

We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 1

Representatives and direct Taxes shall be apportioned among the several States, and the District of Columbia, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including all bound Persons for Service or Labour, and three fifths of all other Persons, the Number of free Persons, including all bound Persons for Service or Labour, and three fifths of all other Persons, in each State, and the District of Columbia, in proportion to the Number of free Persons, including all bound Persons for Service or Labour, and three fifths of all other Persons, in each State, and the District of Columbia.



Revisiting Standing Doctrine

**Recent Developments,
Policy Concerns, and
Possible Solutions**

By Scott R. Anderson

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Introduction

Obscure legal doctrines rarely go viral. But that’s exactly what happened on December 12, 2020, when then-President Donald J. Trump took to Twitter to complain about his treatment at the hands of the federal judiciary.

“The Supreme Court had ZERO interest in the merits of the greatest voter fraud ever perpetrated on the United States of America[.]” Trump wrote, reacting to a recent decision by the nation’s highest court that declined to hear a challenge to the 2020 election results brought by his political allies in the Texas state government. “All they were interested in is ‘standing’, which makes it very difficult for the President to present a case on the merits. 75,000,000 votes!”¹ More than 274,000 Twitter users “liked” Trump’s message. Few of them seem likely to have realized that the argument Trump was making echoed complaints that progressives have been putting forward for decades.

The word at the center of Trump’s tirade—standing—is shorthand for a complex and contested legal doctrine that plays a central role in determining who has access to federal courts and for what purposes. Rooted in a particular understanding of the Constitution, its contours have built up through the uneven accumulation of judicial precedent over the past several decades, resulting in a complicated set of rules that are often beyond even Congress’ ability to supersede or amend.

The Supreme Court has long described the careful assessment of standing and rejection of cases where it is lacking as “fundamental to the judiciary’s proper role in our system of government[.]”² In recent decades, the strict application of standing requirements has become a widely accepted feature of the federal legal system. Many

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1 @RealDonaldTrump, Twitter (Dec. 12, 2020, 11:04 AM EST), available at <https://www.thetrumparchive.com/>.

2 *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37 (1976) (Powell, J.).

see this as a crowning accomplishment for legal conservatives, who have frequently advocated for a narrower view of standing.³ Others, however, have accused standing doctrine of being “squishy and subjective,”⁴ “incoherent, inconsistent, and unprincipled[.]”⁵ and “a largely meaningless litany recited before the [c]ourt...chooses up sides and decides the case”⁶ in ways that too often reflect their personal views as opposed to the substance of the law. Progressives have repeatedly objected that standing doctrine is too readily manipulated and too often used to limit who may use the courts to address unlawful behavior, in a manner that frequently disadvantages already vulnerable communities.⁷

But as Trump’s brief encounter with standing doctrine illustrates, these views no longer fall so neatly along ideological lines. Despite some discomfort, progressives have become more adept at using standing doctrine to thwart litigation seeking to advance conservative policies, including

many challenges to the 2020 election results put forward by former President Trump supporters.⁸ Meanwhile, a growing number of conservative judges, academics, and practitioners have begun to echo some of the criticisms of standing doctrine put forward by their progressive counterparts, including that it is, in the words of one Trump-appointed federal appellate judge, “incoherent in theory and easily manipulable in practice.”⁹

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3 See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk Univ. L. Rev. 881 (1982) (arguing that “the judicial doctrine of standing is a crucial and inseparable element of th[e] principle” of separation of powers to which “courts need to accord greater weight than they have in recent times”).

4 Kimberly Wehle, *The Squishiness of Federal Courts’ ‘Standing’ Doctrine*, The Bulwark (Dec. 23, 2020), <https://www.thebulwark.com/the-squishiness-of-federal-courts-standing-doctrine/>.

5 Richard Pierce, *Standing Law is Inconsistent and Incoherent*, Yale J. Reg. Notice & Comment (Sept. 7, 2021), <https://www.yalejreg.com/nc/standing-law-is-inconsistent-and-incoherent/>.

6 Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 22–23 (1982).

7 See, e.g., David H. Gans, *How Scalia Made It Difficult to Bring Cases to Court*, The Atlantic, Aug. 1, 2016, <https://www.theatlantic.com/politics/archive/2016/08/scalia-access-to-courts/493592/> (“All too often, the Court’s standing jurisprudence has been at its strictest when courts are asked to redress harms to racial minorities and others not likely to prevail in the political process”).

8 See Josh Gerstein, *After Trump’s Drubbing in the Courts, Liberals Fear a Legal Hangover*, Politico (Jan. 1, 2020), <https://www.politico.com/news/2021/01/01/donald-trump-courts-election-legal-hangover-453217>.

9 *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1132 (11th Cir. 2021) (Newsom, J., concurring). For other similar views by conservatives, see *Transunion v. Ramirez*, 594 U.S. ___ (2021) (slip op.) (Thomas, J., dissenting); *Arpaio v. Obama*, 797 F.3d 11, 25 (2015) (Brown, J., concurring); David B. Rivkin, Jr. & Elizabeth Price Foley, *Federal Courts Need to Stop Obama from Flouting the Constitution*, Wash. Post (July 25, 2014).

This shift in perspective presents an opportunity to revisit modern standing doctrine and its consequences. Toward this end, the Brookings Institution has hosted several roundtables with legal experts and practitioners to discuss their views on and experiences with standing doctrine.¹⁰ This report draws on the insights shared in those discussions as well as an independent survey of relevant case law and academic literature. The goal is to not only bring some of the contemporary policy issues raised by standing doctrine into sharper focus for audiences who may be less familiar with the doctrine, but also to identify some mechanisms through which Congress, policymakers, and other interested parties may be able to address them.

Part I provides an overview of standing doctrine. While a full account of the wide-ranging case law and academic literature on standing is beyond the scope of this report, this section sketches out the essential contours for readers who may not be familiar with the doctrine. It also reviews some of the most widely cited criticisms and defenses of standing doctrine, including its impact on potential litigants.

Part II then highlights several of standing doctrine's real-world consequences. Specifically, it examines three types of legal disputes whose judicial resolution standing doctrine often complicates: threats to public goods that are of broad interest to most, if not all, Americans; questions relating to the constitutional structure of American government, particularly the separation of powers; and hidden injuries where the conventional harms an individual may experience are probabilistic, inchoate yet fully evident, or otherwise uncertain. Each type of dispute has played a central role in recent high-profile legal and policy debates. Exploring these case studies can in turn help to clarify the consequences of standing doctrine, particularly for policymakers and others who may not be well positioned to engage the nuances of the doctrine directly.

Part III then examines what might be done if Congress or other interested parties were to decide that good public policy requires more consistent judicial protection of these sorts of interests than modern standing doctrine currently permits. Abandoning standing doctrine is almost certainly outside the realm of possibility. Nor is it clear that doing so would be desirable. But there are ways to address some of the most significant negative consequences that can result from standing doctrine, some of which are already being pursued by creative plaintiffs and policymakers.

The first is the use of public institutions as plaintiffs, as such institutions often have more success at securing standing than private plaintiffs due to their unique and far-ranging interests. The fifty states and the District of Columbia are the most obvious such plaintiffs and have already come to

10 For a recording and transcript of a public event that was a part of these discussions, see *Access to the Courts: Assessing Modern Standing Doctrine and Potential Reforms*, The Brookings Institution (Mar. 16, 2021), <https://www.brookings.edu/events/access-to-the-courts-assessing-modern-standing-doctrine-and-potential-reforms/>.

play an outsized role in an array of public interest litigation over the last few decades. But recent case law suggests that Congress and its constituent bodies—the House and Senate as well as the committees created by each—may be able to play a similar role regarding at least certain types of claims.

The second is for Congress to enact legislation that expands litigants' access to standing. While rarely used to their full effect, case law suggests two such avenues are possible. The most well-established means of doing so would be a return to historically accepted statutory arrangements that simulate this effect, such as *qui tam* arrangements. Other case law suggests that Congress may also be able to expand access to standing by enacting legislation that pushes the definition of injury in fact—the key prerequisite for establishing standing—further out toward its currently uncertain constitutional limits.

The third is for advocates and litigants to continue to highlight internal tensions within standing doctrine. These include tensions between how modern standing doctrine operates in practice and its purported intent to remain consistent with historical practice, protect the role of the political branches, and restrain the judiciary to facilitate the neutral application of the law. While standing requirements are unlikely to go away anytime soon, pushing on these tensions may encourage federal courts to curb some of modern standing doctrine's excesses and move it in a direction more consistent with the principles in relation to which it is often justified—namely, as a doctrine that supports impartial adjudication, democratic governance, and the efficient operation of the federal court system.

I. An Overview of Standing Doctrine

By its own account, standing doctrine has its roots in Article III of the Constitution's assertion that "[t]he judicial power" should only extend to certain "Cases" and "Controversies[.]"¹¹ The Supreme Court has interpreted this language as implicitly limiting the jurisdiction of federal courts to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."¹² Standing doctrine, in turn, interprets and elaborates on what constitutes a case or controversy for this purpose.

Whether this view of Article III comports with traditional understandings of the Constitution, however, is itself a topic of much debate.¹³ Early federal courts distinguished between private rights held by individuals and public rights held collectively by the community, allowing private plaintiffs to pursue the former but not the latter. They also eschewed advisory opinions and occasionally dismissed matters where the parties were not opposed or the plaintiffs lacked a personal interest in the dispute, consistent with modern standing doctrine. But it was often unclear whether these limits were the result of common law principles and prudential considerations or perceived constitutional requirements. Other practices in clear tension with how standing limitations are generally understood today, such as *qui tam* arrangements and claims for nominal damages, were widely enacted into law by Congress and accepted without constitutional controversy. Some aspects of modern standing doctrine can no doubt point to historical antecedents in early American and English case law. But for most of American history, there was little sense that there was a clear

11 U.S. Const. art. III, sec. 2.

12 *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 102 (1998).

13 Compare Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689 (2004) ("Contrary to the claims of modern critics...the nineteenth century Supreme Court did see a constitutional dimension to standing doctrine."), with Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stanford L. Rev. 1371, 1374 (1988) ("[F]or the first 150 years of the Republic, the Framers, the first Congresses, and the Court were oblivious to the modern conception either that standing is a component of the constitutional phrase 'cases or controversies' or that it is a prerequisite for seeking governmental compliance with the law").

and comprehensive set of rules governing who can bring what claim before the federal courts, let alone one required by the Constitution.¹⁴

Federal courts must satisfy themselves that all three of these conditions are met before they can exercise jurisdiction and proceed to the merits of a given case.

This idea of a standing doctrine did not emerge in full form until the 20th century, as federal courts that were wrestling with the expansion of the administrative state and growth in litigation over public rights began to subject the question of who can bring what legal claim to greater scrutiny.¹⁵ And while the Supreme Court issued numerous decisions on standing from the 1920s onward,¹⁶ it did not bring the various threads together into a

single comprehensive framework until its 1992 decision in *Lujan v. Defenders of Wildlife*.¹⁷ Authored by Justice Antonin Scalia, a vocal proponent of stricter standing requirements,¹⁸ the majority opinion in *Lujan* articulated a three-part test for determining whether the “irreducible constitutional minimum of standing” exists:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.¹⁹

14 Cf. Woolhandler & Nelson, *supra* note 14, at 691 (conceding that “*qui tam* actions alone might be enough to refute” the suggestion that “history compels acceptance of the modern Supreme Court’s vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on”).

15 See Sunstein, *What’s Standing After Lujan? Of Citizen Suits, ‘Injuries,’ and Article III*, 91 Mich. L. Rev. 163, 179–182 (1992); Winter, *The Metaphor of Standing*, *supra* note 14, at 1452–57.

16 *Fairchild v. Hughes*, 258 U.S. 126 (1922), and *Frothingham v. Mellon*, 262 U.S. 447 (1923), are generally cited as the first modern Supreme Court standing cases, while the term “standing” is first used in relation to these concepts in Justice Frankfurter’s concurrence in *Coleman v. Miller*, 307 U.S. 433, 464–468 (1939) (Frankfurter, J., concurring). See Winter, *supra* note 14, at 1375–78.

17 504 U.S. 555 (1992).

18 See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk L. Rev. 881 (1983).

19 *Lujan*, 504 U.S. at 560–61 (internal citations and quotations omitted).

Federal courts must satisfy themselves that all three of these conditions are met before they can exercise jurisdiction and proceed to the merits of a given case. Moreover, because these requirements are rooted in the Constitution, they cannot be superseded by Congress. While *Lujan* suggests that Congress may be able to provide for certain procedural rights and remedies in statutes that loosen causation and redressability requirements,²⁰ this notably isn't the case for injury in fact. Scalia himself would later describe injury in fact as "a hard floor of Article III jurisdiction that cannot be removed by statute[.]" constraining even Congress in what sort of claims it can require the federal courts to enforce.²¹

Lujan's most immediate effect was to render ineffective "citizen-suit" provisions that provide a statutory right for anyone to challenge unlawful action by the executive branch. To use such provisions, plaintiffs now had to satisfy *Lujan's* requirements by articulating a way the challenged conduct had inflicted a harm unique to them that would be addressed by judicial relief, even where Congress had not built those requirements into the statute. But over subsequent decades, the constitutional vision *Lujan* articulates was read to imply other limits on when litigants may bring claims before the federal courts.

Advocates for strict standing requirements generally argue that standing is essential to ensuring the proper operation of the separation of powers. In this view, standing requirements help to promote an efficient and effective judicial branch by limiting the federal courts' case load to those cases where the parties are genuinely adverse and have the most incentive to explore relevant legal issues as part of our adversarial legal system.²² Standing requirements also support democratic governance by focusing the courts on the adjudication of individual private rights and forcing advocates for broader policy changes associated with public rights to pursue them through the political branches of government instead of the courts.²³ Some relatedly argue that standing requirements reinforce individual rights by empowering those most directly affected by a legal dispute to pursue resolution.²⁴ And it prevents Congress from circumventing the executive

20 *Id.* at 573 n.7.

21 *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (Scalia, J.).

22 See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (asserting that standing limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process"); see also Heather Elliott, *The Functions of Standing*, 61 *Stanford L. Rev.* 459, 468–469 (2008) (collecting other sources).

23 See Scalia, *Doctrine of Standing*, *supra* note 19, at 894 ("[T]he 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."); see also Elliott, *Functions of Standing*, *supra* note 23, at 477–483 (collecting other sources).

24 See Eugene Kontorovich, *What Standing is Good For*, 93 *Virginia L. Rev.* 1663 (2007).

branch's constitutional authority to enforce the law by empowering private citizens to pursue remedies through the judiciary instead.²⁵ Perhaps most fundamentally, however, standing has a certain intuitive appeal: As Justice Scalia himself once put it, standing provides an answer to "the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"²⁶

Critics, however, contend that modern standing doctrine consistently falls short of these principles in practice.²⁷ Instead of constraining the judiciary, the open-ended requirements applied by standing doctrine provide judges with countless avenues they can use to accept or avoid cases in line with their ideological preferences, a move that both undermines judicial impartiality and elevates the power of the judiciary over that of the political branches.²⁸ Even where this is not the case, the uncertainty surrounding standing—and the extended, complex litigation often required to resolve it—may unduly dissuade plaintiffs from seeking to vindicate their legal rights through the judiciary. And those plaintiffs who find themselves on the wrong side of standing doctrine are too often those who are already systematically disadvantaged in our legal and political system.²⁹

Most targeted critiques of standing doctrine focus on the "injury in fact" requirement that is at the heart of the *Lujan* standard. The concept of an injury in fact originally appeared in the Supreme Court's 1970 decision in *Association of Data Processing Service Organizations, Inc. v. Camp*,³⁰ which used it to distinguish from earlier cases that had centered their standing analysis on whether a "legal interest" subject to a cause of action was at stake. These questions of legal interests, the *Camp* majority asserted, were not about standing; they simply show whether the law protects a given interest. Standing should instead hinge on whether "the challenged action has caused [the plaintiff] injury *in fact*, economic or otherwise."³¹ In this sense, an injury in fact requires what legal

25 See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009).

26 Scalia, *The Doctrine of Standing*, *supra* note 19, at 882; cf. Winter, *supra* note 14, at 1386–93 (explaining "standing law" as "a function of particular cognitive processes").

27 See Elliott, *The Functions of Standing*, *supra* note 23, at 463 (arguing that "standing is ill-suited to most of the functions it is asked to serve").

28 See Pierce, *Standing Law*, *supra* note 6 ("The Justices use standing to further a wide variety of goals that are logically unrelated to standing."); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 Cornell L. Rev. 663 (1977) ("Decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim.").

29 See Gans, *supra* note 8 ("All too often, the Court's standing jurisprudence has been at its strictest when courts are asked to redress harms to racial minorities and others not likely to prevail in the political process.").

30 397 U.S. 150 (1970).

31 397 U.S. at 152.

scholar Cass Sunstein has called a “prelegal” harm independent of the rights and obligations provided by the legal system.³²

The problem with this approach is that, as future Judge William Fletcher wrote in a classic critique of *Camp*, evaluating whether such a harm exists requires the courts to “measure something that is ascertainable only by reference to a normative structure[.]”³³ Absent the legal system as a point of reference, that structure is likely to be rooted in culture, identity, and other social values. Certain values—such as individual rights against personal injury, property damage, and economic harm—may be widely accepted as valid, and thus infringements upon them generally understood to be injuries in fact without controversy. But individuals can also suffer from infringements on values and interests that are not so widely held in ways that may not be externally and objectively verifiable. Some people, for example, may sincerely enjoy certain activities that others find to be annoying or disruptive, such as skateboarding in public places. Or an individual may suffer actual psychological discomfort from seeing or knowing that others engage in conduct that they view as immoral or distasteful—such as eating meat, for example, or engaging in certain sexual activities—even if those others enjoy these activities. Both being allowed to pursue and being forced to curtail these activities might be seen as injuring one party or the other in these scenarios, depending on the value system one is applying, and the assumptions it makes about the validity of each actor’s preferences.

Camp asserts that injury in fact can be to “aesthetic, conservational, and recreational as well as economic values[.]” suggesting that the assessment of whether a party has suffered an injury in fact is not supposed to be biased toward any particular value set.³⁴ But this is easier said than done. Normally, one might expect society to debate these questions and resolve them by passing laws establishing what conduct is appropriate and what is not. Yet by requiring an injury in fact rooted somewhere other than the legislative enactments produced by the democratic process, standing doctrine leaves adjudicators without an independent metric to evaluate the adequacy of an injury against. This arguably invites judgments informed by the adjudicator’s own subjective perceptions and social values. And while advocates of standing doctrine often argue that historical practice is the proper touchstone, assessments of such practice are not necessarily any more impartial and risk importing the biases of prior generations.

Case law shows how much federal courts have wrestled with the difficult task of identifying an injury in fact. Beyond physical injury and property damage, economic harms have proven the least controversial and most reliable means of establishing injury in fact. In some cases, even

32 Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1451 (1988).

33 William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 231 (1988).

34 397 U.S. at 154.

a speculative chance of economic harm has proven sufficient to establish standing.³⁵ Claims based on other types of harm, meanwhile, have often faced heightened and uneven levels of scrutiny. Plaintiffs challenging racially discriminatory policies, for example, have been held to lack standing unless they can show that they actively sought the opportunity being denied to them.³⁶ Similarly, plaintiffs arguing that inadequately enforced environmental protections threaten their aesthetic interests have been required to provide evidence of specific plans to visit the areas or see the animals affected.³⁷ As for more general ideological beliefs, “the psychological consequence presumably produced by observation of conduct with which one disagrees” is generally “not an injury sufficient to confer standing”³⁸—except where the beliefs are religious in nature, in which case offended observers may have standing to pursue an Establishment Clause challenge.³⁹

The other elements *Lujan* attaches to injury in fact often only further muddy this analysis. For an injury to qualify as “concrete,” for example, the Supreme Court has explained that it “must actually exist,” but has also conceded that it can still be “intangible” or simply reflect “the risk of real harm”⁴⁰—anything but a model of clarity. Similarly, while a harm can be shared by a very wide class of individuals and still be “particularized,” at some uncertain point it tips over into a “generalized grievance” that can’t serve as a basis for standing.⁴¹ As for whether an injury is “actual or imminent,” *Lujan* itself acknowledges that this concept is “concededly...somewhat elastic[.]”⁴² Perhaps for this reason, the Supreme Court has interpreted it to mean different things in different contexts. For example, it has found this requirement satisfied where a plaintiff challenging the validity of a criminal statute has simply “alleged an intention to engage in a course of conduct arguably

35 See, e.g., *Bryant v. Yellen*, 447 U.S. 352, 366–68 (1980) (holding that plaintiffs have standing to challenge regulatory action that might impact ability to purchase land even though they “could not with certainty establish that they would be able to purchase” the land if successful).

36 See *Allen v. Wright*, 468 U.S. 737, 738 (1984) (“stigmatizing injury caused by racial discrimination...accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct”).

37 See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (noting that the plaintiffs’ “profession of an ‘inten[t]’ to return to the places they had visited before...is simply not enough” to establish standing, at least “without any description of concrete plans, or indeed even any specification of *when* the some day will be”) (original emphasis).

38 *Valley Forge College v. Americans United*, 454 U.S. 464, 485 (1982).

39 See, e.g., *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017); *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); see also *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring) (criticizing the majority’s unwillingness to correct this discrepancy).

40 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (2016).

41 *Compare Federal Election Comm’n v. Akins*, 524 U.S. 11, 24–25 (1998) (accepting that injury in fact can exist “where a harm is concrete, though widely shared”), with *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (rejecting the possibility that standing can arise where “the impact is plainly undifferentiated and common to all members of the public”).

42 *Lujan*, 504 U.S. at 565 n.2.

affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder[.]”⁴³ But it’s also held that plaintiffs who fear being surveilled by the government cannot challenge the legal basis for that surveillance because, while the plaintiff’s activities—engaging in discussions with foreign individuals familiar with terrorist activities—were of a sort that were likely to fall within the surveillance program’s scope, they could not show actual surveillance was “certainly impending” as the government’s activities were classified.⁴⁴

The other prerequisites for standing—causation and redressability—pose similar problems. Both center on questions of causation, between a challenged action and an injury in the former case and between a requested remedy and relief from that injury in the latter case. Where a given plaintiff’s injury arises indirectly, as opposed to directly, from challenged conduct, evaluating either can require speculation as to the chain of events connecting cause and effect. This can in turn hinge on the anticipated decisions of third parties not before the court—a fact that makes it “ordinarily substantially more difficult to establish” standing, as *Lujan* itself acknowledges.⁴⁵ The result is a systematic bias in the availability of standing toward certain litigants depending on their proximity to a challenged action, regardless of who has a greater interest. Most notably, this means that corporate entities that are the subject of governmental regulation often have an easier time securing standing to challenge governmental actions than the consumers and other members of the public who are affected by them, even though the political branches generally engage in regulatory activity for the benefit of the latter.⁴⁶

At the Supreme Court, standing decisions are often distinguished from each other on narrow factual or legal grounds, even where they seem to have little relationship with the broader principles used to justify standing requirements.⁴⁷ In some areas, *stare decisis* or a clear pattern of historical practice has led to the general acceptance that standing exists. Hence, in what are often called “informational injury” cases, it’s generally accepted that broad swathes of individuals and organizations have standing to sue the federal government for information whose disclosure is required by statute, even where it is unclear what injury in fact they might otherwise suffer if it were

43 *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

44 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410–411 (2013); see also *id.* at 431–440 (Breyer, J., dissenting) (assembling precedents applying less-demanding standards).

45 *Lujan*, 504 U.S. at 562.

46 See Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. Rev. 159, 169 (2011); Sunstein, *What’s Standing After Lujan?*, *supra* note 16, at 195–197. For a detailed analysis specifically relating to financial regulation, see Carolyn Sissoko, *Is Financial Regulation Structurally Biased to Favor Deregulation?*, 86 S. Cal. L. Rev. 365, 397–401 (2013).

47 See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 Tex. L. Rev. 1061 (2015) (documenting the fragmentation of standing doctrine along certain factual and legal lines).

withheld.⁴⁸ Similarly, the Supreme Court recently agreed that, based on a strong record of historical practice, a request for nominal damages was adequate to satisfy the redressability requirement for standing, even if the conduct that caused the underlying harm has long since ceased.⁴⁹ But outside of these specialized pockets of standing doctrine, the question of how best to apply the *Lujan* standard often remains sharply contested with results that are not always easy to reconcile.

Standing doctrine's most significant consequences, however, may well manifest among the lower courts as they interpret, apply, and seek to anticipate the Supreme Court's sometimes unpredictable positions on standing. Empirical studies suggest that, in cases where the case law governing standing is relatively clear, lower courts generally apply it consistently and with limited variability. But where standing precedents are not clear, lower court assessments not only vary widely but

often reflect the ideological leanings of the individual judges involved.⁵⁰ One study of standing in environmental cases before the federal circuit courts of appeal, for example, found that lower court judges who were appointed by Republicans were five times more likely to dismiss environmental cases on standing grounds than those appointed by Democrats.⁵¹

This not only prevents some plaintiffs' claims from ever being heard on the merits but can deter prospective plaintiffs from pursuing litigation in the first place.

Prospective plaintiffs, meanwhile, often experience standing doctrine in a more personal fashion. The uncertainty surrounding standing—particularly where a plaintiff's injuries are not material in nature or the direct result of the actions being challenged—can make the prospect of reaching the merits of a plaintiff's claim unclear, particularly given the time and expense associated with litigation even in the best of circumstances. Public interest litigators seeking to protect consumers or vindicate public rights are often forced to choose the plaintiffs they represent carefully to maximize the prospects of securing standing. Meanwhile, the need to resolve questions of standing before proceeding to the merits of a given case can mean months, if not years, of litigation across multiple levels of appeal. This not only prevents some plaintiffs' claims from ever being heard on the merits but can deter prospective plaintiffs from pursuing litigation in the first place.

48 See *Federal Election Commission v. Akins*, 524 U.S. 11 (1998); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989).

49 See *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).

50 See Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. Rev. 612 (2004) (finding that lower courts pursue standing decisions that support ideologically preferred outcomes particularly often at the appellate level, as opposed to the district court level).

51 See Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. Rev. 1741 (1999).

II. Recent Areas of Concern

Criticisms of standing doctrine are nothing new. For as long as standing requirements have existed, legal scholars have questioned their constitutional moorings, highlighted their internal inconsistencies, and taken issue with how federal courts interpret and apply them, even as others have come to the doctrine's defense. Many of these criticisms focus on the internal logic of standing doctrine and advance alternative framings and approaches that would, in the authors' views, yield a more cohesive and normatively justifiable system. The result is an exceptionally wide-ranging academic literature that critically engages nearly every facet of the doctrine but can be challenging for those not deeply immersed in the relevant doctrinal arguments to engage with.

This report pursues a somewhat different tack. Instead of engaging standing doctrine's internal logic, it focuses on some of the consequences of standing doctrine. Specifically, this section identifies three categories of legal interests whose judicial enforcement is complicated by modern standing doctrine's requirements and presents them in the context of recent high-profile legal and policy debates. These disparities in judicial enforcement make standing doctrine not only a legal issue but also a matter of public policy that warrants debate among policymakers and the broader public alike.

A. Public Goods

The Constitution famously states that it is designed to “promote the general Welfare.”⁵² But where public goods truly benefit society at large, it can be difficult to center any injury inflicted by withholding them on a specific plaintiff in the manner that standing doctrine demands. Over the past half century, this proposition has played out most prominently in environmental law cases, where plaintiffs have often struggled to satisfy standing doctrine while trying to protect what is perhaps

⁵² U.S. Const. pmbl.

America's most prototypical public good, its natural environment, in the federal courts.⁵³ But more recently, the question of how to vindicate public goods has come to the fore in another, perhaps more striking arena: efforts to combat public corruption.

Where a government official acts in a corrupt manner, the harm is likely to be widely shared among those members of the public who might have benefitted from whatever alternative policy the corrupt official might have pursued in the absence of corruption.

In the United States, an interconnected set of anti-corruption constitutional provisions, statutes, and regulations try to deter conflicts of interest and prevent elected officials from using their authority for personal gain. The objective of these laws—good, non-corrupt governance—is a public good shared by all Americans who are affected by the operations of government. Where a government official acts in a corrupt manner, the harm is likely to be widely shared among those members of the public who might have benefitted from whatever alternative policy the

corrupt official might have pursued in the absence of corruption. The broadly held nature of this public interest, however, can make it difficult for plaintiffs who are genuinely affected by such corruption to secure the standing necessary to address it in the courts.

An early example of the barriers that standing presents to the enforcement of anti-corruption provisions is the Vietnam War-era case *Schlesinger v. Reservists Committee*,⁵⁴ in which several anti-war military reservists sued to bar members of Congress from serving in the reserves alongside them. The plaintiffs argued that doing so was inconsistent with the Constitution's Ineligibility Clause,⁵⁵ which bars legislators from simultaneously holding positions in the executive branch in order to, in the words of one member of the Constitutional Convention, "keep out corruption, by excluding office-hunters."⁵⁶ The Supreme Court, however, concluded that, even if the members of Congress were violating the Ineligibility Clause, "that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance"—an interest that, precisely because it is so widely held, was insufficient to give the plaintiffs standing to challenge even a plain violation of the Constitution.⁵⁷

53 For a brief overview, see Holly Doremus, *The Persistent Problem of Standing in Environmental Law*, 40 *Env'tl. L. Rep. News & Analysis* 10956 (2010).

54 *Schlesinger v. Reservists Committee*, 418 U.S. 208 (1974).

55 U.S. Const. Art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

56 2 M. Farrand, *The Records of the Federal Convention of 1787* at 491 (1911).

57 *Schlesinger*, 418 U.S. at 417.

Similar dynamics have shown themselves in more recent efforts to enforce anti-corruption provisions of the Constitution against none other than the president himself. As then-President-elect Donald J. Trump prepared to assume office in 2016, he announced that he intended to maintain an ownership interest in his various private sector businesses, including various hotels and resorts that openly accepted money from both foreign governments and from state and federal government agencies. This alarmed anti-corruption experts, who argued that Trump's acceptance of these payments violated two of the Constitution's core anti-corruption provisions, the Foreign and Domestic Emoluments Clauses,⁵⁸ which bar federal officials from accepting payments from foreign governments without the permission of Congress and payments in excess of their official salaries from federal or state governments, respectively.⁵⁹

Less than a week after President Donald Trump was sworn into office, he was sued by Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit ethics watchdog, in federal district court in New York. Several other individuals who owned or were employees of hotels and restaurants that competed with Trump's properties soon joined CREW as co-plaintiffs.⁶⁰ As Trump's time in office progressed, other plaintiffs filed suit. First were the District of Columbia and Maryland, who filed suit (with CREW as co-counsel) in federal district court in Maryland on June 12, 2017.⁶¹ Two days later, a coalition of more than 200 members of the House and Senate similarly initiated litigation in federal district court in Washington, D.C.⁶²

Over the next several years, these three cases—*CREW v. Trump*, *District of Columbia v. Trump*, and *Blumenthal v. Trump*—wound their ways through various levels of the federal court system. But no court was ever able to resolve the merits of the plaintiffs' claims. Instead, the bulk of the proceedings remained narrowly focused on the question of standing. This is especially remarkable because none of the plaintiffs premised their claim on the type of generalized interest in compliance with the Constitution rejected in *Schlesinger*.⁶³ Instead, across these three cases, nearly every

58 U.S. Const. art I, § 9, cl. 8 (“[N]o person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any King, Prince, or foreign State.”); *id.* art. II, § 1, cl. 7 (“The President shall, at stated times, receive for his services, a Compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.”).

59 For an overview of these concerns, see Norman L. Eisen, Richard Painter & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump* (The Brookings Institution 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf.

60 See *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 179–182 (2017).

61 See *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 733–736 (D. Md. 2018).

62 See *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 49–51 (D.D.C. 2018).

63 A fourth case brought by a private citizen in federal court in New York on a theory of generalized grievance was dismissed for lack of standing. See *Weinstein v. Trump*, No. 17-CIV-1018 (GBD), 2017 WL 6544635 (S.D.N.Y. Dec. 21, 2017).

type of litigant—states, individuals, associations, businesses, and members of Congress—argued that they had been injured by Trump’s actions in ways very specific to them. In this sense, they tested whether any plaintiff could satisfy standing requirements and get to the merits of whether President Trump had violated the Emoluments Clauses, whose plain language seemed to prohibit the president from accepting payments from foreign governments or the states absent congressional permission.⁶⁴

The plaintiffs in *CREW v. Trump* put forward two different arguments on standing. CREW alleged what is known as organizational injury, arguing that it was harmed by being forced to divert its organization resources to address the President’s unconstitutional behavior. The plaintiffs from the hospitality industry, meanwhile, argued that Trump’s allegedly unlawful behavior had given his businesses an unfair advantage over their own and negatively impacted the latter’s performance, giving them what is often called competitor standing. The district court found neither argument compelling, holding that the harm alleged by CREW was too self-inflicted to constitute an injury in fact, while the causal link between the hospitality plaintiffs’ business losses and Trump’s conduct was too weak to satisfy standing’s causation and redressability requirements.⁶⁵ But two members of a three-judge panel of the 2nd Circuit—over a dissent by the third panel member—reversed on the latter holding in September 2019, finding that the hospitality industry plaintiffs had in fact adequately alleged that their businesses were competitors with Trump’s businesses and that Trump’s unlawful behavior had given the latter an unfair advantage.⁶⁶ Trump petitioned for the whole of the 2nd Circuit to review this panel’s decision in what is called an *en banc* hearing but was denied in August 2020, over strong dissents by four of the court’s judges.⁶⁷ He then asked the Supreme Court to review the matter.

Meanwhile, in *District of Columbia v. Trump*, the District of Columbia and Maryland sought to establish standing on injuries related to the Trump Organization’s ownership of Trump International Hotel located in Washington, D.C. The district court rejected Maryland’s arguments that it had relied on the enforceability of the Emoluments Clauses when it joined the United States in 1788, and that it had been injured by the tax revenue it had been unable to collect because Maryland businesses were unable to compete with Trump’s hotel, finding the alleged injuries to be ill-defined and their causal relationship to Trump’s actions dubious. But, it held that the plaintiffs had standing

64 For an early analysis of the range of standing arguments presented in these cases, see Matthew Hall, *Who has Standing to Sue the President Over Allegedly Unconstitutional Emoluments?*, 95 Wash. U. L. Rev. 757 (2017).

65 *CREW v. Trump*, 276 F. Supp. 3d at 191–92.

66 *CREW v. Trump*, 953 F.3d 178, 189–194 (2d Cir. 2019). The dissenting judge rejected the plaintiffs’ competitor standing argument while noting that “this case is deeply political and thus finds itself in an area where federal courts ought to tread lightly.” *Id.* at 205 (Walker, J., dissenting).

67 *CREW v. Trump*, 971 F.3d 102 (2d Cir. 2020) (denial of rehearing *en banc*).

because of the unfair competition to which Trump's actions were subjecting their citizens, the plaintiffs' own proprietary interests in running competing convention centers, and the extent to which they were in an "intolerable dilemma" wherein they felt compelled to grant waivers and other actions requested by Trump's businesses due to the President's personal interest.⁶⁸ Trump sought to overrule the district court's conclusion by pursuing a writ of mandamus from the 4th Circuit. In May 2020, a panel of that court initially granted that request on the grounds that the plaintiffs' claims of economic harm were too speculative to provide standing.⁶⁹ But this holding was reversed by the *en banc* 4th Circuit a few months later, on the grounds that the panel's review of the district court's standing decision had been premature.⁷⁰ Once again, Trump sought to appeal to the Supreme Court.

Of the three Emoluments Clauses cases, only *Blumenthal v. Trump* reached a final resolution before the November 2020 elections. Brought by more than 200 individual members of Congress, the plaintiffs argued that Trump's decision to accept foreign emoluments had injured them by denying them the opportunity to vote on whether Congress should authorize any such acceptance, as they were entitled to do under the Foreign Emoluments Clause. The plaintiffs prevailed at the district court level, which concluded the injury from the deprived vote was personal to individual members of Congress whose opportunity to vote had been nullified, not just to Congress as a whole.⁷¹ But a panel of the D.C. Circuit reversed and unanimously held that any such injury belonged to Congress as a whole and could not be a basis for a lawsuit by individual members.⁷² The plaintiffs petitioned the Supreme Court to issue a writ of certiorari and review the case but were denied in October 2020, less than a month before the election.⁷³

Ultimately, over four years of litigation, multiple courts at the trial and appellate levels ruled on whether the various plaintiffs in the Emoluments Clauses litigation had standing, often reaching contradictory conclusions. But by the time of the election, none had even touched the merits. *Blumenthal v. Trump* had concluded on a finding that the plaintiffs lacked standing, while Trump's lawyers in the Department of Justice had petitioned the Supreme Court for review of the standing decisions in the two still viable matters, *CREW v. Trump* and *District of Columbia v. Trump*. The Supreme Court held off on any decision until after President-elect Biden's inauguration. But on

68 See *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018).

69 *In re Trump*, 928 F.3d 360, 364 (4th Cir.).

70 *District of Columbia v. Trump*, 959 F.3d 126 (4th Cir. 2020).

71 *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018). After resolving the standing issue, the district court addressed separate grounds and denied a motion to dismiss in a subsequent opinion. See *Blumenthal v. Trump*, 375 F. Supp. 3d 191 (D.D.C. 2019).

72 *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020).

73 *Blumenthal v. Trump*, 141 S. Ct. 553 (2020) (denying petition for writ of certiorari).

January 25, the Court granted both petitions for certiorari, vacated the lower courts' rulings, and directed the lower courts to dismiss the cases as moot, removing any precedential value the opinions in those cases might otherwise have had.⁷⁴ As a result, after years of litigation, no one was left any clearer about who, if anyone, could sue to enforce this alleged violation of the Constitution.

The Emoluments Clauses cases were in many ways singular. But the standing questions they raised arise in other, more mundane anti-corruption matters as well. Another recent example relates to the Hatch Act,⁷⁵ which bars government employees from using public resources to promote partisan political causes. During the Trump administration, White House official Kellyanne Conway's conduct was the subject of several administrative complaints submitted by members of the public pursuant to the Hatch Act, which requires the Office of Special Counsel (OSC) to investigate and report on any alleged violations.⁷⁶ Some of these complaints were filed by CREW, the same organization that served as plaintiff and co-counsel in several of the Emoluments Clauses cases. OSC concluded that Conway had repeatedly and knowingly violated the law and recommended that she be fired,⁷⁷ but referred its reports to the President, who opted not to pursue any disciplinary action, instead of initiating proceedings with the Merit Service Protection Board (MSPB). CREW objected that this was contrary to what the Hatch Act required and filed suit to compel the OSC to initiate MSPB proceedings.

CREW's case for standing was premised on the injury it suffered as an organization, as it argued that OSC's decision not to refer Conway's case to the MSPB deprived it of an avenue of redress and required it to expend additional institutional resources to pursue alternate means of holding Conway accountable. But the district court found both prongs of these arguments unpersuasive. The district court held that, because CREW's ability to submit the administrative complaint was unaffected, it was not in fact injured, even if OSC had handled that complaint in a matter inconsistent with the Hatch Act. CREW's added expenses, meanwhile, it found to be too elective and similar to activities it was already undertaking to qualify. Even assuming that CREW's allegation that OSC acted unlawfully was true, the district court concluded, "CREW has no greater stake in the disciplinary proceeding to which Conway ultimately is, or is not, subject than any other member

74 See *Trump v. CREW*, No. 20-330, 2021 WL 231541, at *1 (U.S. Jan. 25, 2021); *Trump v. D.C.*, No. 20-331, 2021 WL 231542, at *1 (U.S. Jan. 25, 2021); see also *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950) (recommending remand and vacatur where a case has become moot prior to appeal to "clear the path for future relitigation").

75 5 U.S.C. §§ 7321–25.

76 5 U.S.C. § 1215(b) (regarding employees "in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President").

77 See Letter from Henry J. Kerner, Special Counsel, U.S. Off. Of Special Counsel, to White House (June 13, 2019), <https://int.nyt.com/data/documenthelper/1169-osc-report-on-kellyanne-conway/11f2a2d73d1e14d197f3/optimized/full.pdf>.

of the public[.]” an interest too generalized to provide standing.⁷⁸ Of course, if the institution who initiates the administrative complaint that the OSC is alleged to have mishandled has no adequately specific interest in the outcome, it’s unclear who does.

Few would dispute that a president who accepts money from foreign governments or has the capacity to pay himself with government funds beyond his salary may face incentives to govern in a manner other than in the public interest. No doubt this is why the Framers incorporated a prohibition on such remuneration into the Constitution, absent approval by Congress. But modern standing doctrine makes it remarkably unclear who, if anyone, can seek to enforce these restrictions through the federal courts, at least within the limited timeframe provided by the U.S. electoral cycle. Similar statutory provisions have often fared little better. The result is that many of those legal protections that serve the interests of the broadest swathe of Americans are rendered effectively unenforceable.

But modern standing doctrine makes it remarkably unclear who, if anyone, can seek to enforce these restrictions through the federal courts, at least within the limited timeframe provided by the U.S. electoral cycle.

B. Structural Concerns

Questions of standing can also complicate efforts to protect a different sort of public good: the constitutional structure of American government. Conduct that runs counter to the separation of powers embedded in the Constitution can impact countless Americans and impede the ability of the other branches of government to exercise their own constitutional authority. Yet standing doctrine treats such structural concerns unequally by making it easier to take up structural questions at the behest of private plaintiffs rather than the institutional actors who arguably have the most direct interest in the constitutional issue at hand. This in turn makes certain aspects of the structural constitution more subject to judicial enforcement than others, resulting in a disparate impact on how the constitutional system operates.

Questions of standing can also complicate efforts to protect a different sort of public good: the constitutional structure of American government.

78 *CREW v. U.S. Off. of Special Couns.*, 480 F. Supp.3d 118, 133 (D.D.C. Aug. 6, 2020).

Under modern standing doctrine, structural constitutional questions are well within the scope of issues that can be raised by individual plaintiffs. The Supreme Court made this much clear in its 2011 decision in *Bond v. United States*,⁷⁹ where it held that a criminal defendant had standing to challenge the federal government’s constitutional authority to enact the criminal laws under which she was being prosecuted. “An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable,” Justice Kennedy wrote for the 9-0 majority. Indeed, “[i]n the precedents of this Court,” he observed, “the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances.”⁸⁰

This approach, however, doesn’t reach all structural questions equally. The subjects of governmental enforcement actions are well positioned to have standing to challenge structural defects that bear on the rules being enforced against them or the agencies doing the enforcing. As a result, both criminal defendants and the subjects of governmental regulation can routinely raise structural objections to both the rules being applied to them and the agencies applying them. But other structural concerns that have a more attenuated relationship with governmental enforcement action are far more insulated from such review, even if they relate to core functions of American government and have a substantial impact on public policy. This may not be a concern if the other branches of government that are most directly affected by these structural considerations have standing to sue, but this is not always the case, especially in relation to Congress. The result is what legal scholar Aziz Huq has called a “piebald” pattern of enforcement, wherein certain structural aspects of the Constitution are subject to far greater judicial scrutiny than others.⁸¹

Once again, the recent litigation over the Emoluments Clauses helps to illustrate the problem. This is especially true when it is compared against another case that was working its way through the federal courts at approximately the same time, *Seila Law LLC v. Consumer Financial Protection Bureau*.⁸²

Each of the three major Emoluments Clauses cases rested in part on a contention that a structural aspect of the Constitution—specifically the Foreign Emoluments Clause’s express direction that “no Person holding any Office of Profit or Trust under [the United States], shall, *without the Consent of the Congress*, accept of any present, Emolument, Office, or Title, of any kind whatever, from

79 564 U.S. 211 (2011).

80 *Id.* at 222.

81 Aziz Huq, *Standing for the Structural Constitution*, 99 Va. L. Rev. 1435, 1454 (2013).

82 140 S. Ct. 2183 (2020).

any King, Prince, or foreign State”—had been violated.⁸³ As members of Congress, however, the plaintiffs in *Blumenthal v. Trump* argued that Trump’s violation of the Foreign Emoluments Clause injured them in a more specific way: by depriving them of the opportunity to vote on his receipt of foreign emoluments expressly guaranteed by the plain text of the Constitution. The district court ultimately agreed, distinguishing the plaintiffs’ case from various precedents on the grounds that their claim of injury focused on the nullification of an opportunity to vote that was concrete and specific to them.⁸⁴

But on appeal, the D.C. Circuit—relying on the Supreme Court’s influential 1997 decision in *Raines v. Byrd*⁸⁵—took the view that the injury was to Congress as an institution, not to the lead plaintiff, Senator Richard Blumenthal, or his fellow legislators personally. At most, they had been deprived of the opportunity to act collectively as Congress on the President’s actions. Because they “d[id] not constitute a majority of either [the House or Senate] and [we]re, therefore, powerless to approve or deny the President’s acceptance of foreign emoluments[.]” such an opportunity would not have clearly had any effect on the outcome.⁸⁶ So the injury was not particularized to the legislators, but to Congress—and neither Congress itself nor the critical mass of legislators necessary to change the outcome were plaintiffs in the suit. The Supreme Court ultimately denied certiorari in October 2020, bringing the matter to a close in advance of the forthcoming election.⁸⁷

Around the time that the first Emoluments Clauses cases were being filed in 2017, the Consumer Financial Protection Board (CFPB) was filing suit in another case in northern California, seeking to compel Seila Law, a law firm that offered various debt-related services, to comply with a civil investigative demand directing it to produce certain information and documents related to allegations that it had engaged in unlawful activities. Seila Law advanced a number of arguments as to why it shouldn’t have to comply, but the court proceedings came to focus on one: Its assertion that the CFPB’s actions were invalid because the structure of the agency itself—which Congress had set up with a single director who could only be removed by the president for cause, not at-will like most executive branch employees—unconstitutionally infringed upon the president’s authority to remove executive branch officials under the Constitution’s Appointments Clause.

The case moved through the lower courts briskly, with both the district court and appellate court handily rejecting Seila Law’s arguments.⁸⁸ But in June 2019, Seila Law petitioned the Supreme

83 U.S. Const. art. I, § 9, cl. 8 (emphasis added).

84 See *Blumenthal v. Trump*, 335 F. Supp.3d 45 (D.D.C. 2018).

85 See *Raines v. Byrd*, 521 U.S. 811 (1997).

86 *Blumenthal v. Trump*, 949 F.3d 14, 20 (D.C. Cir. 2020).

87 *Blumenthal v. Trump*, 141 S. Ct. 553 (2020) (denying petition for writ of certiorari).

88 See *CFPB v. Seila Law, LLC*, No. 8:17-cv-01081-JLS-JEM, 2017 WL 6536586 (C.D.Cal. Aug. 25, 2017), *aff’d*, 923 F.3d 680 (9th Cir. 2017).

Court for review. Shortly thereafter, the Trump administration reversed its position and CFPB filed a brief supporting Seila Law's petition for certiorari on the logic that it agreed with Seila Law's reading of the Appointments Clause.⁸⁹ The Supreme Court responded by granting Seila Law's petition for a writ of certiorari in October 2019⁹⁰ and inviting an outside attorney to defend the validity of the lower court's opinion in the CFPB's stead as *amicus curiae*.⁹¹

Seila Law's standing to make its structural argument was not at issue before the district or appellate courts. But the appointed *amicus* raised the issue before the Supreme Court. Specifically, the *amicus* noted that, since the appellate proceedings, the Office of Legal Counsel in the Justice Department had formally come out in agreement with Seila Law's argument that the CFPB was unconstitutionally structured, and that its director was removable at-will by the president.⁹² This view had in turn been expressly accepted by both the CFPB's acting director, appointed by President Trump, as well as his nominee for the position, who had been confirmed by the Senate in December 2018. Yet both officials had continued to pursue the investigation against Seila Law and declined to withdraw the investigative demand that was being challenged. Hence, the *amicus* counsel argued, the potential injury to Seila Law presented by the investigatory action was no longer causally traceable to the alleged constitutional defect in the CFPB's structure and resolving that defect would not provide Seila Law with a remedy.⁹³

The Supreme Court, however, was unpersuaded. While it acknowledged that defendants seeking appellate review had to meet standing requirements, a 5-4 majority held that, under its precedents, "a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority."⁹⁴ In the Court's eyes, that was sufficient for it to conclude that Seila Law had standing and cleared the way for it to reach the merits, where it decided that the CFPB's structure was in fact unconstitutional. As

89 See Brief for the Respondent at 7-20, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7), https://www.supremecourt.gov/DocketPDF/19/19-7/116040/20190917144324154_19-7%20Seila%20Law.pdf.

90 See *Seila Law LLC v. CFPB*, 140 S. Ct. 427 (2019) (granting petition for writ of certiorari).

91 See *Seila Law LLC v. CFPB*, 140 S. Ct. 450 (2019) (inviting former Solicitor General Paul Clement to argue as *amicus curiae*).

92 See Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. O.L.C., slip op. at 1-12 (Nov. 25, 2017), <https://www.justice.gov/olc/file/1085611/download>.

93 See Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below at 21-28, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7), https://www.supremecourt.gov/DocketPDF/19/19-7/128671/20200115125557702_19-7%20Seila%20Law%20LLC%20v.%20CFPB%20amicus%20br.pdf.

94 *Seila Law*, 140 S. Ct. at 2196 (citing *Hollingsworth v. Perry*, 570 U.S. 693 (2013), and *Free Enterprise Fund v. Public Company*, 561 U.S. 477 (2010)).

the CFPB's amicus had predicted, this did not end up mattering for *Seila Law*: Just days after the Supreme Court issued its decision, the CFPB's director expressly re-ratified the civil investigative demand, and the 9th Circuit later confirmed that this remedied any constitutional defects.⁹⁵ But the Supreme Court's decision established a new Appointments Clause limitation that has since thrown numerous federal agency actions by both the CFPB and other agencies with similar structures into constitutional doubt.⁹⁶

The standing outcomes in *Blumenthal* and *Seila Law* were not entirely surprising given the Supreme Court's relevant precedents. But the juxtaposition between them underscores standing doctrine's inconsistent approach to structural concerns. In *Seila Law*, a small debt services law firm was able to assert and vindicate the purported constitutional interests of the president all the way to the Supreme Court, even though the executive branch itself initially did not agree (under the Obama administration) and later brought federal policy into alignment with that view (under the Trump administration). Moreover, *Seila Law* was able to pursue this line of argument despite strong evidence that the outcome would have no impact on the alleged injury it was suffering. Meanwhile, in *Blumenthal*, members of Congress found the courthouse doors closed as they tried to challenge the president's noncompliance with a plainly worded provision of the Constitution that, in their view, entitled each of them to a vote on the matter—and the Supreme Court did so precisely because the *Blumenthal* plaintiffs could not show with certainty that holding this vote would have changed the eventual outcome. The result was that a small private company was in a better position to advance its aggressive reading of the Appointments Clause than the more than 200 members of Congress who were suing in *Blumenthal* were to defend their right to hold a vote that seemed to be guaranteed by the plain language of the Constitution.

C. Intangible Harms

Finally, standing doctrine can also impede efforts to address a variety of harms that are inchoate, or not entirely evident, when they initially occur. Today, such injuries have become particularly common in an arena that touches nearly every American consumer: the modern information economy.

95 See *CFPB v. Seila Law LLC*, 984 F.3d 715 (9th Cir. 2020).

96 See Todd Phillips, *The Impacts of Seila Law Beyond Consumer Finance*, The FinReg Blog (July 9, 2020), <https://sites.law.duke.edu/thefinregblog/2020/07/09/the-impacts-of-seila-law-beyond-consumer-finance/>; U.S. Supreme Court *Seila Law Decision Throws Past CFPB Actions into Question*, Consumer Finance Monitor (July 1, 2020), <https://www.consumerfinancemonitor.com/2020/07/01/u-s-supreme-court-seila-law-decision-throws-past-cfpb-actions-into-question/>.

Where private information is leaked or stolen—or, inversely, information is improperly withheld or inaccurately communicated—individuals can experience an array of harms beyond or in addition to conventional financial losses. Legal scholars Danielle Citron and Daniel Solove have created typologies of the harms that consumers in the information economy can experience from data breaches and privacy violations, which can range from more conventional monetary and reputational harms to anxiety, a loss of autonomy, enhanced discrimination, and damage to familial and other personal relationships.⁹⁷ Some of these harms accrue not just when private information finds its way into a third party's hands, but even where there is just a risk that this will happen. And the full scope of harm that might result from such transfers is often not immediately apparent, as it's not clear what third parties intend to do with the private information they have acquired or when they will do it. These different risks and harms are often "akin to invisible objects in the middle of a crowded room[.]" Citron and Solove write: "We may not be able to see an invisible object, but we see how everyone is bumping into it, how they are changing where they stand because of it, how they are walking different routes to avoid it, and so on. The object is invisible to the naked eye, but it is having a significant effect and people are expending a lot of time and energy to deal with it."⁹⁸

The result is a set of unclear and inconsistent constitutional constraints on the sorts of harms for which consumers can recover—and on Congress' ability to legislate solutions for some of the most defining harms of the modern era.

A patchwork of statutes—many of which predate the modern information economy but have nonetheless been adapted to it—provide consumers with legal protections against at least some of these harms. But consumers' ability to avail themselves of these protections is often compromised by the ill fit between these sorts of injuries and standing doctrine. Lower courts have struggled with the question of when the harm suffered by a given consumer is adequately concrete to

serve as an injury in fact and have often reached contradictory conclusions. The result is a set of unclear and inconsistent constitutional constraints on the sorts of harms for which consumers can recover—and on Congress' ability to legislate solutions for some of the most defining harms of the modern era.

In recent years, the Supreme Court has twice dealt with how intangible injuries should be handled within standing doctrine: once in its 2016 decision in *Spokeo, Inc. v. Robins*⁹⁹ and more recently

97 See Danielle Keats Citron & Daniel J. Solove, Privacy Harms, 102 B.U. L. Rev. 793, 830–861 (2022); Daniel J. Solove & Danielle Keats Citron, Risk and Anxiety: A Theory of Data-Breach Harms, 96 Tex. L. Rev. Online 737, 774–778 (2018).

98 Solove & Citron, *Risk and Anxiety*, *supra* note 98, at 756.

99 136 S. Ct. 1540 (2016).

in its 2021 decision in *TransUnion LLC v. Ramirez*.¹⁰⁰ To date, however, neither decision has successfully resolved these disparate approaches. If anything, they may well have contributed further to the confusion.

Spokeo arose from plaintiff Thomas Robins' discovery that Spokeo, a data aggregator and reporting company, was informing those who queried him that the unemployed, unmarried Robins was married, wealthy, and working as a professional. Robins argued that this misinformation imperiled his employment prospects by making him seem overqualified to potential employers, among other harms. Robins sued arguing that the company had failed to follow reasonable procedures to "assure maximum possible accuracy" of the data it was publicly offering, in violation of the Fair Credit Reporting Act of 1970 (FCRA).¹⁰¹ The district court concluded that Robins lacked standing as he had not alleged that the misinformation about him had actually negatively impacted his career prospects and the mere risk of it doing so was too insubstantial for standing purposes.¹⁰² But the 9th Circuit then reversed, holding that the FCRA provided a statutory right the mere violation of which was sufficient to provide him with standing so long as the harm in question was particularized to him, a standard that was clearly met given the inaccuracies in his personal data.¹⁰³

When this standing question reached the Supreme Court, neither view prevailed. In a 7-2 opinion, the Court reversed on the grounds that the 9th Circuit had failed to consider whether any injury Robins alleged was sufficiently "concrete" for standing purposes, as "Article III standing requires a concrete injury even in the context of a statutory violation." That said, it acknowledged that both "the risk of real harm" and "intangible injuries" like reputational harm can be sufficiently concrete for standing purposes, especially where they are closely related to "a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts" or they have been "identif[ied] and elevat[ed] by Congress" through legislation.¹⁰⁴ Applying this standard on remand, the 9th Circuit concluded that the injuries that Robins claimed to have suffered adequately aligned with the intangible harms that Congress had intended to address through the FCRA, namely the injury to reputation and risk of other harms that consumers suffer from inaccurate credit reporting. The Supreme Court then declined further review.¹⁰⁵

One might hope that the Supreme Court's own effort to wrestle with the difficult questions posed by information era harms would result in some clearer guidance for the lower courts. Instead,

¹⁰⁰ 141 S. Ct. 2190 (2021).

¹⁰¹ 15 U.S.C. § 1681 et seq.

¹⁰² *Robins v. Spokeo, Inc.*, No. CV10-05306, 2011 WL 597867 at *1-2 (C.D. Cal. Jan. 27, 2011).

¹⁰³ *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014).

¹⁰⁴ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

¹⁰⁵ See *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017), cert. denied 138 S. Ct. 931 (2018).

Spokeo did little to resolve any of the disagreements on these issues that had already emerged. As Citron and Solove write, “[r]ather than a simple circuit split or other clear disagreement in approach, courts have produced a jumbled mess by grasping at inconsistent parts of *Spokeo*.”¹⁰⁶

Perhaps the clearest example is in case law relating to data breaches, which have become increasingly common in recent years. Unsurprisingly, such breaches have triggered significant litigation under a variety of statutory and nonstatutory causes of action by plaintiffs concerned that their stolen data will be used to steal their identities or as part of some other criminal enterprise. Only four circuit courts—the 6th, 7th, 9th, and D.C. Circuits—have found that the risk of future identity theft triggered by a data breach is itself sufficient to meet Article III injury requirements.¹⁰⁷ By contrast, the 1st, 3rd, 4th, 8th, and 11th Circuits have concluded that the risk alone is too speculative to constitute an injury without some evidence that such harm has actually already occurred or is imminent.¹⁰⁸

A similar pattern is evident in the treatment of lawsuits under the Telephone Consumer Protection Act (TCPA),¹⁰⁹ a statute that provides consumers with a private right of action to sue companies who violate its restrictions on telemarketing. The 2nd, 7th, and 9th Circuits have concluded that the receipt of an unwanted text message is a sufficiently concrete injury to grant standing, on the logic that it resembles the historical common law tort of intrusion upon seclusion, and that Congress had clearly intended that sort of harm be addressed by the law.¹¹⁰ But the 11th Circuit held that Congress did not intend to curtail intrusions on seclusion when it passed the TCPA, and that the court concluded that historical practice did not support concluding that sending unsolicited text messages constitutes a tortious intrusion on private affairs.¹¹¹

106 Citron & Solove, *Privacy Harms*, *supra* note 98, at 805; see also Jennifer A. Jackson & Matthew M. Petersen, *Spokeo IV: Cert Denied and the Circuit Splits Left Behind*, JD Supra (Feb. 16, 2018), <https://www.jdsupra.com/legalnews/spokeo-iv-cert-denied-and-the-circuit-45262/> (identifying several post-*Spokeo* circuit splits relating to informational injuries).

107 See *In re Office of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 54–61 (D.C. Cir. 2019) (per curiam); *In re Zappos.com, Inc.*, 888 F.3d 1020, 1027–29 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1373 (2019); *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App’x 384, 388–391 (6th Cir. 2016); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 692 (7th Cir. 2015).

108 See *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1344–45 (11th Cir. 2021); *In re SuperValu, Inc.*, 870 F.3d 763, 771–73 (8th Cir. 2017); *Beck v. McDonald*, 848 F.3d 262, 274–75 (4th Cir. 2017), *cert. denied*, 137 S. Ct. 2307 (2017); *Katz v. Pershing, LLC*, 672 F.3d 64, 80 (1st Cir. 2012); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 41–43 (3d Cir. 2011).

109 See 47 U.S.C. § 227.

110 See *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 92–93 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042–43 (9th Cir. 2017).

111 *Salcedo v. Hanna*, 936 F.3d 1162, 1169–72 (11th Cir. 2019); see also *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, 982 F.3d 1069, 1071 (7th Cir. 2020); *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067, 1068 (7th Cir. 2020).

Post-*Spokeo* standing has also complicated the enforcement of statutes that provide consumers with rights to the disclosure of certain information, a common mechanism for consumer protection. The 9th Circuit, for example, has concluded that an employee whose employer violates the FCRA by failing to disclose an inaccurate consumer report before basing disciplinary action on that report lacks standing unless they can show that disclosure would have changed the outcome.¹¹² But the 3rd Circuit and the 7th Circuit have reached the opposite conclusion, holding that failing to give the employee an opportunity to correct any inaccuracies is a sufficient harm to satisfy standing requirements.¹¹³ The 7th Circuit has reached the opposite conclusion, however, in the context of violations of the Fair Debt Collection Practices Act's (FDCPA) similar requirement that when debt collectors notify recipients of a notice of debt, recipients must dispute it in writing within a particular time period.¹¹⁴ The courts also held that a recipient must allege that they intended to pursue a dispute in order to have standing.¹¹⁵ Other courts, meanwhile, have disagreed and held that a failure to disclose is itself enough to establish standing, at least in most cases.¹¹⁶

Post-*Spokeo* standing has also complicated the enforcement of statutes that provide consumers with rights to the disclosure of certain information, a common mechanism for consumer protection.

In 2021, the Supreme Court revisited this post-*Spokeo* framework in *TransUnion v. Ramirez*, another FCRA case.¹¹⁷ The named plaintiff, Sergio Ramirez, was one of approximately 8,000 consumers participating in a class action lawsuit against the credit rating agency TransUnion, which had inaccurately identified them as being subject to certain terrorism-related sanctions. A jury had awarded substantial damages to the entire class under the FCRA, but TransUnion argued that the class should never have been certified, as the inaccurate information for more than three-quarters of the class members had never been communicated to any third parties. In a 5-4 opinion authored by Justice Kavanaugh, the Supreme Court agreed and found that most class members lacked standing as the mere presence of inaccurate information in their file did not constitute an injury in fact for the purposes of seeking damages. The majority did, however, acknowledge that all

112 See *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1175–76 (9th Cir. 2018).

113 See *Long v. Se. Pennsylvania Transportation Auth.*, 903 F.3d 312, 323–24 (3d Cir. 2018); *Robertson v. Allied Solutions*, 902 F.3d 690, 696–698 (7th Cir. 2018).

114 15 U.S.C. § 1692g(a)(4).

115 See *Casillas v. Madison Avenue Assos.*, 926 F.3d 329, 334 (7th Cir. 2019) (Barrett, J.) (noting that the plaintiff could not allege “any comparable lost opportunity” to the FCRA plaintiff in *Robertson*).

116 See *Macy v. GC Servs. Ltd. Partnership*, 897 F.3d 747, 761 (6th Cir. 2018); *Church v. Accretive Health, Inc.*, 654 F. App'x 990, 994 (11th Cir. 2016). For a longer discussion of this split, see Jason Smith, *Statutes and Spokeo: The Case of the FDCPA*, 87 U. Chi. L. Rev. 1695 (2020).

117 141 S. Ct. 2190 (2021).

the plaintiffs could have had standing to pursue other legal remedies, such as injunctive relief compelling TransUnion to correct the relevant files if they were still inaccurate.

According to the *TransUnion* majority, to satisfy standing doctrine's concreteness requirement, an intangible injury must have "a close historical or common-law analogue[.]" including to such common law injuries as "reputational harms, disclosure of private information, [or] intrusion upon seclusion."¹¹⁸ This is what the plaintiffs whose claims were invalidated lacked, even though TransUnion's mishandling of their data violated the FCRA. Of course, what sort of close analogue

satisfies this standard is far from clear. The only insight the Court gives in this regard is that this standard does not require "an exact duplicate in American history and tradition" but should not be taken as "an open-ended invitation to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts[.]"¹¹⁹ providing little guidance on how courts should navigate the wide terrain between these two points.

The main takeaway from *TransUnion* is likely to be this: Congress' ability to craft remedies to new types of harm associated with the information economy remains constrained.

While it is too soon to evaluate *TransUnion*'s full effect, there are few signs that it is providing lower courts any more clarity on how intangible harms should be handled. Academic commentators have been almost uniformly negative in their view of the decision, objecting both to its continued ambiguity and its potentially far-reaching implications, if the Supreme Court's holding is taken to its logical limits.¹²⁰ Several circuit courts have continued to apply their pre-*TransUnion* case law, suggesting that existing splits may well continue.¹²¹ In one case, an 11th Circuit panel interpreted *TransUnion* as requiring that an intangible injury be "the same kind as a harm actionable at common law but not necessarily the same degree" and, as a result, concluded that a plaintiff's claims that a debt collector's disclosure of their personal information to a third party was a sufficient analogy to traditional invasion of privacy torts to satisfy standing requirements. But the

¹¹⁸ 141 S. Ct. at 2204.

¹¹⁹ *Id.*

¹²⁰ See Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 George Mason L. Rev. 729 (2022); Erwin Chemerinsky, *What's Standing After TransUnion?*, 96 N.Y.U. L. Rev. Online 269 (Oct. 2021); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 Boston Univ. L. Rev. Online 62 (2021).

¹²¹ See, e.g., *Tailford v. Experian Info. Sols., Inc.*, 26 F.4th 1092, 1100 (9th Cir. 2022); *Cothron v. White Castle Sys., Inc.*, 20 F.4th 1156, 1160–61 (7th Cir. 2021); *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 667–668 (7th Cir. 2021).

whole court subsequently chose to vacate the panel's decision and rehear the matter *en banc*, underscoring how much internal disagreement is continuing to take place.¹²²

For both policymakers and potential plaintiffs, the main takeaway from *TransUnion* is likely to be this: Congress' ability to craft remedies to new types of harm associated with the information economy remains constrained by its ability to show that the harm it is seeking to address bears an adequate resemblance to the sorts of harms courts heard centuries before modern computer technology was invented. Hidden injuries without such pedigree, meanwhile, may be beyond even Congress' ability to regulate in a manner that is judicially enforceable. And the line between the two is up to the federal courts to determine, which have not yet settled on any unified approach or standard. As a result, whether American consumers are protected from such injuries hinges not just on the enactments of Congress but also on their geography and the related assignments of jurisdiction that determine which lower federal court's approach will apply to their claims.

¹²² See *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 17 F.4th 1016, 1027 (11th Cir.), *reh'g en banc granted, opinion vacated*, 17 F.4th 1103 (11th Cir. 2021).

III. Possible Solutions

These recent experiences show that standing doctrine's impact on the availability of judicial protection can raise not just legal but policy concerns. Less clear, however, is what can be done about it. While the exact contours of standing doctrine remain the subject of debate, there appears to be broad judicial consensus that the Constitution imposes at least some limitations on the cases and controversies that federal courts can hear. The foundational principle of *stare decisis*, meanwhile, makes the Supreme Court's numerous opinions upholding standing requirements difficult to abandon, at least absent a sea change in legal views that would likely take generations to work its way into the federal judiciary. Nor is a constitutional amendment altering standing's role as a foundational element of the U.S. legal system likely to be feasible anytime soon.

That said, there may be ways to address at least some concerns with standing doctrine without abandoning it altogether. In recent years, the case law on standing has taken several twists not clearly anticipated by—and arguably at odds with—the logic set forth in *Lujan* and related cases. Some have defined specialized standing standards in certain types of cases, while others have highlighted ways in which standing may be expanded beyond its conventional limits. Whether these are underappreciated nuances of standing doctrine or cracks in its façade is largely a matter of perspective. But together they provide mechanisms that may be able to mitigate some of standing doctrine's most negative consequences from within its own confines.

This section identifies several such trends, each of which points to possible solutions for those who are concerned with the limits that standing doctrine currently places on access to the federal courts. None of these approaches are cure-alls, as they generally only apply to certain types of claims and often pose an array of practical challenges to implement. Nonetheless, they present ways by which some of the harshest consequences of modern standing doctrine may be alleviated, several of which creative litigants have already begun to capitalize upon.

A. Turning to Institutional Plaintiffs

One way of surmounting standing barriers to a particular claim may be to use a different type of plaintiff. Most standing doctrine was developed with a natural person in mind as the litigant. When that person is replaced with an institution, the latter's different array of interests can make establishing standing easier. Private organizations, for example, not only have standing to represent their members in matters related to their institutional purpose, but also to challenge unlawful activities that impact their institutional interests by requiring them to expend additional resources in order to pursue their intended purpose.¹²³ By combining this representative standing with standing based on their own, potentially broad institutional interests, organizations can be potent vehicles for bringing claims that would be beyond the reach of most individual plaintiffs.

Most standing doctrine was developed with a natural person in mind as the litigant.

This same logic applies to institutions of government as well. Moreover, because these public institutions tend to operate at a larger scale and with a broader institutional mandate than private organizations, the interests on which they can make claims of standing are also much broader. In this sense, public institutions may be particularly well suited to pursue an array of public interest claims that individual plaintiffs often cannot. This section focuses on two such types of plaintiffs: the states and Congress.

1. The States

Today, the fifty states and the District of Columbia have come to play a central and growing role in public interest litigation. While state attorneys general have long been active in pursuing lawsuits against corporate interests on behalf of their citizens, this trend has expanded to include a growing number of lawsuits against the federal government as well. By one count, the fifty states and the District of Columbia filed 138 lawsuits challenging federal agency action during former President Trump's sole term in office. This is approximately twice as many as occurred during the two-term Obama and George W. Bush administrations, which themselves experienced substantially more such cases than their predecessors.¹²⁴ Much of this growth can be attributed to the states' ability

123 See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–379 (1982) (finding organizational standing on the basis of interference with an organization's activities and depletion of its resources); *Warth v. Seldin*, 422 U.S. 490, 510–512, 514–517 (1975) (acknowledging that an organization can have standing to represent its members so long as its members would have standing and the claim relates to their ties to the organization).

124 See Erik Ortiz, *State attorneys general have sued Trump's administration 138 times—nearly double those of Obama and Bush*, NBC News (Nov. 16, 2020), <https://www.nbcnews.com/politics/politics-news/state-attorneys-general-have-sued-trump-s-administration-138-times-n1247733>.

to secure standing where private litigants cannot, allowing them to address issues that standing requirements might otherwise insulate from judicial scrutiny.

While state attorneys general have long been active in pursuing lawsuits against corporate interests on behalf of their citizens, this trend has expanded to include a growing number of lawsuits against the federal government as well.

The rise of the state as litigant would be a surprise to early American courts, which often took a narrow view of state standing as limited to conventional institutional interests, such as proprietary interests in state-owned property.¹²⁵ But over the 20th century, the Supreme Court gradually opened the aperture for what claims states are able to pursue. This included the ability to sue on behalf of the interests of their citizens (a capacity referred to as *parens patriae*) so long

as the state also suffered an injury to related “quasi-sovereign” interests of its own, a broad category that can range from interests in “the health and well-being of its residents” to “assuring that the benefits of the federal system are not denied to its general population.”¹²⁶ Under the Supreme Court’s 1923 holding in *Massachusetts v. Mellon*, however, these latter claims generally cannot be pursued against the federal government on the grounds that it has a superior claim to represent the interests of states’ citizens *parens patriae*.¹²⁷ Instead, the federal government may only be subject to claims based on the state’s proprietary and other conventional common law interests, as well as certain sovereign interests relevant to the state’s own legal rights within the federal constitutional system.

The Supreme Court, however, brought this schema into some doubt through its 2007 decision in *Massachusetts v. Environmental Protection Agency (EPA)*.¹²⁸ There a 5-4 majority held that the state of Massachusetts had standing to challenge the Bush administration’s decision not to regulate greenhouse gasses under existing environmental statutes. Writing for the majority, Justice Stevens noted that “States are not normal litigants for the purpose of invoking federal jurisdiction” because they have a quasi-sovereign interest in the property and well-being of their residents but had ceded authority over many of the actions that a conventional sovereign might pursue to secure those interests.¹²⁹ “These sovereign prerogatives are now lodged in the Federal Government,” Stevens wrote, “and the Congress has [not only] ordered EPA to protect Massachusetts (among others)

125 For an authoritative account of the historical evolution of state standing, see Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387 (1995).

126 *Alfred L. Snapp Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607–08 (1982).

127 *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

128 549 U.S. 497 (2007).

129 *Id.* at 518–519.

by prescribing [environmental regulations]” but “recognized a concomitant procedural right to challenge” such efforts in the form of a statutory cause of action within the Clean Air Act itself.¹³⁰ Given these factors, Stevens concluded that Massachusetts was “entitled to special solicitude in [the Court’s] standing analysis.”¹³¹ Moreover, he noted, “[b]ecause the Commonwealth owns a substantial portion of the states’ coastal property, it has alleged a particularized injury in its capacity as a landowner.”¹³² Specifically, the state had shown that “the rise in sea levels associated with global warming” had not only “harmed and will continue to harm Massachusetts” but presented a “risk of catastrophic harm [that], though remote, is nevertheless real” and “would be reduced to some extent if petitioners received the relief they seek.”¹³³ Together, these factors were sufficient to establish standing.

What exact role the “special solicitude” that Stevens identified played in this analysis are far from clear. The dissent accused the majority of “[r]elaxing Article III standing requirements” regarding injury in fact, causation, and redressability, as it viewed the alleged harm itself of dubious seriousness and questionable causal relationship to the small fraction of global emissions that would be impacted by the federal regulation in question.¹³⁴ It also argued that the majority appeared to view special solicitude as an exception to the *Mellon* rule that traditionally barred states from pursuing claims based on quasi-sovereign interest against the federal government. That said, the dissenters acknowledged that the majority’s simultaneous reliance on Massachusetts’ direct interest as a property owner muddled the analysis enough to make this unclear.

Little clarity on this issue has emerged in the years since. The Supreme Court has generally declined to meaningfully revisit the issue, denying certiorari in most cases that raise it and splitting 4-4 on those cases it has taken up.¹³⁵ Lower courts have grappled with when and how to apply special solicitude, with many acknowledging its existence in certain contexts without clearly relying on

130 *Id.* at 519–520 (referencing 42 U.S.C. § 7607(b)(1)).

131 *Id.* at 518–520.

132 *Id.* at 522 (internal citation and quotation omitted).

133 *Id.* at 526.

134 *Id.* at 536–537 (Roberts, C.J., dissenting).

135 See *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam) (affirming a lower court decision on state standing on a split 4-4 vote without written discussion); *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011) (same); *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir.), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268–69 (4th Cir. 2011), *cert. denied*, 567 U.S. 951 (2012). But see *infra* nn. 142–144 and accompanying text (describing recent cases rejecting state standing arguments).

it as a basis for substantially relaxing standing requirements.¹³⁶ Several have similarly left the *Mellon* rule in place, in spite of the holding in *Massachusetts v. EPA*.¹³⁷ For its part, the executive branch has suggested that any “special solicitude” should at most be limited to cases where a state is suing over quasi-sovereign interests pursuant to a specific statutory cause of action.¹³⁸

But this uncertainty hasn’t stopped states from citing *Massachusetts v. EPA* as they’ve pursued more and more public interest litigation, including against the executive branch. Among the more common strategies is for state plaintiffs to rely on conventional proprietary interests in seeking to establish standing against a backdrop that clearly implicates quasi-sovereign interests as well, whether expressly or implicitly. Using this approach, states have successfully established and maintained standing on such propriety interests as the added costs of providing driver licenses to newly arrived immigrants and the negative impact that federal policies may have on the operation of state university systems.¹³⁹ Whether this ability to secure standing based on these proprietary claims reflects something like the special solicitude at play in *Massachusetts v. EPA* is unclear. Several legal scholars have posited that the inherently broad array of interests that states can invoke is itself likely to satisfy standing analysis, creating the illusion for special solicitude that is simply the application of conventional standing requirements to an unconventional type of litigant.¹⁴⁰

That said, in recent terms, the Supreme Court has also driven home the point that state standing has limits. Most notably, in its politically heated 2020–2021 term, the Supreme Court declined no fewer than three different sets of claims by states on standing grounds, rejecting arguments that states could establish standing based on the purported impact an unenforceable mandate has on their citizens’ enrollments into federal programs,¹⁴¹ how the executive branch will implement an order from the outgoing president to exclude certain aliens “to the extent feasible” from the census numbers used to apportion congressional seats,¹⁴² and their interests in another state’s

136 See, e.g., *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 923 F.3d 209 (1st Cir. 2019); *New Mexico v. Dep’t of the Interior*, 854 F.3d 1207, 1219 (10th Cir. 2017) (noting “the lack of guidance on how lower courts are to apply the special solicitude doctrine to standing question”); *Indiana v. Env’tl. Prot. Agency*, 796 F.3d 803 (7th Cir. 2015); *North Carolina v. Env’tl. Prot. Agency*, 587 F.3d 422 (D.C. Cir. 2009).

137 See *State ex rel. Schmitt v. Bernhardt*, 923 F.3d 173 (D.C. Cir. 2019); *Michigan v. E.P.A.*, 581 F.3d 524 (7th Cir. 2009).

138 See Brief for the Petitioners at 29–30, *United States v. Texas*, 136 S. Ct. 2271 (No. 15-674).

139 See *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), cert. denied sub nom. *Golden v. Washington*, 138 S. Ct. 448 (2017) (university system); *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015), aff’d per curiam by an equally divided court, 136 S. Ct. 2271 (2016) (driver’s licenses).

140 See Ernest A. Young, *State Standing and Cooperative Federalism*, 94 Notre Dame L. Rev. 1893 (2019); Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 Notre Dame L. Rev. 2015 (2019).

141 See *California v. Texas*, 141 S. Ct. 2104 (2021).

142 See *Trump v. New York*, 141 S. Ct. 530 (2020) (per curiam).

management of its elections.¹⁴³ While no clear rule emerged from these cases, the strong suggestion is that whatever special solicitude states may receive is no guarantee of standing, especially in cases that are highly politically charged.

For their part, scholars have continued to debate the virtues of state standing and the states' expanded role in public law litigation. Some have welcomed it as an important feature of contemporary federalism, wherein states are not just competing sovereigns but play a central role in implementing federal law and ensuring that the executive branch acts consistent with it.¹⁴⁴ Others have questioned broad assertions of state standing and presented alternative, generally narrower foundations for sustaining it.¹⁴⁵

A recurring theme across these accounts, however, is anxiety over the degree to which such litigation often appears to be motivated by partisan politics.¹⁴⁶ From a practical perspective, political incentives may well drive states to vindicate valuable legal rights in some cases, but they undoubtedly also lead to frivolous and divisive litigation that is intended to send a political message more than to succeed on the merits. As one former state attorney general put it, "we should be cautious about accepting every state-filed lawsuit as a faithful effort to vindicate federalism."¹⁴⁷ The political dynamics surrounding public law litigation—and the internal institutional politics and processes of each individual state—can in turn constrain which legal interests states are willing to litigate, making state-driven litigation unevenly available at best. For these reasons, reliance on states as litigants is likely to be far from ideal and may have negative ramifications for other political processes that bear on the parties' interests. And it may ultimately prove self-defeating, if the pursuit of frivolous and partisan litigation undermines support for state standing more generally—a trend that may already be under way.

143 See *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020).

144 See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 Tex. L. Rev. 43 (2018); Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and 'The New Process Federalism'*, 105 Calif. L. Rev. 1739 (2017).

145 See, e.g., Note, *An Abdication Approach to State Standing*, 132 Harv. L. Rev. 1301 (2019); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 Cornell L. Rev. 851 (2016); Stephen I. Vladeck, *States' Rights and State Standing*, 46 Univ. of Richmond L. Rev. 845 (2012).

146 Cf. Mark L. Earley, "Special Solicitude:" *The Growing Power of State Attorneys General*, 52 Univ. of Richmond L. Rev. 561 (2018) (former Virginia state attorney general expressing uncertainty as to whether expanded state involvement in public law litigation reflects "a glorious playing out of the freewheeling and adaptable democratic system of checks and balances" or "the grotesque free fall of an orderly administration of government that is now hopelessly divided").

147 Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 Univ. of Richmond L. Rev. 633, 634 (2018) (by former West Virginia state solicitor general).

Wherever state standing may be headed, it is sufficient for present purposes to note that states have proven capable of establishing standing in a variety of scenarios where doing so would be difficult for private litigants. While it's possible this reflects some degree of special solicitude, it may also simply reflect the fact that states can lay legitimate claim to a broader array of conventional, sovereign, and quasi-sovereign interests in making its case for standing. On the basis of these interests, states may be well positioned to sue over public goods where their citizens cannot, because the harm to their interests may be seen as more concrete and specific than the generalized grievance that private citizens share in enforcing the law.¹⁴⁸ States may also be able to sue over certain types of structural constitutional concerns, either on behalf of their citizens (assuming they can get around the *Mellon* rule) or in pursuit of their own institutional interests. As for hidden injuries, the fact that states tend to experience such harms in the aggregate—both in the impact on their citizens and the direct costs to their public programs and economies—may make them more concrete in courts' eyes than those brought by individuals. In this sense, turning to state plaintiffs can be an effective, if at times controversial, means of overcoming standing barriers to vindicating an array of legal claims.

2. Congress

In contrast with the states, Congress and its component institutions—meaning its two chambers and their various committees—have traditionally been far more reticent to engage directly in litigation. But over the past few decades, individual legislators, committees, and chambers within Congress have occasionally turned to the federal courts to vindicate their legal views. At times, these efforts have encountered some substantial legal limits. But they have also illuminated certain avenues through which Congress may be able to avail itself of judicial remedies not available to other plaintiffs.

The key authority on congressional standing is the Supreme Court's 1997 decision in *Raines v. Byrd*,¹⁴⁹ which addressed a constitutional challenge brought by six members of the House and Senate to a law that allowed the President to substantially amend certain legislation after its adoption by Congress. The Court held that the individual legislators lacked standing on the grounds that their claimed injury—being deprived of the opportunity to debate and vote on legislation—was not particularized to them and was in fact an injury to the House and Senate of which they were parts. In reaching this conclusion, Chief Justice Rehnquist's majority opinion examined whether there were historical precedents for such claims or alternative political remedies available. And

148 Cf. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (suggesting a case “a relator [acting] on behalf of the State” is more likely to have standing than “private citizens acting on their own behalf” whose interests were too generalized to warrant standing).

149 521 U.S. 811 (1997).

it rooted the Court's analysis against the background assumption that standing analysis must be "especially rigorous" in cases where "reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional[.]" setting a higher bar for congressional standing where plaintiffs are challenging executive branch actions.¹⁵⁰

The lower courts have since applied this framework to reject an array of legal challenges brought by legislators on standing grounds. But this skepticism toward congressional standing hasn't abolished it entirely. *Raines* itself leaves open the possibility that legislative institutions could establish standing in at least two different circumstances: First, in cases of vote nullification where the challengers are "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act[.]"¹⁵¹ and second, where the challengers are—unlike those in *Raines*—"authorized to represent their respective Houses of Congress[.]"¹⁵²

Individual Legislators

The idea that vote nullification can serve as a basis for individual legislators to secure standing has its origins in *Coleman v. Miller*,¹⁵³ a 1939 decision in which the Supreme Court held that 20 members of Kansas's 40-member state Senate, who were suing as a bloc, could challenge the validity of a state constitutional amendment that only passed the deadlocked state Senate because the state's Lieutenant Governor cast an allegedly invalid tie-breaking vote. In distinguishing this scenario in *Raines*, Rehnquist noted that "our holding in *Coleman* stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."¹⁵⁴

Subsequent lower court decisions have wrestled with what exactly constitutes vote nullification. Relevant cases generally arise in the D.C. Circuit, which first took on this question in its 1999 decision in *Chenoweth v. Clinton*,¹⁵⁵ wherein four members of Congress sued the Clinton administration over its decision to implement a policy program by executive order. The court distinguished the case from *Coleman* on the grounds that the *Chenoweth* plaintiffs "d[id] not allege that the necessary majorities in Congress voted to block [the program]" and thus "c[ould not] claim their

¹⁵⁰ *Id.* at 819–20.

¹⁵¹ *Id.* at 823.

¹⁵² *Id.* at 829–30, 829 n.10 (internal citations omitted).

¹⁵³ 307 U.S. 433 (1939).

¹⁵⁴ *Raines*, 521 U.S. at 823 (internal citation omitted).

¹⁵⁵ *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999).

votes were effectively nullified by the machinations of the Executive.”¹⁵⁶ The next year, in *Campbell v. Clinton*,¹⁵⁷ the D.C. Circuit faced a similar scenario in which several members of Congress sued President Clinton on the grounds that he had initiated military operations in the former Yugoslavia without seeking congressional authorization. While the House of Representatives had defeated a resolution authorizing the intervention on a tie vote, among other measures, the court nonetheless distinguished this scenario from *Coleman* on the grounds that the *Campbell* plaintiffs did not represent a voting bloc sufficient to authorize or prohibit such military operations. The D.C. Circuit has since repeatedly reaffirmed this view, including in the aforementioned Emoluments Clause case *Blumenthal v. Trump*,¹⁵⁸ concluding that the *Coleman* exception applies only in the narrow circumstance where the plaintiffs can reasonably claim that they would have had the votes necessary to trigger a different policy outcome than the one being pursued, if those votes were given the effect required by law.

But as narrow as these circumstances may be, there are still scenarios where vote nullification might still support lawsuits by groups of legislators. For example, as the Constitution requires that two-thirds of the Senate provide its advice and consent for any treaty,¹⁵⁹ 34 senators—one-third of the whole chamber plus one—might have standing to challenge efforts to enter a treaty without the Senate’s advice and consent, even though they would not necessarily have the majority of votes needed to authorize litigation on the Senate’s behalf as an institution. Similarly, even if a majority of legislators in a chamber agree on the need to pursue litigation to vindicate a certain shared institutional interest, certain super-majoritarian rules, such as the Senate filibuster, may prevent them from voting to authorize litigation on these bodies’ behalf. In these scenarios, *Coleman* may still provide an avenue for that majority to establish standing for purposes of litigation to vindicate their shared institutional interests.

Notably, *Raines* also does not necessarily mean that legislators lack standing to enforce legal rights provided to them in their individual official capacities by Congress. The D.C. Circuit made this much clear in the recent matter of *Maloney v. Murphy*, wherein a group of eight members of the House of Representatives sued to secure certain information from the General Services Administration that they had requested pursuant to a statutory provision empowering them to make that request in lieu of the entire Committee on Government Operations of which they were a part. A district court initially dismissed for lack of standing under *Raines*. But a panel of the D.C. Circuit reversed, holding 2-1 that Congress could assign legal rights to its individual members (or

¹⁵⁶ *Id.* at 117.

¹⁵⁷ *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000).

¹⁵⁸ *Blumenthal v. Trump*, 949 F.3d 14, 20 (D.C. Cir. 2020).

¹⁵⁹ See U.S. Const., art. I, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provide two thirds of the Senators present concur[.]”).

groups thereof) and that withholding information to which such members are entitled constitutes an injury in fact under the Supreme Court's precedents on informational injury.¹⁶⁰

Regardless, vote nullification scenarios are understandably rare. In most cases, the threshold for vote nullification in each chamber or committee is a majority of its members. If these conditions exist, then the same members of Congress are likely to find it easier to formally authorize litigation on the chamber or committee's behalf, shifting the standing analysis to *Raines*' second exception.

Congressional Institutions

Congressional institutions—a category that includes Congress as a whole in addition to the House and Senate, plus whatever committees and internal institutions they may establish and empower to act on their behalf—engage in civil litigation relatively rarely. Yet *Raines* itself suggests that each possesses institutional interests that might be able to provide them the standing necessary to do so in the correct circumstances. The factors that Rehnquist analyzed in *Raines*—including a lack of historical practice and the availability of alternate political remedies—weigh against the availability of standing in certain circumstances, particularly where the congressional litigants are challenging the actions of the executive branch. But recent case law suggests that this barrier is far from absolute.

The most common scenario in which congressional institutions have pursued litigation has been to enforce congressional subpoenas.

The most common scenario in which congressional institutions have pursued litigation has been to enforce congressional subpoenas. The Supreme Court confirmed that both the House and Senate have standing to enforce subpoenas through other mechanisms over the course of the 20th century,¹⁶¹ but did not address whether it could do so through civil litigation. Lower federal courts held that committees in both the House and Senate had such standing so long as their efforts were duly authorized by their chambers. The D.C. Circuit had even upheld such efforts when they targeted or were opposed by the executive branch through the 1970s.¹⁶² But language in *Raines*

160 See *Cummings v. Murphy*, 321 F.Supp.3d 92 (D.D.C. 2018), *rev'd sub nom. Maloney v. Murphy*, 984 F.3d 50 (D.C. Cir. 2020).

161 See *Watkins v. United States*, 354 U.S. 178 (1957) (relating to criminal contempt); *Quinn v. United States*, 349 U.S. 155 (1955) (same); *McGrain v. Daugherty*, 273 U.S. 135 (1927) (relating to each chamber's inherent contempt authority).

162 See *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. AT&T Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (*en banc*); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013).

and other subsequent cases suggesting a higher bar in separation of powers cases left open the question of whether this same conclusion would apply in lawsuits against the executive branch.

This issue did not squarely present itself to the D.C. Circuit until 2020 in the matter of *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*,¹⁶³ which addressed a House committee's effort to enforce a subpoena for testimony against a former White House Counsel over the objections of the Trump administration. An initial D.C. Circuit panel relied on *Raines* to reverse the district court and held that no congressional committee has standing to enforce a subpoena against the executive branch through litigation.¹⁶⁴ But upon rehearing the matter, a 7-2 majority of the *en banc* D.C. Circuit rejected the proposition that the separation of powers imposes any "structural barrier to judicial involvement in informational disputes between the elected branches."¹⁶⁵

As support, the *en banc* D.C. Circuit liberally cited the Supreme Court's recent decision in *Trump v. Mazars*,¹⁶⁶ which had come down since the initial panel decision. In *Mazars*, the Court held that separation of powers concerns did not bar Congress from enforcing a subpoena against a private party for the president's personal records, though it did require judicial scrutiny of the need behind the request, its scope, the validity of the legislative purpose behind it, and the burdens it imposes on the president. Following this logic, the *en banc* D.C. Circuit acknowledged that the courts have "a duty of care" not to interfere with the negotiated accommodation process through which the political branches usually resolved such conflicts but argued that categorically refusing to enforce such subpoenas by finding that the committee lacked standing would itself "upset settled expectations and dramatically alter bargaining positions in the accommodation process." Moreover, judicial enforcement might be needed where "an impasse contrary to traditional norms"—which the Court identified in the Trump administration's categorical refusal to cooperate with any aspect of the House's impeachment investigation, including the subpoena—threatened "a rare breakdown in the accommodation process itself."¹⁶⁷ Hence, while courts might reasonably resist making litigation a quick and easy remedy, it was ultimately available for Congress to enforce its subpoenas.

The executive branch chose not to appeal this issue further. Instead, on remand, it persuaded the original panel to dismiss once again on separate grounds, leading the plaintiffs to successfully

163 415 F.Supp.3d 148 (D.D.C. 2019).

164 *Comm. On the Judiciary of the U.S. House of Representatives v. McGahn*, 951 F.3d 510 (D.C. Cir. 2020).

165 *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 769–772 (D.C. Cir. 2020) (*en banc*).

166 *Trump v. Mazars U.S., LLP*, 140 S. Ct. 2019 (2020).

167 *McGahn*, 968 F.3d at 769–772.

petition the *en banc* court for another rehearing.¹⁶⁸ But before the *en banc* court could issue a second opinion, the newly elected Biden administration—which now controlled the Justice Department that had been representing McGahn and did not categorically object to his testimony—began settlement negotiations with the committee. The two sides ultimately agreed that McGahn would provide limited testimony in exchange for an agreement to end the litigation.¹⁶⁹ As part of this arrangement, the two sides agreed to end the litigation and asked the *en banc* D.C. Circuit to vacate the panel opinion it had agreed to review. Doing so, however, left the prior *en banc* McGahn decision in place as circuit court precedent, confirming that Congress has standing to enforce subpoenas (at least in the D.C. Circuit).

Fewer cases have addressed the extent to which Congress has standing to vindicate institutional interests beyond subpoena enforcement. The closest the Supreme Court has arguably come in recent years is its 2015 decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, wherein the Supreme Court held that Arizona’s state legislature as a whole had standing to challenge the constitutionality of a statewide referendum transferring authority over congressional districting to an independent commission, on the logic that such a measure would nullify the state legislature’s voting authority in a manner similar to the plaintiffs in *Coleman*.¹⁷⁰ That said, in 2019, the Supreme Court seemed to reach the opposite conclusion in *Virginia House of Delegates v. Bethune-Hill*,¹⁷¹ which denied Virginia’s House of Delegates—one of two chambers in Virginia’s bicameral state legislature—standing to appeal a judicial ruling that invalidated electoral districts established by state law. The Court distinguished *Arizona State Legislature* on the grounds that the plaintiff there was the whole legislature responsible for redistricting, while in *Virginia House of Delegates* the plaintiff was just one chamber of the two-chamber legislature that held that responsibility.¹⁷² Following the logic in *Coleman*, the key consideration was whether the institution suing was the one whose vote had been effectively nullified.

168 *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020), *reh’g en banc granted, judgment vacated* (Oct. 15, 2020).

169 See Joint Motion to Postpone Oral Argument, *Comm. on the Judiciary of the U.S. House of Representatives*, 973 F.3d 121 (D.C. Cir. 2020) (No. 19-5331), <https://claimsissues.typepad.com/files/mcgahn-agreement-2021-05-12-in-house-committee-on-judiciary-v.-mcgahn-d.c.-cir.-appeal-1.pdf>. For critical takes on the committee’s decision to enter into this agreement, see Michael Stern, *House Judiciary’s Terrible, Horrible, No Good, Very Bad McGahn Deal*, Point of Order (June 6, 2021), <https://www.pointoforder.com/2021/06/06/house-judiciarys-terrible-horrible-no-good-very-bad-mcgahn-deal/>; Jonathan Shaub, *Why the McGahn Agreement is a Devastating Loss for Congress*, Lawfare (May 19, 2021), <https://www.lawfareblog.com/why-mcgahn-agreement-devastating-loss-congress>.

170 See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2663–65 (2015).

171 *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

172 See *id.* at 1953.

The Supreme Court was careful to throw cold water on the idea that the same conclusion would necessarily apply to Congress, due to the “especially rigorous” scrutiny applied to separation of powers situations under *Raines*.¹⁷³ But lower courts that have considered the issue in the context of Congress have applied a similar logic, rooted in *Coleman*-style vote nullification at an institutional level.

The first such case was 2015’s *Burwell v. U.S. House of Representatives*,¹⁷⁴ wherein the House challenged the Obama administration’s interpretation and application of the Affordable Care Act on both statutory grounds and as a violation of the Appropriations Clause. The district court held that the House had standing to challenge alleged violations of the Appropriations Clause, but not where they were only alleged to be inconsistent with relevant statutes, as the latter presented a generalized grievance while the former did not. “Congress (of which the House and Senate are equal) is the only body empowered by the Constitution to adopt laws directing monies to be spent from the U.S. Treasury[.]” the district court noted. “Yet this constitutional structure would collapse, and the role of the House would be meaningless, if the Executive could circumvent the appropriations process and spend funds however it pleases.”¹⁷⁵

Burwell, however, was settled prior to appellate review. As a result, when the same basic question re-emerged several years later in *U.S. House of Representatives v. Mnuchin*, which addressed the Trump administration’s efforts to pay for the construction of a border wall over restrictions in relevant appropriations legislation, a different judge on the same district court reached the opposite conclusion and denied that Congress had any such standing under *Raines*, given the separation of powers concerns the case inevitably raised.¹⁷⁶

The D.C. Circuit did not weigh in until September 2020, after waiting for the results of the first *en banc* rehearing in *McGahn*.¹⁷⁷ In a unanimous opinion, the *Mnuchin* panel largely aligned itself with the approach in *Burwell*, seeing it as a natural outgrowth of the *en banc* D.C. Circuit’s *McGahn* holding. “The alleged Executive Branch action cuts the House out of the appropriations process,” the panel wrote, “rendering for naught its vote withholding the Executive’s desired border wall funding[.]” Key to the court’s reasoning was the fact that the Appropriation Clause is structured as

173 *Ariz. State Legislature*, 1353 S. Ct. at 2665 n.12.

174 *Burwell v. U.S. House of Representatives*, 130 F. Supp. 3d 53, 71 (2015).

175 *Id.* at 71.

176 *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8 (2019).

177 The D.C. Circuit panel originally recommended that *Mnuchin* be considered *en banc* alongside *McGahn*. The *en banc* court accepted and held oral arguments in *Mnuchin* alongside *McGahn*, but ultimately only issued an opinion in the latter. The former it remanded back to the original panel for further consideration in light of the *en banc* decision in *McGahn*. See *U.S. House of Representatives v. Mnuchin*, 969 F.3d 353 (D.C. Cir. 2020) (per curiam).

a prohibition—“[n]o Money shall be drawn from the Treasury”—absent authorization by Congress, effectively giving each chamber a veto. The court contrasts this with other constitutional authorities that require both chambers to operationalize, like “the affirmative power to pass legislation.”¹⁷⁸ This is why, it held, Appropriations Clause violations “‘zer[o] in’ on the House[,]” not just Congress as a whole, and provide it standing.¹⁷⁹ But as in *Burwell*, the panel declined to extend this standing to the various statutory violations alleged by the House, noting that Congress “does not have standing to litigate a claim that the President has exceeded his statutory authority” as such a claim “is a generalized grievance and not particular to the body (or part of the body) that passed the law.”¹⁸⁰

The *en banc* D.C. Circuit subsequently denied a motion to reconsider the panel’s opinion.¹⁸¹ But on entering office, the Biden administration changed the executive branch’s policy and ceased the alleged violation of the Appropriations Clause, leading both the House and the Justice Department to agree that the case was moot. The Justice Department then petitioned the Supreme Court for a writ of certiorari to vacate the D.C. Circuit’s opinion, which the Court granted over the House’s objection in October 2021.¹⁸²

Where exactly this leaves congressional standing is not entirely clear. The *en banc* D.C. Circuit opinion in *McGahn* certainly establishes that each House of Congress has standing to sue to enforce subpoenas, including against the executive branch. The separation of powers is not an absolute barrier to congressional standing in such cases, though it may require that the information being sought be limited in scope and for certain specific purposes. The vacated panel opinion in *Mnuchin*, meanwhile, strongly suggests that at least the current D.C. Circuit sees both Congress as a whole and the House and Senate as having standing to litigate Appropriations Clause violations by the executive branch. At the same time, *Mnuchin* rejects the idea that a single chamber can sue for simple statutory violations or for constitutional violations that, unlike the Appropriations Clause, require both chambers to operationalize; instead, only Congress as a whole can do that. It also reiterates earlier D.C. Circuit guidance suggesting that Congress as a whole lacks standing to challenge simple statutory violations, on the logic that this is too generalized a grievance.¹⁸³

178 *United States House of Representatives v. Mnuchin*, 976 F.3d 1, 14 (D.C. Cir. 2020).

179 *Id.* at 13 (quoting *Ariz. State Legislature*, 576 U.S. at 802).

180 *Id.* at 15.

181 *See id.* at 1 (“Rehearing *En Banc* Denied January 13, 2021”).

182 *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332 (2021) (granting petition for a writ of certiorari, vacating, and remanding with instructions to dismiss as moot).

183 For a well-developed academic account of this position, see Bradford C. Mank, *Does a House of Congress Have Standing Over Appropriations?: The House of Representatives Challenges the Affordable Care Act*, 19 U. Pa. J. Constl. L. 141 (Oct. 2016). The distinction between statutory and constitutional violations, however, may not withstand substantial scrutiny. After all, why is Congress’ interest in ensuring that the executive branch does not nullify its legislative authority more generalized than the House or Senate’s interest in ensuring the executive branch does not abrogate their Appropriations Clause authority? It is difficult to draw a clean distinction, at least where the executive branch’s actions are beyond the scope of whatever interpretive discretion the president may be entitled to exercise under the Take Care Clause.

Together, these factors point to a limited but potentially significant role for Congress as a potential litigant in addressing certain legal issues that private plaintiffs may not have the standing to address. At a minimum, congressional institutions seems well positioned to address structural concerns relating to their authority that might otherwise be beyond other litigants' reach. Most notably, under the logic of *Mnuchin*, both the House and the Senate would have had standing to pursue the failed structural challenge in *Blumenthal v. Trump*, as the Foreign Emoluments Clause has the same negative structure as the Appropriations Clause. Congress as a whole, meanwhile, may be able to sue to vindicate certain other constitutional authorities against infringement by the executive branch or other actors. And while Congress most likely does not have standing to sue over simple statutory violations, it may be able to facilitate judicial enforcement—at the initiation of the House or Senate, no less—by tying statutory requirements to appropriations restrictions, thereby implicating the Appropriations Clause that, under *Mnuchin's* logic, gives each chamber

a specific and individualized interest in ensuring it is duly respected instead of just Congress as a whole. If done properly, this might allow Congress or the House and Senate to play a more active role in enforcing legislative requirements that are difficult for private litigants to enforce, such as those relating to corruption. And while congressional standing is not certain in these circumstances, the credible threat of such litigation may itself serve as a deterrent.

At a minimum, congressional institutions seems well positioned to address structural concerns relating to their authority that might otherwise be beyond other litigants' reach.

In all these cases, the key requirement is that any litigation be authorized by the congressional institution whose authority is purportedly being nullified. This will normally be one of the two chambers or Congress as a whole, depending on how the constitutional authority at issue is structured. The clearest way to provide such authorization is no doubt to vote on a case-specific measure specifically authorizing such litigation. But doing so may well prove politically and procedurally cumbersome in many cases. For this reason, either Congress as a whole or the House or Senate might choose to delegate this authority to initiate litigation on their behalf to some subordinate body through statute or their internal rules.¹⁸⁴

184 See *United States v. AT&T Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) (“[T]he House as a whole has standing to assert its investigatory power, and can designate a member to act on its own behalf.”).

Some have expressed concerns that such general delegations may not be as effective as case-specific authorization.¹⁸⁵ But Congress has long done this for the Senate through statute¹⁸⁶ and the House has employed rules authorizing its Bipartisan Legal Advisory Group (BLAG) to initiate litigation on its behalf for a number of years.¹⁸⁷ The BLAG in particular has repeatedly authorized high-profile legal action on behalf of the House, none of which has been viewed as inadequately authorized to date.¹⁸⁸ Hence, such delegation seems like a viable means by which Congress could position itself to more routinely assert Congress' legal interests through litigation, including in cases where private plaintiffs are unlikely to have standing.

As with state legislation, the most significant constraint on such efforts is likely to be political. Setting up Congress-wide mechanisms will require broad support across the House and Senate, while mechanisms for each individual chamber will nonetheless require a strong hand by majority leadership there. Perhaps more importantly, whichever party establishes these mechanisms would have to accept the consequences when the other party inherits them and wields them with a different agenda in mind. Super majoritarian voting thresholds within any BLAG-type body may help limit this risk but could also make it less efficient. Congressional leaders, meanwhile, may resist delegating away the authority to make litigation decisions to any nominally independent body. For these reasons, Congress' role as a litigant seems likely to remain limited.

Setting up Congress-wide mechanisms will require broad support across the House and Senate, while mechanisms for each individual chamber will nonetheless require a strong hand by majority leadership there.

185 See Wilson C. Freeman & Kevin M. Lewis, *Congressional Participation in Litigation: Article III and Legislative Standing*, Congressional Research Service No. R43636 (Oct. 29, 2019) at 24–27 (citing *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002) (concluding that the “generalized allocation of enforcement power” does not suffice to establish “that the current Congress ha[d] authorized” a designee “to pursue a judicial resolution of the specific issues” under consideration) (emphasis added)).

186 See 2 U.S.C. § 288b(a) (“The Counsel shall defend the Senate or a committee, subcommittee, Member, officer, or employee of the Senate...when directed to do so by two-thirds of the Members of the Joint Leadership Group or by the adoption of a resolution by the Senate.”) (emphasis added); see also *id.* § 288a (establishing the Senate’s Joint Leadership Group).

187 See H. Res. 5, 114th Cong. § 2(b) (2015) (amending House Rule II(8)(B) to read in part: “Unless otherwise provided by the House, the Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters.”).

188 See, e.g., *United States v. Windsor*, 570 U.S. 744, 807 (2013) (Alito, J., dissenting) (“[I]n the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.”). For a detailed analysis supporting the BLAG’s authority to pursue litigation on the House’s behalf, see Ben Miller-Gootnick, *How the House Sues*, 2021 Univ. of Ill. L. Rev. 607 (2021).

At a minimum, litigation remains a possibility for exceptional circumstances and may find broader and more frequent application where institutional interests rival partisan interests. In those cases, Congress and its component parts may provide a means of vindicating important legal interests through the federal courts, in a manner not possible for other potential plaintiffs

B. Expanding Standing by Statute

Of course, serving as a plaintiff isn't the only way that Congress can exercise influence over standing. By virtue of its constitutional role in creating and defining the jurisdiction of the federal courts, Congress is in a unique position to push the constraints imposed by standing doctrine to their constitutional limits, which may differ substantially from the standards that the federal courts apply absent such action by Congress. *Lujan* acknowledges that Congress can enact procedural rights that provide plaintiffs with standing "without meeting all the normal standards for redressability and immediacy[.]"¹⁸⁹ Subsequent case law suggests that Congress may also be able to help define when and where a plaintiff has an injury in fact, at least in certain circumstances.

By virtue of its constitutional role in creating and defining the jurisdiction of the federal courts, Congress is in a unique position to push the constraints imposed by standing doctrine to their constitutional limits, which may differ substantially from the standards that the federal courts apply absent such action by Congress.

This section identifies two ways Congress can take such a step. First, Congress can assign a portion of the United States' own injury in fact to private plaintiffs, allowing them to proceed in its stead through what are called *qui tam* actions. Second, Congress has some ability to elevate certain types of harms to the level of an injury in fact through legislation, even if they would not normally qualify. The Supreme Court has not yet fully developed either authority, leaving their potential scope of application unclear. But each could play a central role in making standing

available to a broader range of potential plaintiffs than is currently the case, if Congress were to determine that doing so is consistent with the public interest.

189 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992).

1. Authorizing *Qui Tam* Actions

On occasion, instead of relying on the executive branch to enforce federal laws that it enacts, Congress has chosen to delegate that authority to a private plaintiff in exchange for a financial reward. This sort of arrangement, known as *qui tam*,¹⁹⁰ is relatively rare today but saw much broader application in earlier periods of American history. Based on this historical practice, the Supreme Court has held that at least some *qui tam* arrangements are consistent with Article III standing requirements, despite its clear tension with the usual requirement of an injury in fact specific to the plaintiff.

Today, *qui tam* actions are primarily associated with the False Claims Act,¹⁹¹ which authorizes private persons to bring civil actions on behalf of the federal government against third parties who they believe have defrauded it. The federal government may then elect whether to represent itself in the civil claim or to allow the private person who brought the claim on the United States' behalf (known as the "relator") to do so. If the lawsuit is successful, then the relator is entitled to a portion of the recovered funds. Each year, hundreds of relators bring claims under the False Claims Act, which result in billions of dollars of recovery by the United States and hundreds of millions of dollars in awards to the relators in question.¹⁹²

While other *qui tam* provisions remain in federal law, most are centuries old and no longer widely used.¹⁹³ Historically, however, *qui tam* actions were employed for a wide array of purposes.¹⁹⁴ The English Parliament enacted hundreds of *qui tam* provisions from the 14th century onwards as a

190 The phrase "*qui tam*" is short for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King as well as his own." See *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000).

191 31 U.S.C. §§ 3729–33.

192 For example, the U.S. Department of Justice claims to have received 672 *qui tam* actions under the False Claims Act, recovered more than \$1.6 billion from *qui tam* claims, and awarded over \$300 million to relators in fiscal year 2020. See Civil Division, U.S. Dep't of Justice, *Fraud Statistics, October 1, 1986 – September 30, 2020*, <https://www.justice.gov/opa/press-release/file/1354316/download>.

193 See, e.g., 25 U.S.C. § 201 (relating to violations of Native American protection laws); 26 U.S.C. § 7341 (relating to the sale of taxable property without paying required taxes); 35 U.S.C. § 292(b) (relating to patent violations). Other statutory provisions provide that informers should receive some financial reward, but do not state explicitly that they may initiate litigation. See, e.g., 18 U.S.C. § 962 (mobilizing military forces against a friendly nation); 46 U.S.C. § 80103 (removing undersea treasure from Florida coastline). The Supreme Court has suggested that these provisions may implicitly authorize *qui tam* lawsuits, see *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4. (1943), but several lower courts have declined to infer such authorization where not expressly provided by Congress, see *Stalley v. Methodist Healthcare*, 517 F.3d 911, 920 (6th Cir. 2008); *United Seniors Ass'n, Inc. v. Philip Morris USA*, 500 F.3d 18, 23 (1st Cir. 2007); *Jacklovich v. Interlake, Inc.*, 458 F.2d 923, 924 (7th Cir. 1972).

194 For a detailed overview of the historical use of *qui tam*, see Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235 (2018).

means of enforcing the law alongside suits by public officials and parties who had been directly injured by unlawful conduct. This practice transferred to the United States, where it was widespread by the time the Constitution was adopted. Many of these provisions specifically related to unlawful conduct by executive branch officials. Early examples included statutes allowing private citizens to sue federal officials for failing to submit an accurate census return on time, accepting unauthorized loans on behalf of the United States, and licensing prohibited trade with Native American communities.¹⁹⁵ This use continued into the 19th century when the original False Claims Act was enacted but became less common over time, in substantial part over relators' pursuit of litigation that was seen as being in tension with the interests of the federal government.¹⁹⁶

Qui tam actions are in clear tension with modern standing doctrine's conception of injury in fact, as the relator pursuing the *qui tam* litigation is not themselves required to have suffered any harm because of the purportedly unlawful action. Nonetheless, the Supreme Court has held that *qui tam* litigation is consistent with Article III standing limitations. In a 2000 majority opinion in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,¹⁹⁷ Justice Scalia rejected the suggestion that the False Claims Act relator at issue had standing to pursue a lawsuit by virtue of the financial award he would receive if successful, on the logic that such "byproduct[s]" of a lawsuit cannot themselves give rise to standing to sue.¹⁹⁸ But looking to the long history of *qui tam* actions in England and the United States, he concluded that the False Claims Act's *qui tam* provision "can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the relator.¹⁹⁹ As a result, he concluded that the long record of historical practice left "no room for doubt that a *qui tam* relator under the [False Claims Act] has Article III standing."²⁰⁰ Presumably this same conclusion would apply to relators under other similar *qui tam* statutes as well.

The wide array of *qui tam* actions that have existed throughout American (and early English) history support the conclusion that Congress has broad discretion to make use of them within the scope of matters subject to federal regulation. Several analysts have identified *qui tam* actions as a potential vehicle for Congress to protect public goods and address structural constitutional

195 See An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 12, 1 Stat. 329, 331 (1793); An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, § 9, 1 Stat. 191, 194 (1791); An Act Providing for the Enumeration of the Inhabitants of the United States, ch. 11, § 3, 1 Stat. 101, 102 (1790).

196 For a discussion of these issues and the related decline in the use of *qui tam*, see J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539 (2000).

197 529 U.S. 765 (2000).

198 See *id.* at 773 (comparing *qui tam* payments to awards of attorneys' fees in this regard).

199 *Id.* at 773–74.

200 *Id.* at 778.

concerns,²⁰¹ as the United States has an undoubted interest in each. Indeed, many early *qui tam* provisions were specifically intended to combat corruption and police against other unlawful behavior by government officials, providing a strong historical case in support of the validity of such applications. For example, relators with knowledge that a public official has an unlawful conflict of interest—or is unlawfully accepting emoluments—could be authorized to sue over the issue and provided a portion of whatever financial penalty may ultimately be imposed. Or instead of threatening federal officials who use funds in violation of the Appropriations Clause with criminal prosecution under the Antideficiency Act,²⁰² Congress could allow relators to bring civil suits and provide them a portion of whatever financial penalty is assessed if that suit is successful.²⁰³ Congress may also be able to erect a similar scheme of allowing whistleblowers to initiate *qui tam* litigation where they become aware of noncompliance with legal requirements relating to data and privacy, providing a more decentralized means of addressing intangible harms (albeit without compensating affected consumers for them). Such actions could provide an effective legal remedy in circumstances where no private plaintiff is likely to have standing to enforce more conventional legal requirements.

A potential limitation on *qui tam* actions, however, is the extent to which they are seen as unconstitutionally infringing on the authorities that Article II of the Constitution provides to the executive branch. In an internal 1989 Justice Department memorandum, then-Assistant Attorney General of the Office of Legal Counsel (and later two-time Attorney General) William Barr articulated two grounds other than standing on which *qui tam* actions were supposedly unconstitutional: first, by authorizing individuals to exercise prosecutorial authority constitutionally vested in the executive branch without complying with the requirements of the Appointments Clause; and second, by encroaching on the president's constitutional authority under the Take Care Clause to exercise prosecutorial discretion and manage litigation on behalf of the United States.²⁰⁴ These arguments never fully carried the day within the George H.W. Bush administration's Justice Department²⁰⁵ and Barr's position on the Appointments Clause was expressly rejected in a subsequent Office of

201 See, e.g., Myrian Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 Tex. L. Rev. 489 (2020); Randy Beck & John Langford, *Reviving Qui Tam Monitoring of Executive Branch Officials*, Lawfare (Jan. 22, 2020), <https://www.lawfareblog.com/reviving-qui-tam-monitoring-executive-branch-officials>; Masha Simonova, *Using Qui Tam Statutes to Check Unconstitutional Exercises of Executive Power*, Lawfare (June 12, 2020), <https://www.lawfareblog.com/using-qui-tam-statutes-check-unconstitutional-exercises-executive-power>; Randy Beck, *Promoting Executive Accountability Through Qui Tam Legislation*, 21 Chapman L. Rev. 41 (2018).

202 31 U.S.C. § 1341.

203 See Beck, *Promoting Executive Accountability*, *supra* note 202, at 46–48 (making a similar proposal).

204 Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207, 221–24, 228–32 (1989).

205 See *id.* at 208 (noting that the Solicitor General wished to intervene to support the constitutionality of *qui tam* actions).

Legal Counsel opinion published in 1996.²⁰⁶ But they've continued to find currency among some academic commentators.

For his part, Justice Scalia expressly reserved judgment on both issues in *Vermont Agency*. But in their dissent, Justices Stevens and Souter asserted that “[the same] evidence” supporting the constitutionality of *qui tam* provisions on standing grounds, “together with the evidence that private prosecutions were commonplace in the 19th century, is also sufficient to resolve the Article II question” in reference to Appointments Clause and Take Care Clause concerns.²⁰⁷ Nor has either argument seen much success in the lower federal courts.²⁰⁸ A key factor in assuaging these constitutional concerns, however, has been the degree of control the False Claims Act gives the federal government control over *qui tam* actions, including the ability to intervene, take over the litigation, or motion for (but not compel) dismissal. *Qui tam* actions without comparable elements of federal control may be more vulnerable to challenges on these grounds.

Ironically, one signature characteristic of *qui tam* actions that is not clearly relevant to their constitutional viability is the financial stake they provide the relator in the outcome. While a nearly universal aspect of *qui tam* actions, Justice Scalia's opinion in *Vermont Agency* makes clear that the relator's financial interest in the outcome of a *qui tam* suit has no bearing on whether it complies with Article III standing requirements.²⁰⁹ Nor does the financial award factor strongly into analyses concluding that *qui tam* provisions comply with the Appointments Clause and otherwise do not violate the separation of powers. Perhaps this is why, historically, the size of the *qui tam* award was not always scaled to the public harm averted or amount recovered. On this logic, Congress might be able to enact *qui tam* provisions that provide only *de minimis* compensation—or perhaps none at all—without compromising their viability. This may help mitigate concerns that expanded *qui tam* provisions will lead to a burdensome amount of litigation or provide a financial incentive for frivolous lawsuits.²¹⁰

206 See The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 146 n.65 (1996).

207 *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 801 (2000) (Stevens, J., dissenting).

208 See *United States ex rel. Stone v. Rockwell Int'l Corp.*, 92 Fed. App'x 708, 725–28 (10th Cir. 2004), *rev'd on other grounds*, 549 U.S. 457 (2007); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753–58 (5th Cir. 2001); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 749–59 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).

209 See *Vermont Agency*, 529 U.S. at 773 (“[A]n interest that is merely a ‘byproduct’ of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes”).

210 See Elliott, *Congress's Inability to Solve Standing Problems*, *supra* note 47, at 204–205 (discussing this issue and possible solution).

That said, the factor that has weighed more heavily in favor of *qui tam* actions' constitutionality than any other is historical practice. As Justice Scalia wrote in *Vermont Agency*, "the long tradition of *qui tam* actions in England and the American Colonies" is "well nigh conclusive" with respect to the question of whether they are consistent with standing requirements.²¹¹ Lower courts have similarly leaned heavily on historical practice to uphold *qui tam* provision against other challenges.²¹² For this reason, new *qui tam* provisions that change some of the most common characteristics of past *qui tam* provisions may be at greater risk of constitutional invalidation for the simple reason that they are distinguishable from this long line of historical practice. As a result, if Congress wishes to make renewed use of *qui tam* provisions to address issues that may be difficult to reach through more conventional arrangements, it may be well advised to model them as closely as possible on historical precedents.

2. Defining Injury in Fact

Another avenue by which Congress may be able to expand access to standing is to use legislation to better define the scope of what constitutes an injury in fact. The reality is that Justice Scalia's widely cited description of injury in fact as "a hard floor . . . that cannot be removed by statute" is something of an overstatement. Scalia's own majority opinion in *Lujan* acknowledges that Congress can elevate "concrete, *de facto* injuries that were previously inadequate in law" to the status of "legally cognizable injuries[.]"²¹³ In their concurrence, Justices Kennedy and Souter—whose votes were necessary to constitute the 6-3 majority in *Lujan*—endorsed the even stronger position that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before[.]"²¹⁴ Consistent with this latter view, the Supreme Court has at times accepted that a simple statutory violation can itself be a sufficient injury in fact to provide standing—for example, in informational injury cases where a statute requires the government disclosure of information.²¹⁵ But in other cases, majorities composed of different

211 *Id.* at 774–77; see also *id.* at 788 (Ginsburg, J., concurring) ("I agree that history's pages place the *qui tam* suit safely within the 'case' or 'controversy' category.").

212 See *Riley*, 252 F.3d at 752 ("[T]he same history that was conclusive on the Article III question in [*Vermont Agency*] with respect to *qui tam* lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question concerning this statute."). But see *Boeing*, 9 F.3d at 760 n.23 (noting that the historical evidence does not appear to rise to the level of an "unambiguous and unbroken history" on either side and declining to consider historical arguments).

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

214 *Id.* at 580 (Kennedy, J., concurring).

215 See, e.g., *FEC v. Akins*, 524 U.S. 11, 21 (1998) (finding injury in fact on the basis of the plaintiffs' "inability to obtain information . . . that, on [their] view of the law, the statute requires [be made] public"); *Public Citizen v. Department of Justice*, 49 U.S. 440, 449 (1989) (holding that the inability to secure information whose release is required by statute "constitutes a sufficiently distinct injury to provide standing to sue"); *Havens Realty v. Coleman*, 455 U.S. 363 (1982) ("[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." (citations and quotations omitted)).

justices on the Supreme Court have seemed to embrace a view much more in line with Scalia's "hard floor," refusing to allow that a statute can create an injury in fact where one does not already exist.²¹⁶ The result has been a great deal of confusion regarding when a statutory right created by Congress can provide a plaintiff with standing.

The Supreme Court took on this apparent discrepancy in its aforementioned 2016 decision in *Spokeo v. Robins*,²¹⁷ which addressed a lawsuit against the operators of an online "people search engine" for containing inaccurate information about the plaintiff in violation of the FCRA. The 7-2 majority opinion, authored by Justice Alito, held that the appellate court had erred in allowing the lawsuit to proceed strictly on the basis of the statutory violation without independently considering whether the plaintiff had suffered an injury in fact that was duly "concrete" as required by *Lujan*.²¹⁸ But in doing so, it acknowledged an "important rol[e]" for "the judgment of Congress, as "Congress is well positioned to identify intangible harms that meet minimum Article III requirements" and can "elevat[e] [them] to the status of legally cognizable injuries" through legislation.²¹⁹ In other words, plaintiffs like those in *Spokeo*, who Congress clearly intends to benefit from a particular statutory remedy, still need to plead some injury in fact. But it can be substantially less certain and more speculative than might otherwise be required, so long as it is the type of harm that Congress intended to protect against when it enacted the statute. This seemed to make congressional judgment equally as "instructive and important" as the other factor the majority opinion noted, namely, "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."²²⁰

The dissent by Justices Ginsburg and Sotomayor accepted this general framework but maintained that the plaintiff had, in fact, already satisfied this requirement by claiming that the inaccurate information that the defendant had posted and left uncorrected might harm his future job prospects.²²¹ The 9th Circuit reached more or less the same conclusion on remand and the Supreme Court declined further review, suggesting that those justices in the *Spokeo* majority were satisfied that this risk was sufficient to constitute the injury in fact that had previously been overlooked.²²²

216 See, e.g., *Raines v. Byrd*, 521 U.S. 811, 820 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing").

217 136 S. Ct. 1540 (2016).

218 See *Spokeo II*, 136 S. Ct. at 1547–50.

219 *Id.* (quoting *Lujan*, 504 U.S. at 578).

220 *Id.* at 1549.

221 See *id.* at 1554–56 (Ginsburg, J., dissenting).

222 See *Spokeo III*, 867 F.3d 1108 (9th Cir. 2017), *cert. denied*, 867 F.3d 1108 (2018).

Then the Supreme Court added another wrinkle through its 2021 decision in *TransUnion v. Ramirez*.²²³ As discussed above, the 5-4 majority, led by Justice Kavanaugh, held that members of a class action lacked standing because the defendant's decision to leave inaccurate information in their credit files, while in violation of the FCRA, did not in fact inflict an injury in fact on them, as that inaccurate information was never shared with any third parties. In reaching this conclusion, the Court re-read *Spokeo* as holding that, even where Congress has clearly provided for relief in a statute, standing doctrine's concreteness requirement demands that the plaintiff suffer not just a statutory violation, but a harm that has "a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."²²⁴ This includes both "tangible harms" like physical injury or monetary damages as well as some "intangible harms" such as reputational harm, the disclosure of private information, intrusion upon seclusion, and infringement upon various constitutional rights.²²⁵ A substantial risk of injury might be adequate for a plaintiff seeking injunctive relief to eliminate that risk but could not alone provide standing for a claim for damages as the *TransUnion* plaintiffs were pursuing.

In short, instead of being able to elevate any individualized interest to a cognizable injury in fact, Congress may only do so for injuries that have an adequate analogue in historical practice. Of course, it's up to the federal courts to determine what types of historical parallels are sufficient, and the *TransUnion* majority does not provide them with any clear metric or analytical framework for doing so.²²⁶

TransUnion's apparent narrowing of the congressional authority suggested in *Spokeo* sparked a strong dissent by Justice Thomas, who was joined by the court's three remaining liberal justices. Further developing a theory he had initially put forward in his concurrence in *Spokeo*, Thomas argued that the violation of statutory rights was historically a sufficient basis for establishing standing, so long as they were held by an individual and not the public at large.²²⁷ In a brief supplemental dissent, Justice Kagan, who was joined by Justices Breyer and Sotomayor, declined to go quite so far and asserted that some independent injury in fact was necessary, but that the federal courts should give deference to Congress' judgment as to what constitutes an injury in fact—a standard that, in their view, should "lead to the same result" as Thomas' approach "in all

²²³ 141 S. Ct. 2190 (2021).

²²⁴ *Id.* at 2204 (quoting *Spokeo*, 136 S. Ct. at 1549).

²²⁵ *Id.*

²²⁶ See *supra* Part II.C.

²²⁷ See *TransUnion*, 141 S. Ct. at 2214 (Thomas, J., dissenting); *Spokeo*, 136 S. Ct. at 1550 (Thomas, J., concurring). Several academics have endorsed Thomas's approach. See Beske, *supra* note 121; William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197 (2017).

but highly unusual cases.”²²⁸ Both dissents stood for the proposition that the majority opinion, in Kagan’s words, “transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement.”²²⁹ And Thomas specifically expressed concern that identifying which types of intangible harms are, or are not, sufficiently concrete for standing purposes was an “inescapably value-laden inquiry” that could only “devolv[e] into [pure] policy judgment.”²³⁰

Where exactly *Spokeo* and *TransUnion* leave the line between what is and is not within the control of Congress is unclear. But even the majority in *TransUnion* concedes that the courts “must afford due respect to Congress’s decision to impose a statutory prohibition or obligation” and once again reiterates that Congress can “elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.”²³¹ In this view, the injury in fact requirement operates as more of a soft floor for Congress, providing a baseline threshold that Congress has at least some authority to adjust through statute down to what is, in fact, its actual constitutional minimum.

This minimum remains the subject of a heated debate between closely split factions of the Supreme Court, with four current justices favoring deference to Congress and five seeing a higher threshold heavily informed by the federal courts’ understanding of historical practice and analogies therefrom. But under either view, there are steps Congress can take that may well expand plaintiffs’ access to standing beyond what it would be without congressional action. As the history behind *Spokeo* and *TransUnion* suggests, this approach could prove integral in better addressing intangible harms. Congress may be able to use this same authority to give certain categories of private plaintiffs standing to sue to protect public goods and address difficult to reach structural concerns as well, effectively recognizing and elevating the specific manner in which those plaintiffs are harmed over more generalized grievances.

The conventional way Congress has done this has been to give the class of potential plaintiffs a cause of action, as it did through the FCRA at issue in *Spokeo* and *TransUnion*. But this often leaves it to the federal courts to infer the underlying harms Congress is seeking to remedy. A more effective approach may be for Congress to pair a cause of action with congressional findings and other statutory language that is more explicit in identifying who it expects to be eligible under a given statutory cause of action and the types of harms to those persons that the statute is intended to remedy, at least in a representative or non-exhaustive manner. Where possible, Congress may also wish to draw historical parallels between those harms and the types of harms for which

228 *TransUnion*, 141 S. Ct. at 2226 (Kagan, J., dissenting).

229 *Id.* at 2225.

230 *Id.* at 2224 (quoting *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1129 (11th Cir. 2021) (Newsom, J., concurring)).

231 *TransUnion*, 141 S. Ct. at 2204–05.

judicial remedies have traditionally been available, illustrating the link to historical practice that the *TransUnion* majority demands. And where the cause of action is to provide damages as opposed to injunctive relief, Congress may wish to make clear that it is acting to address harms that have already been incurred—such as emotional harms or the costs associated with mitigating the risk of harms—in addition to the risk of potential future harm itself. In the case of the FCRA violation at issue in *TransUnion*, Kavanaugh himself suggests that the disqualified plaintiffs might have had more success if they had tied their injury in fact to the “current emotional or psychological harm” they suffered upon discovering *TransUnion*’s error and analogized to “the tort of intentional infliction of emotional distress.”²³² Congress could in turn strengthen such arguments by incorporating such logic and intent into the statutes themselves through legislative findings and statements of purpose.

These findings would not necessarily be determinative, as the federal courts would still ultimately be responsible for determining whether this harm was consistent with Article III requirements.²³³ But explicitly enacting such provisions—and especially if they were considered and enacted into law as part of the statutory language itself, instead of simply being incorporated into the legislative record—would put Congress’ institutional weight squarely behind the proposition that the plaintiffs identified have suffered harm that should be adequate to establish an injury in fact for standing purposes. The four justices who dissented in *TransUnion* clearly believe that Congress’ position in this regard is entitled to substantial deference. It might also carry enough weight with those justices in the *TransUnion* majority to persuade at least one to defer, given their acknowledgment of the need to respect Congress’ ability to craft such remedies.

C. Highlighting Internal Tensions

Of course, each of the above approaches hinges on political institutions that are outside the control of most private individuals. Unless and until these institutions act, private litigants and the legal counsel who represent them will be the ones primarily responsible for engaging the federal courts on how they should interpret and apply standing doctrine, with assistance from legal scholars, policy advocates, and others whose views often inform legal debates. In the context of litigation, the best approach will inevitably depend heavily on the relevant facts in that specific case and where they fall on standing doctrine’s complicated terrain. Moreover, an individual plaintiff’s

232 *TransUnion*, 141 S. Ct. at 2211 n.7 (articulating this possibility without taking a position on whether it would be sufficient).

233 See Elliott, *Congress’s Inability to Solve Standing Problems*, *supra* note 47, at 180–194 (identifying continued the judiciary’s final decisionmaking authority a substantial limit on the effectiveness of this approach).

interests may not align with those of potential plaintiffs writ large. For these reasons, providing generalized advice on how these actors should approach standing doctrine is a difficult task.

That said, there are certain themes in what has appeared to resonate with federal courts when they have proven willing to critically consider prevailing standing requirements, several of which are already evident in the analysis pursued above. Each reflects a tension between certain principles that standing doctrine is purportedly intended to serve and the way it currently operates. Highlighting these tensions has already led at least some federal courts to adjust tack. Continuing to push the federal courts on these internal tensions may in turn lead judges to adopt decisions that cabin some of the more problematic consequences that often accompany modern standing doctrine.

The first such tension is between modern standing doctrine and the federal courts' own historical practice. Standing doctrine purports to constrain the jurisdiction of the federal courts to the types of matters that were understood to be a "case" or "controversy" by the authors of Article III of the Constitution. Yet many of the limitations that modern standing doctrine has come to impose would exclude claims that were widely accepted by American and English courts around the time of the Constitution, including *qui tam* actions and those for nominal damages.

These inconsistencies haven't led to the widespread reevaluation of standing requirements that some scholars have urged. But evidence of consistent historical practice still weighs heavily in support of assertions that a given party has standing, even where that conclusion seems inconsistent with the logic of modern standing doctrine. The Supreme Court's acceptance of *qui tam* actions and nominal damages are perhaps the clearest examples,²³⁴ but they are not the only ones. Historical practice also weighs heavily in standing analyses under *Raines v. Byrd*²³⁵ and *TransUnion v. Ramirez*,²³⁶ among other relevant precedents. Of course, assembling historical evidence is not the type of task that litigators are necessarily well positioned to undertake, meaning that law professors, historians, and other academics may need to step in and help to identify historical practice that is relevant to contemporary types of claims. But the more litigants can produce evidence of early historical practices that match or are close analogies to their claims, the easier time they are likely to have establishing standing.

234 See *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021) (nominal damages); *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) (*qui tam* actions).

235 521 U.S. 811, 829 (1997) ("[Plaintiffs'] attempt to litigate this dispute at this time and in this form is contrary to historical experience.").

236 141 S. Ct. 2190, 2204 (2021) ("[H]istory and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.") (internal citations and quotations omitted).

The second tension is between modern standing doctrine and principles of democratic governance, particularly as they relate to Congress. Proponents of standing doctrine often argue that it protects the political branches from judicial encroachment by ensuring that broad questions of public policy are resolved through the political process, not the courts. In practice, however, modern standing doctrine places judicially crafted limits on Congress' ability to craft legislative solutions to contemporary public policy problems. *TransUnion v. Ramirez* is the clearest recent example, as it expressly limits Congress' ability to craft statutory remedies to harms that the federal courts believe have an adequately "close historical or common-law analogue," without giving guidance on what that means in practice.²³⁷

In practice, however, modern standing doctrine places judicially crafted limits on Congress' ability to craft legislative solutions to contemporary public policy problems.

Yet defying Congress is often easier said than done. The Supreme Court has repeatedly noted that it is appropriate to defer to the judgment of Congress in evaluating various standing requirements, including in *Lujan* itself. The *TransUnion* majority makes a similar concession, while the four justices in dissent support more fulsome deference to Congress. For these reasons, strong evidence of congressional intent may still prove influential in standing determinations. Litigants may be able to strengthen their case by presenting evidence that Congress intended to make the type of claim they are advancing legally available to parties like the litigant. Better yet would be if the same legislative intent also tied the statutory cause of action to a specific type of harm that Congress believes individuals like the litigant are experiencing and needs judicial resolution. In either case, the objective is to place the full weight of Congress' judgment and relevant constitutional authority squarely in the corner of a finding of standing.

The final tension is between modern standing doctrine and what the Supreme Court has often described as the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."²³⁸ This quote is often used as an affirmation of the importance of neutrality in applying the law, as it confirms that federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."²³⁹ But it's a vision that is difficult to reconcile with the widespread perception that federal judges use standing doctrine to limit what claims they hear in ways that are at best inconsistent and at worst ideologically motivated.

237 See *supra* Part III.B.2.

238 *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 (1976).

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

The Supreme Court has frequently cited this obligation to push back on litigants and lower courts who have sought to use flexible legal doctrines to exclude cases from consideration by the federal courts in other contexts. The most notable recent example is the Supreme Court's 2014 decision in *Lexmark International v. Static Control Components*,²⁴⁰ wherein a unanimous Court substantially narrowed the legal doctrine of prudential standing, which had purported to provide courts a degree of discretion in deciding what cases to hear separate and apart from any Article III standing requirements. More recently, it has appeared in dissents criticizing the majority for manipulating other legal standards to exercise similar discretion over whether it hears a given matter, including standing requirements.²⁴¹

What would it mean for the federal courts to squarely confront the tension between this principle and modern standing doctrine? At a minimum, it would require an acknowledgment that overly strict standing requirements present as much constitutional risk as overly lax standards. Doing so may in turn encourage courts to calibrate their standing analysis away from a search for disqualification toward a more holistic assessment of the litigants' circumstances. Where standing hinges on subjective factors that a given litigant is best positioned to experience and articulate, courts may be inclined to give them the benefit of the doubt or accept evidence providing a reasonable basis for believing that they are telling the truth, instead of demanding specific plans for future conduct or other evidence that even those asserting such interests in good faith would not necessarily have. Courts may also see reason to provide litigants more opportunities to remedy defects in standing that they identify during litigation, a practice that the Supreme Court has recommended in the past.²⁴² Several circuit courts have recently embraced such an approach in allowing plaintiffs to cure standing defects through amended pleadings that allege facts that occurred after filing their original complaint.²⁴³ Together, these measures may shift standing analysis from what is too often a search for technical grounds for disqualification in a plaintiff's pleadings into a fuller inquiry as to whether a litigant's real-world facts and circumstances reasonably satisfy relevant standards—an analysis that is arguably closer to the intended purposes of standing doctrine in the first place.

240 572 U.S. 118, 125–127 (2014).

241 See, e.g., *United States v. Zubaydah*, 142 S. Ct. 959, 996 (2022) (Gorsuch, J., dissenting) (regarding state secrets privilege); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2216 (2021) (Thomas, J., dissenting) (regarding standing doctrine); *Texas v. California*, 141 S. Ct. 1469 (2021) (Alito, J., dissenting) (regarding a denial to of a motion for leave to file a bill of complaint); *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2144 (2020) (Thomas, J., dissenting).

242 See *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“[I]t is within the trial court’s power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff’s standing”).

243 See, e.g., *Scahill v. District of Columbia*, 909 F.3d 1177 (D.C. Cir. 2018); *Travelers Ins. Co. v. 633 Third Associates*, 973 F.2d 82 (2d Cir. 1992). For a more thorough analysis of this trend, see Carson Miller, Note, *Please Remain Standing: Using Fed. R. Civ. P. 15(d) Supplemental Pleading to Cure Defects in Standing*, 88 U. Cin. L. Rev. 857 (2020).

Conclusion

For better or worse, standing doctrine is not going away anytime soon. Despite decades of academic criticism, its requirements have become a widely accepted—if still hotly contested—part of the rules governing the jurisdiction of federal courts. Barring a constitutional amendment or a sea change in judicial philosophies, it is likely to continue to constrain the extent to which individuals can secure the federal judicial enforcement of their legal rights into the foreseeable future.

But this doesn't mean that Americans are stuck with standing doctrine's most problematic consequences, such as its under protection of public goods, inconsistent treatment of structural concerns, and inadequate acknowledgment of intangible harms. Existing case law points toward several possible avenues of relief, including the use of public institutions as plaintiffs, legislation that assigns the government's own standing or expands which private plaintiffs have it, and advocacy strategies that highlight tensions within modern standing doctrine and urges the federal courts to ease them through a more balanced approach. None of these solutions are panaceas. But in an era where both political parties are beginning to take issue with some of modern standing doctrine's overreaches, they are potentially important tools. Policymakers should in turn know that they are available as they consider enacting policies whose effectiveness may hinge on effective judicial enforcement by the federal courts.

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