forum for which no equivalent substitute is available. Such scrutiny demands that the governmental doctrine in question serve a compelling governmental interest and that the means be narrowly drawn toward achieving that interest. In cases involving the review of administrative rulemaking, standing doctrine imposes a differential burden on a specific viewpoint—that of regulatory beneficiaries seeking to ensure stricter regulation—and eliminates for many of them the exclusive public forum for the airing of their views and grievances. Let us assume, as the Court has, that the constitutional values served by standing doctrine are compelling. Standing doctrine should thus be re-examined to determine whether it indeed serves its constitutional values through means narrowly drawn.

C. Assessing the Means and Ends of Standing Doctrine

Earlier in this Article, I reviewed the constitutional values and functional interests that have been identified in support of standing restrictions. These interests and justifications include the theoretical separation-of-power interests in restricting the function of the judicial branch to the "judicial" function and in preventing judicial usurpation of the executive and legislative roles. They also include the more functional

528. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (holding that First Amendment speech interests overcome Fifth Amendment protected property interests and overturning convictions of Jehovah's Witnesses prosecuted for soliciting in a company-owned town).

529. "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668-69 (1970). *See also* *United States v. Woodley*, 751 F.2d 1008, 1020 (9th Cir. 1985) (Norris, J., dissenting) ("The Court's attempt to resolve the conflict between the two religion clauses of the First Amendment illustrates the essential process of weighing competing constitutional values.").

interests in ensuring the quality of the litigation process, avoiding sham and collusive litigation, and managing the federal court docket.

As I discussed earlier, some of the justifications for standing doctrine are ultimately self-referential and circular. Justifications based on the inherent nature of a case or controversy, those based on the traditional role of the courts, and those based on a sense of the historical nature of the judicial function have been shown to be unsupported by text and history. Ultimately these self-referential justifications for standing boil down to judicial declarations that a case or controversy is what the justices of the Supreme Court say it is, nothing more and nothing less. Any attempt to analyze such justifications for a compelling governmental interest with means narrowly drawn is reduced to a simple declaration that confining the judiciary to the judicial role (as the courts have defined it) is a compelling interest, and by definition the means are narrowly drawn and excluded no more speech than necessary to serve that interest.

Such a tautological approach would not be justified in the case of competing constitutional values. As the Court itself has acknowledged, the contours of standing doctrine are not absolute, but consist of a balancing of the competing interests involved.⁵³⁰ When constitutional values compete, the Court's usual approach is not to afford absolute status to one constitutional value and ignore the other.⁵³¹ Balancing competing constitutional values requires an identification of the foundational underpinnings of the competing values and an interpretation of the provisions in question to accommodate both sets of values. These foundational interests, for the First Amendment political freedoms (such as freedom of petition), include interests in vigorous debate, open to all points of view, and interests in avoiding rules that distort the debate by favoring one view over the other. On the other hand, the non-definitional constitutional interests served by standing doctrine include the interest in avoiding excessive judicial intrusion into the duty of the executive to "take care" that the laws are faithfully executed, the interest in avoiding advisory opinions given on hypothetical states of fact, the interest in avoiding judicial intrusion into the congressional

530. See *Parole U.S. Comm'n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980).

531. See *Walz*, 397 U.S. at 668-669; Carlos E. Gonzalez, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 523-33 (2001) (arguing that in the case of conflicts between the Bill of Rights and other constitutional norms, the Supreme Court interprets the scope of the conflicting provisions in a manner to avoid the conflict); *Gravel v. United States*, 408 U.S. 606, 632 (1972) (Stewart, J., dissenting) ("Why should we not, given the tension between two competing interests, each of constitutional dimensions, balance the claims of the Speech or Debate Clause against the claims of the grand jury in the particularized contexts of specific cases?"); *Meek v. Pittenger*, 421 U.S. 349, 395 (1975) (Rehnquist, J., dissenting) (quoting PAUL G. KAUPER, *RELIGION AND THE CONSTITUTION* 79 (1964)) ("Any interpretation of [the Establishment Clause] and the constitutional values it serves must also take account of the free exercise clause and the values it serves."); Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 798 (2004) (arguing for "pliability" of rules in resolution of conflicts between competing constitutional interests as opposed to absolutist approach). In a dissenting opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Justice White suggested exactly such a balancing of constitutional interests in interpreting the scope of the Article III judicial power, albeit in a different context: "Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck." *Id.* at 113 (White, J., dissenting).

legislative function, the interest in vigorous presentation of issues for judicial resolution, and the interest in avoiding collusive or sham litigation.

Let us assume that the various interests served by judicial standing doctrine are “compelling” governmental interests for First Amendment analysis. Let us now examine these interests, the efficiency with which standing doctrine achieves these interests, and the extent to which these interests might be as well protected with judicial doctrines less restrictive of the marketplace of ideas and diversity of viewpoints when ideologically-motivated plaintiffs challenge the sufficiency of administrative rulemaking to achieve statutory goals. Such an analysis reveals that nearly all of these functional goals are already protected by other doctrines of judicial review, and the remaining goals of ensuring concrete adversity and avoiding sham or collusive litigation can be better served by means that are less restrictive of a diversity of viewpoints.

1. Avoiding Judicial Intrusion into the Executive Role of Faithfully Executing the Law

The primary functional value identified for restrictive standing rules is the avoidance of judicial intrusion into the executive role to “take Care that the Laws are faithfully executed.”⁵³² This value underpins the separation of powers rationale for standing rules, at least in the case of challenges to administrative rulemaking.⁵³³ The Executive’s authority under the Take Care Clause is not an absolute constitutional value. Rather, the functional values of judicial review at the behest of regulatory objects (in the former case)—to protect their implicit due process liberty interests in avoiding invalid regulations—defeat a claim of absolute immunity from judicial inquiry on the part of the executive branch. Similarly, when organizational plaintiffs seek judicial review of the Executive’s failure to adequately enforce the law on behalf of regulatory beneficiaries, they too invoke constitutional values inherent in the Petition Clause—both associational values of organized law-influencing activity and political freedom values of promoting vigorous representation of all viewpoints in matters of public debate.

Can the Executive’s interest in its freedom of action under the Take Care Clause be accommodated through means less restrictive than a judicial access doctrine that imposes substantially higher burdens on one side of the regulatory debate than the other? Not only can it be accommodated, to a large extent it already has been. Recall that the nature of judicial review of administrative rulemaking is highly deferential under the doctrine of *Chevron v. NRDC*. Administrative rulemaking will be upheld unless it is contrary to the expressed intention of Congress, or is based on a statutory interpretation that is so out of bounds as to be an “impermissible” reading of the statute, or is arbitrary and capricious. This standard of review is based almost self-consciously on minimizing judicial interference with the executive function of implementing statutory mandates:

532. U.S. CONST. art. II, § 3.

533. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Different separation of powers concerns are at stake when standing doctrine is applied to limit challenges to congressional legislation as opposed to executive action.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”⁵³⁴

As a result of this highly deferential standard of review, most challenges to agency regulations fail.⁵³⁵ By definition, the judiciary will interfere with an administrative rule only if the court determines that the agency has taken an impermissible view of the underlying legislation. This can hardly be considered judicial intrusion into the executive function. The highly deferential standard of review afforded by *Chevron* to agency rulemaking more than adequately protects the Executive's breathing room for implementing statutes. A standing doctrine that distinguishes between those seeking less regulation and those seeking greater regulation does not add to this executive freedom of action; rather, if anything, standing doctrine reduces the Executive's freedom of action by making one set of choices (more restrictive regulation) more likely to be litigated and rejected than the other set (less restrictive regulation).

Accordingly, the governmental interest in avoiding judicial intrusion on the Executive's function to “take care that the laws are faithfully executed” can be accommodated by less restrictive means and should not justify a standing doctrine that distinguishes between regulatory objects and beneficiaries.

2. *Avoiding Advisory Opinions on Hypothetical Facts*

The “rule” against advisory opinions is already riddled with exceptions, not the least of which is the exception for moot cases capable of repetition yet evading review. To the extent that the rule against advisory opinions is meant to avoid conversion of the judiciary into an advisory body that opines on the legality of executive action prior its execution,⁵³⁶ such an interest hardly seems to be invoked at all in cases brought by public interest organizations to challenge administrative rulemaking that has already been accomplished. As with the concerns about interference with the executive function of taking care that laws are faithfully executed, existing administrative law doctrines adequately protect the interests of the judiciary in avoiding resolution of disputes at an unripe, or hypothetical, stage. *Abbott Laboratories v. Gardner*⁵³⁷ required specific justification for immediate review of regulations upon promulgation and precluded litigation of rulemaking challenges that were fact-bound or otherwise could not be adequately determined until specific application of the rules. Any

534. *Chevron v. NRDC*, 467 U.S. 837, 866 (1984) (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

535. See Thomas Miles & Cass Sunstein, *Do Judges Make Regulatory Policy*, 73 U. CHI. L. REV. 823, 849 (2006).

536. Cf. THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826, at 486-89 (Henry T. Johnston ed., Da Capo Press 1971) (1891) (relating Chief Justice John Jay's refusal to provide President Washington with an advisory opinion on a hypothetical legal question).

537. 387 U.S. 136 (1967).

controversy that survives the *Abbott Laboratories* inquiry should be far from an advisory opinion. The *Abbott Laboratories* test also ensures sufficient “concreteness” for presentation of the issues in a judicial setting. Once again, this existing less restrictive means serves the judiciary’s interest without imposition of viewpoint differential standing doctrine.

3. *Avoiding Judicial Intrusion into the Congressional Legislative Function*

This justification for restrictive standing rules is simply not applicable in a case where an ideological plaintiff seeks implementation of a congressional statute *as written* as against administrative rulemaking claimed to violate the statute. Far from being a “Council of Revision”⁵³⁸ in such a case, the judiciary is simply performing its traditional judicial function to “say what the law is”⁵³⁹ (within the deferential parameters of *Chevron*, of course). Nor does ideological litigation on behalf of regulatory beneficiaries involve the least democratically responsible branch at odds with the most democratically responsible branch; to the contrary, the judiciary is simply implementing the will of the directly elected branch as opposed to the interpretation of agencies responsible to an indirectly elected executive.⁵⁴⁰

4. *Interest in Vigorous Presentation of Issues*

This is a more utilitarian rationale for standing doctrine. Theoretically, the extent of a plaintiff’s personal stake in a controversy has some direct bearing on the vigor and care with which the plaintiff is likely to pursue and present her case. However, given the low absolute economic value of the standing bar established by the Supreme Court—“an identifiable trifle will suffice”⁵⁴¹—injury-in-fact becomes a very poor proxy for either inclination or capacity to mount a vigorous challenge to rulemaking. As noted earlier, Judge Scalia acknowledged 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,” and that “[o]ften the 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’ whatsoever.”⁵⁴² Indeed, one would be hard pressed to find a single rulemaking challenge brought by an individual regulatory beneficiary, without the assistance and support of a public interest organization, because their personal stake in the case was so great that they would invest the hundreds of thousands of dollars necessary for vigorous litigation to protect their interests. Current standing doctrine, which has the perverse effect of disqualifying public interest organizations with the capacity and inclination to litigate regulatory issues, falls far short of serving the interest in assuring vigorous presentation of the issues. A standing test that focused

538. *Flast v. Cohen*, 392 U.S. 83, 107 (1968) (Douglas, J., dissenting).

539. *Marbury*, 5 U.S. (1 Cranch) 137, 177 (1803).

540. See U.S. CONST. art. II, § 1.

541. *Pub. Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 71 (3d Cir. 1990) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)).

542. Scalia, *supra* note 222, at 891.

more narrowly on the organizational capacity and interest of the ideological plaintiff organization would be a much more narrowly tailored means of achieving this governmental interest.

5. Avoidance of Sham or Collusive Litigation

As with the interest in assuring concrete adversity, there is some theoretical relationship between a plaintiff's personal stake in a controversy and the relative unlikelihood that that plaintiff would act against her own interests by colluding with a defendant to obtain a ruling. Once again, the "trifling" nature of the requisite personal stake reduces the effectiveness of standing doctrine as a means to assure this rarely invoked judicial interest. As with the interest in concrete adversity, it is likely that an inquiry into the organizational capacity and purposes of an organizational plaintiff would more effectively achieve this goal without the viewpoint discriminatory effects of the injury-in-fact requirement as applied to rulemaking challenges.

While the means-ends analysis of heightened First Amendment scrutiny is itself somewhat subjective, this functional analysis does suggest that most of the identifiable constitutional Article III and separation of powers interests served by standing doctrine are adequately served, at least in the case of administrative rulemaking challenges, by existing doctrines restricting the scope and availability of judicial review of rulemaking. This analysis does not necessarily suggest the abandonment of standing doctrine, but rather its refinement to recognize that the constitutional values implicated by standing doctrine differ according to the nature of the litigation in question. Standing to challenge action by administrative agencies that are indirectly responsible to the electorate and subject to influence by the regulated community should hardly be addressed on the same terms as standing to challenge congressional legislation on the grounds that the action of an elected coordinate governmental branch violates the Constitution.

D. A More Closely Tailored Standing Doctrine

This analysis demonstrates that of all the functional interests served by standing restrictions, only two—ensuring vigorous advocacy and avoiding collusive litigation—are not adequately protected by existing doctrines of deference and ripeness. Nor is existing standing doctrine narrowly (or even loosely) tailored to address these interests in promoting vigor and avoiding collusion. Although standing doctrine may be a relatively late innovation in justiciability, its persistence suggests that it addresses a strong intuitive sense that judicial remedies are inherently limited to the "right" kind of plaintiff. I do not advocate an abandonment of this inquiry into the "rightness" of the plaintiff, just a redefinition of "rightness," at least in the context of rulemaking challenges, to more narrowly address the proper judicial concerns for vigorous advocacy and genuineness while preserving the right to petition interests in full expositions of both sides of the regulatory debate.

Standing to challenge regulatory action should inquire directly into the organizational or individual capacity and genuineness of the plaintiff, rather than

artificial and trifling notions of injury-in-fact.⁵⁴³ Courts routinely inquire about the litigating capacity of plaintiffs as part of the class certification process under Rule 23 of the *Federal Rules of Civil Procedure*.⁵⁴⁴ Additionally, courts may also examine the genuineness of the plaintiff's interests to ensure against sham or collusive litigation.⁵⁴⁵

1. Organizational Litigating Capacity

A narrowly tailored standing inquiry might draw from concepts of representative capacity for certifying class action representatives. Indeed, the class action and the regulatory challenge brought in virtually representative capacity by ideologically motivated organizational plaintiffs address the same problem: the problem of collective action to protect widely shared interests that lack sufficient value to motivate protective actions by individuals or small groups. Thus, the class action device has been described as a device to accommodate the adjudication of large numbers of small claims that would otherwise not be vindicated.⁵⁴⁶ Chief Justice Burger described the class action device in terms of regulatory failure that might equally describe public interest rulemaking challenges:

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.⁵⁴⁷

Indeed, the Supreme Court has upheld the use of the class action device as a means of challenging government regulations on behalf of regulatory beneficiaries.⁵⁴⁸

The class action device does not solve the Petition Clause issue addressed by this Article because class action certification, like representative standing doctrine, requires identification of an individual class member who would have standing.⁵⁴⁹ However, the Rule 23 inquiry into the representative capacity of a plaintiff is perfectly tailored to ensure the presentation of issues underlying standing doctrine. Federal courts describe this inquiry in the same terms used to describe the standing interest in

543. Injury-in-fact may well serve as an appropriate proxy for "genuineness" in actions seeking more particularized relief, such as enforcement of a regulatory standard in a particular case. *Cf.* *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

544. FED. R. CIV. P. 23(a)(4).

545. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968) (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)).

546. *See id.* at 560.

547. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

548. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

549. *See* *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001); *Martens v. Thomann*, 273 F.3d 159, 173-74 n.10 (2d Cir. 2001). In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Supreme Court considered an appeal challenging durational residency requirements for divorce despite the mootness of the named plaintiff's case and the impossibility of repetition with respect to her, on the grounds that unnamed (and unidentified) class representatives might still be affected by the rule. This application of the "capable of repetition yet evading review" exception to mootness supports the thesis of this Article that the lack of an identified individual with a live injury does not absolutely preclude Article III jurisdiction over a representative case.

“vigorous” prosecution of claims: “it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel.”⁵⁵⁰ In making this inquiry, courts look both to the nature of the named plaintiff, and to the nature of the class attorneys. The attorney must be “qualified, experienced, and generally able to conduct the proposed litigation.”⁵⁵¹ Courts may also inquire into whether the named plaintiffs possess adequate financial resources to prosecute the litigation.⁵⁵²

Thus, an inquiry into the adequacy of counsel and resources identical to that conducted under Rule 23 would achieve the judicial interest in vigorous advocacy and sharp presentation of issues. The Supreme Court has previously recognized the representational value and resources organization plaintiffs bring to public rights litigation.⁵⁵³ There can be little doubt that the national organizations such as the NRDC, which seek standing on behalf of regulatory beneficiaries, would more than satisfy the adequacy of counsel and sufficiency of resources requirements.

2. *Genuineness of Plaintiff Interest*

The class certification inquiry into the suitability of class representatives also serves to guard against collusive or sham litigation.⁵⁵⁴ Although federal courts have asserted the authority to dismiss sham or collusive lawsuits *sua sponte*,⁵⁵⁵ few cases can be found that have sustained dismissals based on collusion.⁵⁵⁶

However, in the case of organization plaintiffs asserting pluralistic interests, judicial inquiry into the organizational bona fides should not be difficult. The organizational standing inquiry already includes a determination of whether the litigation falls within the organizational purposes of the plaintiff organization.⁵⁵⁷ The true organizational interests of a litigating not-for-profit organization are easily determined by reference to its fundraising literature and the nature of its large contributors.

In any event, a judicial inquiry into the advocacy capacity and organizational bona fides of an ideological plaintiff challenging regulatory inaction should be less difficult than the evanescent law of injury-in-fact in current standing doctrine, which engages courts in arcane inquiries into statistical probabilities of an individual NRDC member contracting cancer, or the bona fides of a Friends of the Earth supporter’s claim to be

550. *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973); *accord*, *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982); *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996); *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 524 (6th Cir. 1976).

551. *See Eisen*, 391 F.2d at 562.

552. *See Hurwitz v. R. B. Jones Corp.*, 76 F.R.D. 149, 164-65 (W.D. Mo. 1977); *Ralston v. Volkswagenwerk, A.G.*, 61 F.R.D. 427, 433 (W.D. Mo. 1973); *P.D.Q. Inc. v. Nissan Motor Corp.*, 61 F.R.D. 372, 377, n.5 (S.D. Fla. 1973) (“The financial means of the representative, bearing as it does on the vigor of the prosecution, becomes an important area of inquiry for the Court.”); *contra Sanderson v. Winner*, 507 F.2d 477, 479-80 (10th Cir. 1974).

553. *See U.A.W. v. Brock*, 477 U.S. 274, 289 (1996).

554. *See Eisen*, 391 F.2d at 562 (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)).

555. *See Jefferson Fourteenth Assocs. v. Wometco de P.R., Inc.*, 695 F.2d 524 (11th Cir. 1983); 8 JAMES WM. MOORE et al., *MOORE’S FEDERAL PRACTICE* § 41.50(6)(b) (3d ed. 2008).

556. The seminal case establishing the non-justiciability of collusive actions is *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850), where the Supreme Court dismissed an action contrived by friendly parties seeking to establish navigation rights in Penobscot River.

557. *See Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

“concerned” about the health effects of minute amounts of mercury contamination in the North Tyger River. Such a direct inquiry into capacity and bona fides is judicially manageable, and much more narrowly tailored to serve the structural Article III interests underlying standing doctrine than an injury-in-fact inquiry that presumes standing for one side of the regulatory debate and sets a high burden to establish standing for the other side.

VIII. CONCLUSION

Agency rulemaking pursuant to statutory delegation forms a major part of the modern lawmaking process. Judicial review is a critical final step in that process. As such, equal availability of judicial review is critical to self-governance. Ideologically motivated organizational plaintiffs represent pluralistic values in the judicial review step of this lawmaking process, but the Supreme Court’s standing doctrine establishes differential barriers to court access, which has the effect of favoring the views of regulated entities over the views of regulatory beneficiaries. Consistent with the First Amendment’s explicit guarantee of court access to petition the judiciary for redress of grievances, and interests in viewpoint neutrality and maximization of competing ideological inputs in the process of self-governance, standing doctrine should be reconsidered in the context of judicial review of rulemaking so as to ensure that the standing bar is no greater than necessary to serve the identified functional interests underlying Article III justiciability. Separation of powers interests are adequately served by principles of deference, so the standing inquiry should focus on the legitimate concerns for vigorous advocacy and avoidance of collusive litigation.