Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication

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STANDING FOR NOTHING: THE PARADOX OF DEMANDING CONCRETE CONTEXT FOR FORMALIST ADJUDICATION

David M. Driesen†

This Article examines a paradox found in public law cases. While justiciability doctrines aim to provide concrete context for adjudication of public law questions by insisting upon individual injury, the Supreme Court often ignores the litigants' injuries when it turns to the merits of cases. Examination of this paradox leads to a fuller appreciation of the structure and nature of public law. In particular, it sheds light on a recent debate about whether constitutional litigation should be seen as concerning individual rights or the validity of legal rules. It also raises serious questions about the modern doctrine of standing.

Alexander Bickel, in his influential writing on the "passive virtues," viewed justiciability doctrines as an aid to wise decision-making. Bickel emphasized that the law of standing would provide concrete information about the consequences of laws undergoing judicial review that would contribute to sounder, more enduring judgments regarding constitutionality. But information about injury often has no influence upon the merits of public law cases, and an analysis of the reasons for this lack of influence casts doubt on justiciability doctrines' capacity to aid wise decision-making. Courts should adopt a new set of "active virtues"—a set of practices governing the framing, consideration, and resolution of the merits of public law cases.

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INTRODUCTION

In 1996, Congress passed the Line Item Veto Act (Act).¹ The Act addressed the problem of “pork barrel spending”—a representative’s insertion of line items into the federal budget for projects of dubious general value that deliver federal money to the representative’s home district.² This pork barrel spending had made it very difficult to properly manage the federal budget.³ Absent authority to veto each line

¹ Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified as amended at 2 U.S.C. §§ 691–692 (2000)).

² S. REP. NO. 104-13, at 2 (1995), *reprinted in* 1996 U.S.C.C.A.N. 879, 880; *see* Mary E. Foster, Note, *The Line Item Veto Act After Raines v. Byrd*, 20 T. JEFFERSON L. REV. 323, 323–24 (1998).

³ *See* Gordon T. Butler, *The Line Item Veto and the Tax Legislative Process: A Futile Effort at Deficit Reduction, but a Step Toward Tax Integrity*, 49 HASTINGS L.J. 1, 6–7 (1997) (discussing budgetary outcomes and government hardship associated with pork barrel spending).

item, the President could combat pork barrel spending only by vetoing the entire federal budget, which might well have shut down the federal government.⁴

The day after the Act went into effect, six members of Congress brought suit to challenge the Act's constitutionality.⁵ After the district court declared the Act unconstitutional,⁶ the Supreme Court agreed to hear the case under the statute's provision for expedited review.⁷

The Supreme Court held that the congressmen did not "allege[] a sufficiently concrete injury to have established Article III standing."⁸ The Court linked its concern with concrete injury to the need to adjudicate disputes "'traditionally thought to be capable of resolution through the judicial process.'"⁹ The Court contrasted a suit based on concrete injury with "'amorphous general supervision of'" government operations.¹⁰ This suggests that concrete injury would render the litigation itself more concrete and less "amorphous." And indeed, the Court and commentators have both linked the requirement of concrete injury to a desire for more concrete adjudication.¹¹

Justice Souter wrote separately, in part, because he believed that the congressmen's injury might "satisfy the requirement of concreteness."¹² Justice Souter, however, ultimately concurred, because he thought it prudent to avoid immediate involvement in a dispute between two branches of the federal government and instead await a case involving more "concrete" injury.¹³

Justice Breyer, in dissent, even more clearly linked the concept of concrete injury to the hope for concrete adjudication. He viewed the question of standing as, in part, a question of whether "the dispute. . .

⁴ See *id.* at 6; Antony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 478-79 (1994).

⁵ See *Raines v. Byrd*, 521 U.S. 811, 814 (1997).

⁶ *Byrd v. Raines*, 956 F. Supp. 25 (D.D.C. 1997).

⁷ See *Raines*, 521 U.S. at 817-18 (citing 2 U.S.C. § 692(b), (c) (Supp. II 1994)).

⁸ *Id.* at 830; cf. Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 HARV. L. REV. 1741, 1752-58 (1999) (criticizing *Raines* for failure to grant standing); *The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 197, 227 (1997) (criticizing the Court's confusion of the law of legislative standing); Tracy Rotner Yu, Casenote, "Standing" in a Quagmire: *Raines v. Byrd*, 117 S. Ct. 2312 (1997), 67 U. CIN. L. REV. 639, 658-668 (1999) (critiquing the Court's reasoning for denying standing, but agreeing with the result).

⁹ *Raines*, 521 U.S. at 819 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

¹⁰ *Id.* at 829 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).

¹¹ See, e.g., *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979) (distinguishing between a case or controversy and an "abstract question"); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 113-27 (2d ed. 1986).

¹² *Raines*, 521 U.S. at 831 (Souter, J., concurring).

¹³ See *id.* at 832-34 (Souter, J., concurring).

[is] concrete.”¹⁴ Standing should exist, Justice Breyer wrote, because the plaintiffs ask the court to determine “‘a concrete, living contest,’” rather than an “‘abstract intellectual proble[m].’”¹⁵

Litigants with sufficiently concrete injuries to justify standing subsequently challenged the Act in *Clinton v. City of New York*.¹⁶ The majority opinion in *Clinton* describes the facts giving rise to these injuries in detail.¹⁷ A federal statute had reduced a subsidy financing medical care of the indigent by requiring states to subtract from the subsidy amounts they received through certain taxes on providers.¹⁸ New York City and certain of its health care providers faced a potential liability to the government for these monies due to President Clinton’s veto of a line item giving New York favorable treatment with respect to Medicaid.¹⁹ A farmers’ cooperative faced the loss of a potential tax benefit, because of another line item veto.²⁰ The Court found these economic injuries sufficiently concrete to justify standing.²¹

Waiting for plaintiffs with concrete injuries to sue, however, did not lead to particularly concrete adjudication. Rather, *Clinton* treats the constitutionality of the line item veto as an “‘abstract intellectual proble[m],’”²² which the Court resolved through a formalist approach.²³ The injuries discussed in such detail at the outset of the opinion play almost no role in the subsequent discussion of the merits.

The majority analogized the line item veto to repeal of a statute.²⁴ Because the Constitution does not authorize presidential repeal of legislation, reasoned the majority, the statute authorizing presidential veto of line items conflicts with the Constitution.²⁵ The Court bolstered this reasoning by explaining that the statute as modified by exercise of the line item veto did not receive the approval of the House and Senate, as required by Article I, Section 7 of the Constitution.²⁶ This reasoning makes no reference to injuries, but only to the content of the Constitution and the statute.

¹⁴ *Id.* at 839 (Breyer, J., dissenting) (emphasis added).

¹⁵ *Id.* at 839–40 (Breyer, J., dissenting) (alteration in original) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)).

¹⁶ 524 U.S. 417 (1998).

¹⁷ *See id.* at 421–36.

¹⁸ *See id.* at 422.

¹⁹ *See id.* at 422–23, 426, 430–31.

²⁰ *See id.* at 423–25, 426–27, 432–36.

²¹ *See id.* at 429–436.

²² *Raines v. Byrd*, 521 U.S. 811, 840 (1997) (Breyer, J., dissenting) (alteration in original) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)).

²³ *See Clinton*, 524 U.S. at 436–49 (1998) (analyzing constitutionality of Act).

²⁴ *See id.* at 438.

²⁵ *See id.* at 438–39.

²⁶ *See id.* at 448–49.

The *Clinton* majority refused to analogize the line item veto to the veto of a bill under Article I, Section 7 of the Constitution. The Court explained that the traditional veto applies only to an entire bill and only after the President has signed it into law.²⁷ By contrast, the line item veto applies to parts of bills and comes before the bill is signed into law.²⁸ This formal distinction does not depend upon the nature of injuries incurred under the statute. Indeed, it would exist with no injury at all. The opinion's basic affirmative argument—that the line item veto conflicts with the Constitution, because the Constitution does not expressly authorize it²⁹—contains not a single reference to the injury that the Court found so necessary to its constitutional adjudication.³⁰

The government attempted to analogize the Act to delegation of discretionary power to the President, which the Court has upheld.³¹ It relied upon *Field v. Clark*,³² which upheld legislation delegating discretionary authority to impose a tariff in the face of a claim that the statute unconstitutionally delegated legislative authority to the President.³³ The government's analogy persuaded Justices Scalia, Breyer, and O'Connor that the statute should be upheld.³⁴

Neither the majority nor the dissent found the concrete factual context of the *Clinton* case important in deciding whether to accept the analogy to *Field v. Clark*. Indeed, none of the Justices directly mentioned the injuries giving rise to justiciability in discussing the argument at the heart of the government's case,³⁵ and these injuries

²⁷ See *id.* at 439.

²⁸ See *id.*

²⁹ See *id.* at 448 (“[O]ur decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution.”).

³⁰ See *id.* at 436–40.

³¹ See *id.* at 442.

³² 143 U.S. 649 (1892).

³³ See *Clinton*, 524 U.S. at 442–44 (discussing *Field*).

³⁴ See *id.* at 463–69 (Scalia, J., concurring in part, dissenting in part); *id.* at 473–97 (Breyer, J., dissenting).

³⁵ The majority rejected the analogy to *Field v. Clark* for three reasons. First, the power to levy a tariff at issue in *Field* came into play only when a new condition arose, whilst exercise of the line item veto would occur without new conditions arising. See *Clinton*, 524 U.S. at 443. Second, while the Line Item Veto Act authorized but never required a veto, the Tariff Act did require the imposition of tariffs when the relevant condition arose. See *id.* at 443–44. Third, the presidential imposition of a tariff reflected congressional policy found in the Tariff Act. See *id.* at 444. By contrast, the President relied upon his own policy judgment in exercising the line item veto while rejecting Congress's chosen policy. See *id.* The first two reasons involve comparisons between the Tariff Act and the Line Item Veto Act with no reference at all to the facts of the *Clinton* case. See *id.* at 443–44. In making the third argument, however, the Court does cite the particular reason President Clinton gave for one of his line item vetoes to show that presidential judgment operates. See *id.* at 444 n.35. But this does not amount to consideration of the injury giving rise to standing. In the end, the Court relied on a purely formalist acontextual argument to justify rejecting the *Field* analogy. Unlike predecessor statutes, wrote the majority, the Line Item Veto Act

receive only cursory mention in the discussion of subsidiary arguments.³⁶

The *Clinton* case illustrates the paradox this Article will explore. On the one hand, the Supreme Court has insisted on justiciability cri-

"gives the President the unilateral power to change the text of duly enacted statutes." *Id.* at 447.

The dissents' reasoning also depended in no way upon the nature of the injuries incurred by plaintiffs in the case. Justice Scalia explained that "there is not a dime's worth of difference between Congress's authorizing the President to *cancel* a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion." *Id.* at 466 (Scalia, J., concurring in part, dissenting in part). Justice Scalia then relied on the long history of authorization for discretionary spending to justify upholding the Act. *See id.* at 466–69 (Scalia, J., concurring in part, dissenting in part). His argument combines analogy with an appeal to history, without a single reference to the concrete context provided by having injured plaintiffs before the Court.

Justice Breyer in dissent likewise referred not at all to the injuries making the case justiciable. He developed an illustration for his rejection of the majority's conclusion from one of the particular line items President Clinton had vetoed, but did not refer to the injury that the veto of that line item produced. *See id.* at 474–75 (Breyer, J., dissenting). Moreover, Breyer supplemented this illustration with another example, from the law of trust instruments, that has no connection with the facts of the case at all. *See id.* at 476 (Breyer, J., dissenting). He read the statute as allowing the President to exercise delegated authority as in *Field* for reasons unrelated to the injuries inflicted in the *Clinton* case.

Justice Kennedy's concurring opinion claimed that the Act threatened the liberties of individual citizens. *See id.* at 449–53 (Kennedy, J., concurring). In making this argument about the Act's effects he refers not once to the litigants' injuries or liberty interests.

³⁶ The Court's refutation of one of the government's subsidiary arguments refers to the injuries the actual plaintiffs incurred, but this reference appears incidental. The government relied upon the "lockbox" provisions" of the statute, which required that line item veto savings be used reduce the deficit, to argue against characterizing the line item veto as a repeal of part of a statute. *See id.* at 440 & n.31. Since that provision has a legal effect even after the line item veto's exercise—prohibiting spending of the cancelled monies on other priorities—the government argued that the veto amounted to something less than repeal of the line item. *See id.* at 440–41. The Court responded to that argument with a reference to the injuries justifying standing, explaining that the cancellation of line items had withdrawn benefits from the litigants in the case. *See id.* at 441. But this reference seems merely illustrative. The statute itself made it obvious that cancellation of a line item would prevent the expenditure of the relevant funds, and would therefore prevent somebody from receiving something. *See* 2 U.S.C. § 691b(b) (2000) ("Upon the cancellation of a dollar amount . . . , the total appropriation for each relevant account of which that dollar amount is a part shall be simultaneously reduced by the dollar amount of that cancellation."). The validity of the Court's argument in no way depends upon the deprivation of funds actually injuring anybody. Even if the hospitals losing Medicare funding escaped injury by making up the funding loss from new private donations, the statute would nevertheless possess the feature that troubled the Court. And certainly nothing about the particular injury incurred by the hospital, the loss of funding for the indigent, mattered at all to the lockbox argument. The Court rejected the lockbox argument on the ground that a repeal of the expenditure alone does constitute at least a "partial repeal" of the line item. *Clinton*, 524 U.S. at 441. The Court thus decided this issue by abstract reasoning, not by responding to any particular injury.

Justice Breyer, in his rejoinder to the majority's dismissal of the lockbox argument, does not mention injury at all. *See id.* at 478–79 (Breyer, J., dissenting). He accepted the government's argument that the lockbox feature does not constitute a repeal, and argued that it supports his conclusion that the Act delegates executive authority to the President. *See id.* at 478–80 (Breyer, J., dissenting).

teria that aim to make adjudication concrete, rather than abstract. On the other hand, it often relies upon abstract formalist reasoning to resolve cases on the merits, thereby gaining no benefit from the concrete context.

This concreteness paradox leads to fresh questions both about the so-called "passive virtues," devices for avoiding decisions until an issue has become concrete and well developed,³⁷ and about formalism. What precisely is the value of a concrete context for adjudication? Do we want judges to respond to injuries of the litigants who come before them, or, in the words of Justice Roberts, "to lay the . . . Constitution . . . beside the statute" to see whether the statute conflicts with that grand document?³⁸ If judges should respond to the injuries they see, how should those injuries influence them? Are some types of legal questions inherently abstract? And if so, what value does requiring injury-in-fact have for adjudication?

Part I of this Article explores the role concreteness plays in the Court's justiciability jurisprudence, with some emphasis upon the doctrine of standing. This Part also discusses the role that abstract formalism plays in merits adjudication, with emphasis upon separation of powers jurisprudence.

Part II tests the hypothesis that the Line Item Veto Act cases suggest: that standing requirements do not give rise to concrete adjudication. It examines numerous Supreme Court cases to see whether plaintiff's standing makes merits adjudication more concrete. It then draws some conclusions about the relationship between standing and concreteness in adjudication.

Part III develops the theoretical implications of the concreteness paradox. Analysis of the paradox shows that the Court has not adequately justified the law of standing and illuminates the fundamental structure of public law.³⁹ The Article closes with a recommendation

³⁷ See BICKEL, *supra* note 11, at 111-98 (describing the "passive virtues").

³⁸ *United States v. Butler*, 297 U.S. 1, 62 (1936); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (describing judicial review as an exercise in resolving conflicts between the statutory law and the Constitution); *THE FEDERALIST* No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (same).

³⁹ I define public law as law creating obligations for government. *See, e.g.*, *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-68 (1982) (plurality opinion) (defining the public rights doctrine). This includes constitutional and most administrative law. By contrast, private law involves questions of one individual's liability to another. *See id.* at 69-70 (plurality opinion). This definition is not uncontroversial, nor does it resolve all issues. *See* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 598-600 (1985) (Brennan, J., concurring) (concluding that case about scheme creating rights between private parties should be thought of as providing public rights, because public purposes pervade the scheme); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 35-36 (1979) (defining "all rights enforced by courts" as public).

for a new set of “active virtues,” that is, a set of practices to follow in resolving, rather than avoiding, consideration of the merits of cases.

I

CONCRETENESS AND ABSTRACTNESS IN CONSTITUTIONAL ADJUDICATION

This Part describes the law of standing and several related justiciability doctrines. It then presents information about the role of formalism in constitutional adjudication. It closes with an effort to elucidate what scholars, lawyers, and judges mean when they distinguish between abstract and concrete cases.⁴⁰ This Part’s description highlights the importance of the concreteness ideal, the notion that only concrete, rather than abstract, cases should be justiciable under Article III.⁴¹

A. Concreteness and the Law of Standing

The Supreme Court has held that federal courts may only exercise jurisdiction over cases brought by plaintiffs that have “standing” to bring the claim. The modern standing doctrine put an emphasis on concreteness from the beginning.⁴²

In *Baker v. Carr*,⁴³ the Court asked whether the appellants had “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”⁴⁴ It described this inquiry as “the gist of the question of standing.”⁴⁵ Thus, the *Baker* Court set up assurance of “concrete adverseness” as the measuring rod for an adequate “personal stake” in a case.⁴⁶ Concrete adverseness, claimed the *Baker* Court, “sharpens the presentation of issues” to “illuminat[e] . . . difficult constitutional questions.”⁴⁷ The Court went on to grant standing to voters challenging redistricting under the Equal Protection Clause.⁴⁸ In a separate passage, the Court formulated the modern political question doctrine and held that the constitutionality of redis-

⁴⁰ See, e.g., *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 297 (1979) (distinguishing between a case or controversy and “abstract questions”).

⁴¹ See *id.*

⁴² The modern doctrine has some early antecedents. See, e.g., *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (stating that general interest in enforcement of laws is insufficient basis for lawsuit seeking to invalidate the Nineteenth Amendment).

⁴³ 369 U.S. 186 (1962).

⁴⁴ *Id.* at 204.

⁴⁵ *Id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.* at 206–07.

tricting under the Equal Protection Clause posed a justiciable legal question.⁴⁹ By treating standing as a separate doctrinal issue, the Court began the modern movement toward formulating a distinct standing doctrine.

Five years later in *Flast v. Cohen*, the Court elaborated upon the *Baker* Court's statement that the gist of the standing inquiry addresses concreteness concerns.⁵⁰ It identified standing doctrine with avoidance of "ill-defined controversies over constitutional issues"⁵¹ and cases "of 'a hypothetical or abstract character.'"⁵² Thus, the Court relied heavily upon a dichotomy between abstract and concrete cases to justify a standing requirement. Noting confusion in prior cases regarding what standing addressed, the Court, building on *Baker*, explained that standing addressed the question of who "is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."⁵³

The *Flast* Court went on to link standing's concrete adverseness requirement not just to sharp presentation of issues, a concern that seems to address how well arguments about a predetermined issue are made, but to the very definition of the issue before the Court.⁵⁴ It also identified standing with vigorous pursuit of litigation.⁵⁵ Finally, the *Flast* Court claimed that framing of specific issues, "adverseness," and vigorous litigation would "assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution."⁵⁶ Thus, the *Flast* Court created a concept of a proper case as one where "concrete adverseness"⁵⁷ creates specific issues vigorously litigated by opposing parties. At the time of *Flast* and *Baker*, the Court employed a "legal interest" test to implement the concern over concrete adverseness.⁵⁸ When the Court substituted an injury-in-fact test requiring past or likely future injury for the legal interest test in *Barlow v. Collins*⁵⁹ and *Association of Data Processing Service Organizations, Inc. v. Camp*⁶⁰ in 1970, it continued to treat "concrete adverseness" as

⁴⁹ See *id.* at 209-237.

⁵⁰ 392 U.S. 83 (1968).

⁵¹ *Id.* at 100 (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 90 (1947)).

⁵² *Id.* (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)).

⁵³ *Id.* (footnote omitted).

⁵⁴ See *id.*

⁵⁵ See *id.* at 106.

⁵⁶ *Id.*

⁵⁷ *Id.* at 101.

⁵⁸ See generally Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 915, 920 (1986) (describing the legal interest test).

⁵⁹ 397 U.S. 159, 163-64 (1970).

⁶⁰ 397 U.S. 150, 152 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact . . .").

central to the standing inquiry.⁶¹ An injury-in-fact requirement became the means of ensuring the concrete adverseness that standing doctrine demands.⁶²

Concrete adverseness remained central as the Court developed the standing doctrine further. In the 1970s, the Court added to the injury-in-fact test it first articulated at the beginning of that decade, requiring a causal link between the alleged injury and the challenged action, and a likelihood that a favorable judgment will redress the injury alleged.⁶³ The Court repeatedly cited *Baker's* "concrete adverseness" language to justify all of these requirements and often linked standing even more directly to a concern for concrete merits adjudication.⁶⁴

For many years, the Court generally treated standing as amenable to legislative control.⁶⁵ *Barlow*, however, began a slow shift toward constitutionalizing a core set of standing elements as required by Article III's language authorizing adjudication of cases or controversies.⁶⁶ This shift culminated more than twenty years later in the Court's first

⁶¹ See *Barlow*, 397 U.S. at 164; *id.* at 170 (Brennan, J., concurring in part, dissenting in part) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1982)).

⁶² See *id.* at 163–64; *id.* at 170–73 (Brennan, J., concurring in part, dissenting in part); *cf.* *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979) (requiring "actual or threatened injury").

⁶³ See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 475 (1996) (discussing the Burger Court's creation of causation and redressability requirements); see also *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38, 41–42 (1976) (demanding redressability and causation); *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (noting that indirect link between defendant's action and plaintiff's harm may make required showing of causation and redressability under Article III more difficult); *United States v. Students Challenging Reg. Agency Procs.*, 412 U.S. 669, 688–89 (1973) (requiring that plaintiff allege that he was injured or will be injured by the challenged action); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–18 (1973) (declining standing on ground of an insufficient link between plaintiff's alleged injury, deprivation of child support, and the challenged action, nonenforcement of child support order).

⁶⁴ See, e.g., *Simon*, 426 U.S. at 38 n.16, 41–42 (linking causation to concrete adverseness and then equating redressability with causation); *Linda R.S.*, 410 U.S. at 616–18 (citing need for concrete adverseness and then creating a causation requirement out of demand for a real injury); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (noting that because plaintiffs allege injury with particularity, no "abstract question" is present); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586–87 (1972) ("[F]ederal courts do not decide abstract questions posed by parties who lack 'a personal stake in the outcome of the controversy.'" (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

⁶⁵ See Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (explaining that the existence of standing "is largely within the control of Congress"); see, e.g., *Barlow*, 397 U.S. at 164–65 (analyzing question of standing primarily as one of legislative intent).

⁶⁶ See *Barlow*, 397 U.S. at 164 (referring to "concrete adverseness required by Article III"); Scalia, *supra* note 65, at 885 (describing standing in the mid-1980s as a combination of prudential limits and a constitutional core); see also U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, . . . [and] to Controversies . . .").

decision explicitly overruling a clear congressional grant of standing, *Lujan v. Defenders of Wildlife*.⁶⁷

Concrete adverseness assumed a leading role in this transformation. In *Barlow*, the Court suggested that Article III required concrete adverseness.⁶⁸ In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,⁶⁹ the Court made its growing concept of a concrete case a central element linking Article III to the hurgeoning standing requirements.⁷⁰ *Valley Forge* claimed that a redressable injury "tends to assure" that the Court will resolve legal questions "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," and identified this policy of using the context that facts about injury provide to understand consequences as an "implicit polic[y] embodied in Article III."⁷¹ Hence, by the 1970s the Court had identified standing with concreteness in order to encourage good arguments about issues, sharp framing of what the issues are, and judicial appreciation of the consequences of possible decisions.⁷²

While the Court has repeated the "concrete adverseness" phrase in numerous cases,⁷³ it has never explained its meaning. The concept of "adverseness" seems to demand two parties to litigation that genuinely oppose each other. That term alone would indicate the need to avoid advisory opinions: opinions sought by one party who does not

⁶⁷ 504 U.S. 555, 576–78 (1992) (denying standing under a statute granting any person a right to sue).

⁶⁸ See *Barlow*, 397 U.S. at 164.

⁶⁹ 454 U.S. 464 (1982).

⁷⁰ See *id.* at 472; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1379 (1988) ("In the 1970s, the Burger Court added causation as an element of the threshold determination of standing." (footnote omitted)).

⁷¹ *Valley Forge*, 454 U.S. at 472 (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968)).

⁷² See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (describing as "numbingly familiar" the litany regarding the standing doctrine's purpose, which includes "ensuring that a concrete case informs the court of the consequences of its decisions" (footnote omitted)).

⁷³ See Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 245 (1990) (describing a personal stake assuring concrete adverseness as the test for standing); see, e.g., *Gollust v. Mendell*, 501 U.S. 115, 125–26 (1991) (unanimous opinion); *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 78 (1991), *superseded by statute on other grounds as stated in* *Darlington v. Grand River Dam Auth.*, 145 F.3d 1180 (10th Cir. 1998); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 n.5 (1987); *United Auto. Workers v. Brock*, 477 U.S. 274, 289 (1986); *Diamond v. Charles*, 476 U.S. 54, 61–62 (1986); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *INS v. Chadha*, 462 U.S. 919, 939 (1983); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Larson v. Valente*, 456 U.S. 228, 238–39 (1982); *Valley Forge*, 454 U.S. at 486; *Orr v. Orr*, 440 U.S. 268, 273 (1979); *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1978); *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 345 (1977); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 52–53 (1976); *United States v. Richardson*, 418 U.S. 166, 181 (1974) (Powell, J., concurring); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

ask for a binding judgment and faces no opposition.⁷⁴ It also suggests disapproval of sham litigation, in which two parties in fact want the same result from a case, but contrive a dispute to get the court ruling that both desire.⁷⁵

Most commentators agree, however, that the Court does not need to require injury, causation, and redressability to assure the existence of a real dispute between two parties.⁷⁶ Two parties may have a dispute rendering them adverse to each other even if the plaintiff suffers no injury. Indeed, several commentators, including then-Judge Scalia, have suggested that an ideological plaintiff might litigate more vigorously than one who has simply suffered an injury.⁷⁷ As long as two parties genuinely disagree and the plaintiff seeks a judgment, not just advice, the litigation will be adverse and quite different from a request for a nonbinding advisory opinion.⁷⁸

The standing test does not focus on the factors one should evaluate to avoid advisory opinions.⁷⁹ The injury-in-fact, causation, and redressability requirements do not require an adverse party, because

⁷⁴ See generally Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961) (suggesting that standing is a shorthand for ideas related to avoiding advisory opinions).

⁷⁵ See, e.g., *United States v. Johnson*, 319 U.S. 302, 305 (1943) (vacating a collusive suit); *Lord v. Veazie*, 49 U.S. (8 How.) 251, 254-256 (1850) (distinguishing between a “real dispute” and a case where the parties share a “common interest”).

⁷⁶ See, e.g., *Fletcher*, *supra* note 72, at 247 (explaining that “standing doctrine . . . is not . . . a particularly good [] protection against advisory opinions”); Pushaw, *supra* note 63, at 462 (arguing that Justice Frankfurter “cleverly co-opted the historical term ‘advisory opinion’ and gave it a new meaning” by linking it to standing, ripeness, and mootness).

⁷⁷ See Louis J. Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037-38 (1968) (discussing similarities between ideological plaintiffs and plaintiffs suffering actual injury); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1385 (1973) (arguing that “there is no reason to believe that litigants with a ‘personal interest’ will present constitutional issues any more sharply or ably than the Sierra Club or the ACLU”); Joseph L. Sax, *Standing To Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RESOURCES J. 76, 82 (1973) (suggesting that Sierra Club would make a better plaintiff than a park user for the Mineral King litigation); Scalia, *supra* note 65, at 891 (noting that standing doctrine is “ill designed” “to assure that concrete adverseness which sharpens presentation of issues,” since “[o]ften the very best adversaries are national organizations” with “a keen interest in the abstract question at issue in the case”); Mark V. Tushnet, Comment, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1704 (1980) (“[T]he Court recognizes that in reality an organization will often be a more effective litigant than a single individual.”); cf. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 49-50 (1984) (arguing that a plaintiff who is willing to pay for litigation likely feels a personal stake in the outcome).

⁷⁸ See Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287, 305-06 (2000) (noting that Court’s prohibition of advisory opinions requires that judgment must have some effect).

⁷⁹ See *Fletcher*, *supra* note 72, at 247.

they typically focus only upon the plaintiff.⁸⁰ While the plaintiff must trace her injury to a challenged action and argue that a judicial order would remedy the harm, she need not show that the defendant opposes the order she seeks.⁸¹ In that sense standing doctrine is under-inclusive as a means of avoiding advisory opinions.⁸² In another sense, standing is overinclusive. When a court issues an order after hearing from a proponent and opponent of the order, it has not issued an advisory opinion, even if the court order requested does not remedy the plaintiff's concrete injury. It has issued an order limiting the defendant's conduct, not a response to a unilateral request for advice.⁸³ Since the Court has a separate doctrine prohibiting advisory opinions,⁸⁴ it does not need a standing doctrine to perform this function.⁸⁵

Sham litigation might well include a plaintiff who can meet the requisites of standing, so constitutional standing requirements also seem ill-suited to the task of avoiding sham litigation. Detecting the sham would require a comparison between the interests of the plaintiffs and the defendants to determine whether they coincide,⁸⁶ but the three-part constitutional test for standing does not focus upon this comparison.⁸⁷ Nor do sincere ideological plaintiffs experiencing no personal injury present sham litigation if they seek a judgment against an adverse opponent.

⁸⁰ See Ellyn J. Bullock, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right*, 1990 U. ILL. L. REV. 605, 641 ("Standing is overwhelmingly a plaintiff's hurdle.").

⁸¹ See *INS v. Chadha*, 462 U.S. 919, 924, 935-36 (1983) (holding that Chadha met causation and redressability requirements, even though the INS supported his position on the merits).

⁸² See, e.g., Chemerinsky, *supra* note 78, at 289-91, 304-06 (arguing that Court issued an advisory opinion when it ruled on the constitutionality of a statute challenging *Miranda* at the behest of an amicus when no party to the case raised the issue).

⁸³ See Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 513-14 (1994) (noting that "[c]ontrary to current understanding," early Supreme Court cases on advisory opinions insisted only that resolution of a case must be "final . . . and public").

⁸⁴ See Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 643-44 (1992).

⁸⁵ Cf. Pushaw, *supra* note 63, at 442-44 (discussing evolution of prohibition on advisory opinions into "prohibition against rendering a decision in a litigated case because of standing, ripeness, or mootness concerns," and arguing that this constitutes a misinterpretation of the prohibition on advisory opinions).

⁸⁶ See, e.g., *Chadha*, 462 U.S. at 931 n.6 (finding jurisdiction, even though the INS sided with Chadha, because of intervention of both Houses of Congress as adverse parties); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (holding that no jurisdiction can exist without truly adverse parties).

⁸⁷ See Bullock, *supra* note 80, at 641-42 ("Standing is overwhelmingly a plaintiff's hurdle. . . . The only standing requirement that implicates defendants is causation, and there defendants are implicated only peripherally . . .").

Of course, no doctrine perfectly achieves its intended purpose, so a showing of underinclusion and overinclusion by itself does not necessarily establish a fatal defect. But standing doctrine prohibits so much genuinely adversarial litigation (flowing from ideological conflict without injury), and fails so completely to capture the rare case that is not truly adversarial (sham litigation), that the assurance of “adverseness” cannot count as a substantial justification for standing doctrine.

Since the concept of adverseness does not, by itself, explain injury-based standing’s constitutional status, the idea that the adverseness must be “concrete” should help explain the mystery. But here the Court’s poor use of the English language hinders understanding.⁸⁸ The phrase “concrete adverseness” does not have any readily apparent meaning.⁸⁹ Parties either are adverse or they are not.

The Court’s repeated insistence that concrete adverseness should sharpen presentation of arguments, illuminate difficult questions, and frame issues furthers understanding.⁹⁰ Surely, this view suggests that standing requirements make the case itself more concrete. That is, parties meeting the injury-in-fact test will present a more concrete case, thereby making issues more concrete, and creating more con-

⁸⁸ Cf. Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 33 (2003) (translating concrete adverseness as “concrete adversity between the parties”).

⁸⁹ The Court’s usage taken out of context might suggest that it intends to distinguish concrete from abstract adversarial relationships. Thinking of relationships between people, or worse, between institutions (since many cases have institutional defendants and plaintiffs) as either abstract or concrete, however, seems unusual and not entirely clear. Would such a concept distinguish between cases in which the plaintiffs and defendants know each other prior to the litigation (concrete adverseness) and those where they do not (abstract adverseness)? Would it distinguish litigation involving personal insults (concrete adverseness) from litigation involving impersonal legal arguments (abstract adverseness)? Would it mean to distinguish cases in which the litigants have adverse interests about some matter of principle (abstract adverseness) from cases where they have a narrower disagreement (concrete adverseness)? None of these ideas seems central to standing, for once injury occurs, disagreement can be as impersonal or principled as the litigants wish.

Moreover, it is very hard to see why the concreteness of the relationship between plaintiff and defendant should hinge upon the existence of an injury to the plaintiff. For example, the Court has held that litigants seeking to challenge government administration of laws protecting endangered species who have no concrete plans to see these animals generally cannot claim injury-in-fact. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *id.* at 579 (Kennedy, J., concurring). By contrast, litigants that have such plans can claim injury. See *id.* (Kennedy, J., concurring). Yet in either case, the relationship between the plaintiff and defendant is essentially the same. The plaintiff believes that the government defendant has misconstrued the law and failed to take actions that should help protect the species. It sues the government for relief. Unless one imagines that the intensity of the adversarial relationship varies with the concreteness of the injury, it is hard to distinguish the relationship between the injured plaintiff and the government from the relationship between the non-injured plaintiff and the government.

⁹⁰ See, e.g., *Larson v. Valente*, 456 U.S. 228, 238–39 (1982) (quoting *Baker* on these points); *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (same).

crete results. This reading also comports with important early antecedents of modern standing doctrine.⁹¹

Of course, the Court may simply mean that cases involving an injured plaintiff create a concrete adverse relationship, while cases involving a plaintiff experiencing no injury-in-fact involve an abstract adverse relationship. If so, the Court has simply stated the requirement for injury-in-fact twice, once clearly and once obliquely, without explaining why Article III demands an injury-in-fact requirement.

Indeed, any coherent explanation of why Article III's conferral of jurisdiction over "Cases . . . [or] Controversies"⁹² bars litigation brought without standing must hinge on some judicial definition of cases (and controversies).⁹³ Hence, the Court must mean that the concreteness it seeks applies to the case, i.e., the adjudication of the merits of controversies.

The suggestion that justiciability doctrines, such as the doctrine of standing, aim to make litigation more concrete has firm roots in constitutional scholarship.⁹⁴ This suggestion played a leading role in Alexander Bickel's writing about "passive virtues," i.e., techniques for avoiding or delaying constitutional decision-making in the Supreme Court.⁹⁵ Bickel has suggested that justiciability doctrines, doctrines

⁹¹ See *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89-90 (1947) (identifying "'concrete legal issues, . . . not abstractions'" as requisite for constitutional litigation and expressing concern regarding the lack of specific facts about which of plaintiff's activities the challenged Hatch Act prohibited (quoting *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423 (1940))); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (describing a "justiciable controversy" as a controversy satisfying requirement for a concrete dispute touching a legal relationship between parties); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 324 (1936) (calling for "action of a definite and concrete character" rather than "determination of abstract questions"); *Massachusetts v. Mellon*, 262 U.S. 447, 486-88 (1923) (rejecting taxpayer standing to challenge grant program under the federal statute because case raised abstract questions of political power); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (stating that Court will not decide abstract questions of law that will not affect the case); *Liverpool, N.Y. and Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 38-39 (1885) (describing question of whether Congress constitutionally sanctioned collection of "head mon[ies]" as abstract when state law may not have authorized the collection); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 74 (1831) (Thompson, J., dissenting) (stating that the "Court can have no right to pronounce an abstract opinion upon the constitutionality of a state law").

⁹² U.S. CONST. art. III, §2, cl. 1.

⁹³ See *Arizonans for Official Eng. v. Arizona*, 520 U.S. 43, 64 (1997) ("Standing to sue or defend is an aspect of the case-or-controversy requirement [of Article III]." (citations omitted)). See generally Pushaw, *supra* note 83 (arguing for distinct, separate meanings for "Cases" and "Controversies").

⁹⁴ See, e.g., Fallon, *supra* note 77, at 14 (noting in the context of Article III "adverseness in fact" that a "concrete injury helps frame issues in a factual context suitable for judicial resolution" (footnote omitted)); Monaghan, *supra* note 77, at 1372 (stating that "constitutional questions" must "be presented in a manner sufficiently concrete for resolution of the problem").

⁹⁵ See BICKEL, *supra* note 11, at 98-111 (describing the "passive virtues"). Bickel explains:

allowing the Court to avoid deciding cases otherwise properly before it, help the Court make wise decisions.⁹⁶ Bickel suggests that concrete litigation makes wise decisions more likely and that the standing requirement fosters concrete litigation.⁹⁷

The Court has also explained that separation of powers requires the standing doctrine.⁹⁸ It regards standing as a tool to ensure that courts stay within their properly limited role under the Constitution and do not usurp the powers of the executive or legislative branches of government.⁹⁹ Even though the Court's increased reliance upon separation of powers seems to have led to somewhat less emphasis on concrete adverseness, concrete adverseness remains part of the doctrine.¹⁰⁰ Moreover, this separation of powers rationale aims to explain why the Court reads Article III to require standing.¹⁰¹ Abstract separa-

One of the chief faculties of the judiciary, . . . which fits the courts for the function of evolving and applying constitutional principles, is that . . . the judgment of courts may be had in concrete cases that exemplify the actual consequences of legislative or executive actions. Thus is the Court enabled to prove its principles as it evolves them. The concepts of "standing" and "case and controversy" tend to ensure this

Id. at 115.

Numerous authors have commented on the impact of Bickel's theory of the passive virtues. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Counter-majoritarian Difficulty*, 145 U. PA. L. REV. 759, 760 (1997) (declaring that Bickel's "masterpiece, *The Least Dangerous Branch*, is rightly counted as the most important work of constitutional scholarship written in the last half-century" (footnote omitted)); Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 201 (2002) (describing Bickel's framing of the "'counter-majoritarian difficulty'" in *The Least Dangerous Branch* as "[catching] the attention of the ages"); Pushaw, *supra* note 63, at 465 ("Alexander Bickel set forth a theory [of the passive virtues] that would have a lasting impact on the Court." (footnote omitted)).

⁹⁶ See BICKEL, *supra* note 11, at 115 ("[T]here are sound reasons, grounded not only in theory but in the judicial experience of centuries, here and elsewhere, for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments."); see also Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 246 (1994) (assuming "that courts function best when presented with concrete rather than abstract controversies").

⁹⁷ See, e.g., BICKEL, *supra* note 11, at 115-17. While Bickel's writing only addresses constitutional decision-making in the Supreme Court, the concreteness requirement now also applies to nonconstitutional litigation and to cases in lower federal courts. See Fletcher, *supra* note 72, at 229. Bickel's (and the Supreme Court's) notion that a court would benefit from more concrete adjudicative settings can clearly apply to lower courts as well as the High Court.

⁹⁸ See *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.").

⁹⁹ See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (resting interpretation of Article III standing on separation of powers rather than text of Article III); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979) (noting that standing confines courts to their "'properly limited . . . role . . . in a democratic society'" (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975))).

¹⁰⁰ See *Spencer v. Kemna*, 523 U.S. 1, 10-11 (1998) (disclaiming sole reliance on concrete adverseness as basis for standing).

¹⁰¹ See *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 771 (2000) (declaring that the standing requirements are an "'essential and unchanging part' of Article III's case-

tion of power principles have not supplanted Article III as the source of standing limitations.¹⁰² As a result, the purpose behind the "concrete adverseness" rationale of tying Article III to standing doctrine remains vital.

A separation of powers theory still requires an explanation of why Article III requires injury-in-fact based standing. Stating that standing limits the Court to its proper role does not begin to explain what that proper role is.¹⁰³ A separation of powers approach requires a theory of what precisely the role of the judiciary is.¹⁰⁴ And a theory of standing must explain why that role justifies a particular standing doctrine, such as the requirement that litigants experience injury-in-fact.

The Court's desire to avoid improper interference in the political decisions of the executive and legislative branches does not explain injury-based standing any more than a simple statement that a court must remain within its proper role. Judicial interference with political decisions arises not from grants of standing but from orders issued correcting constitutional and statutory violations. Every judicial order in public law interferes with one of the other branches of government.¹⁰⁵ The Court issues such orders only when it concludes that another branch of government has violated the law.¹⁰⁶ If that conclusion is correct and appropriate, then the interference will usually be proper.¹⁰⁷ The Court has separate doctrines—the political question doctrine and various doctrines of equitable discretion—to prevent is-

or-controversy requirement, and a key factor in dividing the power of government between the courts and the two political branches" (citation omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992))).

¹⁰² See *Steel Co.*, 523 U.S. at 102 n.4 (reaffirming centrality of Article III in standing analysis).

¹⁰³ Cf. Nichol, *supra* note 58, at 1948 (accusing the Court of using separation of powers as a label to accompany a decision not to hear a case, with no explanation as to why it requires that result).

¹⁰⁴ See Bandes, *supra* note 73, at 230–31, 263 (arguing that acknowledgement of the role of separation of powers is only the initial step and that inquiry into the role of the federal judiciary is also required); see also Scalia, *supra* note 65, at 894 (asking whether the doctrine of standing is "functionally related to the distinctive role that we expect the courts to perform").

¹⁰⁵ Cf. Dorf, *supra* note 96, at 245–46 (noting that "any restriction on judicial power" limits "interference with the other branches of government").

¹⁰⁶ See Pushaw, *supra* note 63, at 469 (federal courts inevitably "'interfere'" with the majoritarian branches when these branches "exceed . . . constitutional bounds").

¹⁰⁷ See *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (declaring that "[i]t is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts"); Fallon, *supra* note 88, at 14 (arguing that if Congress "could exceed constitutional bounds without being subject to judicial check, then the restraining function of a written constitution would be obliterated"); Pushaw, *supra* note 63, at 484–85 (federal courts properly enforce executive branch duty to "take Care that the Laws be faithfully executed" when they order compliance with a statute); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1471 (1988) (stating that "the 'take Care' clause . . . do[es] not authorize the executive branch to violate the law").

suance of improper orders, those that resolve political rather than legal questions or unduly intrude upon the political process.¹⁰⁸ The question of improper interference properly focuses upon the merits, the political question doctrine, and questions of equitable discretion, not upon injuries to parties.¹⁰⁹

The suggestion that standing avoids improper interference with other branches of government functions as a tautology, not an explanation. If one assumes that a proper judicial case requires injury, then one can say that any case without an injury is an improper proceeding. The characterization of such a case as an improper proceeding can then plausibly support an inference that any order issuing from such a case is improper. Since orders always interfere, the Court can link standing to improper interference in this way. But this linking does not explain why a proper judicial proceeding must have injury; it just assumes it to be true.

The view that separation of powers requires a contested case,¹¹⁰ as I have explained above, does not justify the injury-in-fact requirement. The Court's discussion of *concrete* adverseness constitutes the Court's only explanation as to why a proper judicial role requires it to distinguish cases with injured plaintiffs from cases with other genuinely interested litigants seeking a binding judgment. The lack of any other explanation for why separation of powers justifies modern standing doctrine necessarily implies that the desire for a "concrete" case must perform the key role of explaining why Article III requires injury-based standing.

¹⁰⁸ See Pushaw, *supra* note 63, at 489 (suggesting the Court combine permissive standing with use of the political question and ripeness doctrines to meet "efficiency" concerns); Fallon, *supra* note 77, at 43–47 (suggesting that doctrines of equitable discretion provide the proper restraint on remedies); see also, e.g., O'Shea v. Littleton, 414 U.S. 488, 499–504 (1974) (discussing doctrines of equitable relief).

¹⁰⁹ See Fallon, *supra* note 77, at 42 (noting that the injury requirement "erects no significant barrier against judicial overextension at the remedial stage"); Tushnet, *supra* note 77, at 1700 (suggesting that separation of powers principles are better considered under the political question doctrine than under standing doctrine); Kerry C. White, Note, *Rule 24(A) Intervention of Right: Why the Federal Courts Should Require Standing To Intervene*, 36 LOY. L.A. L. REV. 527, 553–554 (2002) (standing does not focus upon the "issues of the case," but upon the party and her injury); see also, e.g., Allee v. Medrano, 416 U.S. 802, 811–16 (1974) (addressing equitable discretion of the courts). Then-Judge Scalia has argued that standing can rule out adjudication of an issue in court if the court denies standing to all who might raise it. See Scalia, *supra* note 65, at 892. This does not establish, however, that the interference that judicial resolution of a legal issue would bring is inappropriate as a matter of separation of powers. To take the example Scalia used, separation of powers ought not preclude enforcement of the Establishment Clause of the First Amendment. Cf. *id.* (suggesting that denial of standing in *Flast* would have eliminated judicial enforcement of the Establishment Clause altogether).

¹¹⁰ See, e.g., Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers By Reconsidering Miranda*, 149 U. PA. L. REV. 251, 256 (2000) (stating that conservatives believe that separation of powers requires review only of issues "truly in controversy and therefore represented by vigorous advocacy" (footnote omitted)).

While this Article focuses primarily upon constitutional standing, the Court applies prudential limits to standing as well.¹¹¹ The doctrine of third party standing allows the Court to avoid deciding cases in which a litigant seeks to invoke the rights of others to justify a remedy.¹¹² Under the Administrative Procedure Act,¹¹³ the Court permits standing only when the plaintiff's injury falls within the "zone of interests" arguably protected by the statutory or constitutional provision under which relief is sought.¹¹⁴ And the Court sometimes declines to adjudicate cases based upon a "generalized grievance shared in substantially equal measure by all or a large class of citizens."¹¹⁵ The Court has stated that these prudential limits, like the constitutional limits, allow the Court to avoid deciding "abstract questions of wide public significance."¹¹⁶

Article III requires standing largely in order to assure sufficiently concrete adjudication. And the Court uses the ideal of concrete judicial proceedings to distinguish proper proceedings under Article III from those that may violate separation of powers. Overly abstract matters may fall outside the bounds of the case-or-controversy requirement.¹¹⁷

B. Other Justiciability Doctrines

We have seen that the Court has suggested that Article III requires litigants to satisfy its standing requirements, because of a need

¹¹¹ See *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (describing third party standing as a "prudential" standing principle); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99–100 (1979) (discussing prudential limits on standing); Fallon, *supra* note 77, at 18 (discussing limitations of generalized grievances and third party standing as prudential limits).

¹¹² See, e.g., *Nordlinger*, 505 U.S. at 10–11 (holding that litigant who did not intend to travel cannot invoke constitutional right to travel); *Craig v. Boren*, 429 U.S. 190, 192–97 (1976) (allowing beer vendor to invoke the equal protection rights of young males in challenge to gender discrimination in alcoholic beverage law); cf. *Miller v. Albright*, 523 U.S. 420, 445–51 (1998) (O'Connor, J., concurring) (a party may not assert a third party's rights unless an obstacle prevents the third party from asserting his own rights).

¹¹³ 5 U.S.C. §§ 551–559; 701–706 (2000).

¹¹⁴ See, e.g., *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997).

¹¹⁵ *Warth v. Seldin*, 422 U.S. 490, 499 (1975); see *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury-in-fact.'"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (suggesting that the generalized grievance limitation remains prudential by stating that "[w]hile it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way"); cf. *id.* 504 U.S. at 573–74 (suggesting that the prohibition on generalized grievances is required by Article III); *Warth*, 422 U.S. at 501 (if Congress grants a right of action, a plaintiff may "invoke the general public interest in support of [her] claim[s]").

¹¹⁶ *Warth*, 422 U.S. at 500.

¹¹⁷ See Dorf, *supra* note 96, at 247 (linking Article III case-or-controversy requirement to the interest in "concrete decisionmaking").

for concrete litigation. Other justiciability doctrines also involve concreteness concerns.

1. *Ripeness*

The Court sometimes dismisses cases otherwise properly before it on ripeness grounds. The Court has remarked upon the close relationship between standing and ripeness; ripeness dismissals often suggest that standing does not exist now, but might exist later.¹¹⁸ A dismissal on ripeness grounds, unlike a dismissal on standing grounds, usually suggests that the Court will be willing to hear the case at a later date, once the facts are further developed.¹¹⁹

The Court evaluates two factors in deciding whether a case is ripe for judicial resolution.¹²⁰ First, the Court evaluates the hardship that delay might visit upon the litigants.¹²¹ Second, the Court evaluates the “‘fitness of the issues for judicial decision.’”¹²²

The rationale for the ripeness doctrine places concreteness at center stage.¹²³ The Court has repeatedly explained that avoiding “premature adjudication” prevents courts “from entangling themselves in *abstract* disagreements.”¹²⁴ Ripeness doctrine also “protect[s] the agencies from judicial interference until an administrative decision” has “concrete” effects upon “the challenging parties.”¹²⁵ Thus, the ripeness doctrine also reflects the view that concrete injury makes cases concrete.

¹¹⁸ See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891–893 (1990) (finding challenge to land withdrawal program premature based on grounds suggesting a lack of current injury); *Warth*, 422 U.S. at 499 n.10 (“The standing question . . . bears close affinity to questions of ripeness . . .”); see also *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11–12 (1990) (stating that takings claim will be ripe only after the property owner making the takings claim has taken advantage of relevant Tucker Act remedies).

¹¹⁹ See *Pushaw*, *supra* note 63, at 493 (noting that “ripeness merely postpones a decision until the factual and legal issues have matured”); see also, e.g., *Nat'l Wildlife Fed'n*, 497 U.S. at 892 n.3 (describing actions that will make rejected challenge ripe); *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980) (finding challenge ripe that previously had not been, because “EPA has now taken [a] definitive position”).

¹²⁰ See *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967).

¹²¹ *Ohio Forestry Ass'n*, 523 U.S. at 733.

¹²² *Id.* (quoting *Gardner*, 387 U.S. at 149).

¹²³ See, e.g., *Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) (“Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry . . .” (citations omitted)).

¹²⁴ *Gardner*, 387 U.S. at 148 (emphasis added); see *Ohio Forestry Ass'n*, 523 U.S. at 735 (noting that “ripeness doctrine” gives great weight to avoiding “premature review that may prove too abstract”); *Sierra Club v. Peterson*, 185 F.3d 349, 362 n.16 (5th Cir. 1999) (describing the Supreme Court's most recent ripeness case as “stand[ing] for the proposition that ‘abstract disagreements over administrative policies’ will not make a controversy ripe” (quoting *Ohio Forestry Ass'n*, 523 U.S. at 732–33)).

¹²⁵ *Gardner*, 387 U.S. at 148–49.

The ripeness jurisprudence, however, recognizes that concrete injury does not aid the merits analysis in some instances. The Court considers cases presenting pure issues of statutory interpretation as fit for early judicial decision, because they “would not ‘benefit from further factual development.’”¹²⁶ Thus, the Court recognizes that facts, such as facts about injury, do not illuminate “pure” questions of statutory interpretation.¹²⁷ Similarly, the Court recognizes that facial constitutional challenges do not require facts making the litigation more concrete.¹²⁸ It considers such cases ripe even before the litigants experience the effects of the legislation at issue.¹²⁹ In both classes of cases, the Court seems to recognize something that its standing jurisprudence tends to deny: injury is quite irrelevant to certain types of merits analysis.

But the Court does consider factual development important to the ripeness of as-applied challenges—both statutory and constitutional.¹³⁰ If the litigant wishes to raise the question of whether a particular application of a statute conflicts with the Constitution or the question of whether a particular application of a rule conflicts with a statute, the Court typically insists on some experience making the relevant scope of application clear.¹³¹ In other words, it wants facts—

¹²⁶ See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 479 (2001) (quoting *Ohio Forestry Ass'n*, 523 U.S. at 733).

¹²⁷ See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (noting that “further factual development” will not clarify a “purely legal” issue); *Pac. Gas & Elec. v. Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (finding preemption question fit for judicial resolution because it is “predominantly legal”); *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980) (finding challenge to variances from water pollution control requirements ripe prior to the granting of a variance, because EPA has taken a clear position on which factors are relevant to variances).

¹²⁸ See, e.g., *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 17–19 (1990) (adjudicating claim that Congress lacked authority under the Commerce Clause to enact the “rails-to-trails” program, after finding a takings claim “premature”). But see *Texas v. United States*, 523 U.S. 296, 300–301 (1998) (declining to adjudicate the scope of a statute’s application facially because the statute had not been applied and the Court did “not have sufficient confidence in [its] powers of imagination” regarding how it might be applied).

¹²⁹ See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (“‘facial’ challenges . . . are generally ripe the moment the . . . ordinance is passed”); see also, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000–1013 (1984) (adjudicating takings claim regarding government disclosure of trade secrets, including claims about what government might disclose in the future).

¹³⁰ See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (explaining that Court must “know[] ‘the extent of permitted development’” to adjudicate a nonfacial takings claim (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986))). But see *Dorf*, *supra* note 96, at 294 (arguing that “[t]he distinction between as-applied and facial challenges may confuse more than it illuminates” (footnote omitted)). Even if the distinction between facial and applied challenges is confusing, it is nonetheless the typology that the Court uses. See *id.*

¹³¹ See, e.g., *Ruckelshaus*, 467 U.S. at 1019 (holding that challenge to procedures offering compensation for taking of a trade secret was not ripe, because plaintiff’s “ability to obtain just compensation does not depend solely on the validity” of those procedures).

sometimes including facts about injury—to frame the issue for resolution.¹³² If the scope of application remains subject to definition by future events, the Court labels the issue the litigant seeks to raise abstract and often declines jurisdiction on ripeness grounds.¹³³

2. *Mootness and Concrete Remedies*

The Court also may decline jurisdiction when a party comes to court too late, rather than too early. The Court considers the doctrine of mootness closely related to standing, since a moot claim involves no current injury and therefore offers no opportunity for judicial redress of an injury.¹³⁴ The mootness doctrine addresses the problem of abstract remedial orders, rather than the problem of abstract holdings, i.e., holdings not rooted in the concrete experience provided by the controversy. A judicial order in a moot case might have no significant effect, since the injury giving rise to the claim no longer exists.¹³⁵ But since all of the facts regarding the injury that had occurred remain available to the Court, a moot case offers at least as rich a context for adjudication as a non-moot case.¹³⁶ Indeed, because the Court permits standing based on likely future injuries, a moot case, which arises after all relevant facts are fully known, usually offers more concreteness on the merits than a live controversy.¹³⁷

Logically, any judicial order that stops a defendant from doing something that he would otherwise do appears concrete. The Court sometimes uses the concept of an abstract case to refer to the problem

¹³² See, e.g., *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190–91, 199–200 (1985) (demanding an application for and decisions about variances prior to deciding a takings claim, because the court must evaluate the “economic impact” of the challenged regulations to resolve the takings claim).

¹³³ See, e.g., *Renne v. Geary*, 501 U.S. 312, 323 (1991) (labeling an unripe First Amendment challenge to a prohibition on party endorsement of candidates abstract, as the statute did not precisely define what persons or conduct it covered).

¹³⁴ See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (declaring that Article III’s case-or-controversy requirement “underpins both our standing and our mootness jurisprudence”); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (“Mootness has been described as ‘the doctrine of standing set in a time frame.’” (internal quotation marks omitted) (quoting *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980))); see also *Bandes*, *supra* note 73, at 228 (noting that “[w]hen determining mootness, the Court emphasizes . . . adverse parties with concrete claims” (footnote omitted)).

¹³⁵ See, e.g., *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (stating that mootness occurs when effects of violation have been eradicated and the violation will not recur).

¹³⁶ See *Fallon*, *supra* note 77, at 28–29 (arguing that in mootness scenarios, “[a]n actual injury, even if past, continues to frame litigation in a factual context that illuminates and delimits judicial decisionmaking” (footnote omitted)); *Monaghan*, *supra* note 77, at 1384 (cases becoming moot on appeal present a “concrete record illuminated by the adversary process” (footnote omitted)).

¹³⁷ See *Fallon*, *supra* note 77, at 28–29; cf. *Laidlaw Envtl. Servs.*, 528 U.S. at 191 (noting that mootness may entail abandonment of a case at an advanced state).

of issuing an order that does not change defendant's conduct, because the defendant does not intend to carry out the acts the order forbids.¹³⁸ Such an order is abstract and remedies only hypothetical misconduct.¹³⁹ The ripeness doctrine tends to avoid such orders by delaying adjudication until the precise scope of a legal rule or action becomes clear enough to allow the Court to avoid issuing hypothetical orders. The mootness doctrine also avoids such orders by allowing defendant to escape application of an order if it is clear that the misconduct has ceased and will not reoccur.¹⁴⁰

But the Court sometimes recognizes that an order remedying continuing misconduct may be appropriate, even after the opportunity to redress the plaintiff's injury has passed. For that reason, the Court has carved out an exception to the mootness doctrine for alleged misconduct "capable of repetition, yet evading review."¹⁴¹ This exception supports the idea that an order remedying misconduct can be concrete, even though it does not remedy any specific injury before the Court.¹⁴²

The availability of judicial review not remedying the injury of a party before the Court suggests that Article III does not require injury-in-fact.¹⁴³ But the Court's standing jurisprudence emphatically denies that idea.¹⁴⁴

This Article focuses upon abstraction and concreteness in resolution of the merits, rather than in the content of remedial orders. But

¹³⁸ See, e.g., *County of Los Angeles v. Davis*, 440 U.S. 625, 632-33 (1979) (characterizing a decision about hiring practices that have been abandoned as an "advisory opinion[] on abstract propositions of law" (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969))); cf. *Laidlaw Envtl. Servs.*, 528 U.S. at 189 (stating that a case is moot only if defendant meets a "heavy burden of persuad[ing] a court that violations will not recur" (quoting *United States v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (alteration in original))).

¹³⁹ See, e.g., *Davis*, 440 U.S. at 632-33.

¹⁴⁰ See, e.g., *id.* at 631-32 (state had stopped using invalid civil service exam); *Allee v. Medrano*, 416 U.S. 802, 810-11 (1974) (holding that cessation of wrongful conduct does not moot a case if "there is a possibility of recurrence" (citations omitted)).

¹⁴¹ *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911); see *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (holding that abortion rights can be adjudicated after woman was no longer pregnant, because women can become pregnant more than once and gestation is so short that timely review is nearly impossible).

¹⁴² See Monaghan, *supra* note 77, at 1384-85 (arguing that "[t]he mootness cases serve to confirm the demise of the personal interest requirement").

¹⁴³ I am not the first scholar to question the notion that Article III requires injury in fact. See, e.g., *id.* at 1375 (arguing that injury in fact is not a "constitutional prerequisite"); Bandes, *supra* note 73, at 245-50 (discussing the tension between the mootness doctrine's flexibility and the concrete adverseness requirement found in the standing doctrine).

¹⁴⁴ Cf. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) ("[I]f mootness were simply 'standing set in a time frame,' the exception to mootness that arises when the defendant's allegedly unlawful activity is 'capable of repetition, yet evading review,' could not exist." (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999))).

completeness requires some attention to the concept of an abstract case as a case generating abstract orders. And the doctrine allowing review of cases involving continuing misconduct but no current injury casts doubt on the hypothesis that the need to avoid hypothetical orders justifies the injury-in-fact requirement at the heart of this Article's concerns.¹⁴⁵

C. Formalism and Functionalism

Over time, the Court has tightened justiciability barriers designed to make litigation more functional by providing concrete contexts for judgment.¹⁴⁶ Yet most commentators agree that the modern Court has become increasingly formalist in its approach to the merits of constitutional cases.¹⁴⁷

¹⁴⁵ A related problem involves choices about how defendants respond to a holding that their conduct is illegal. Some responses curing legal defects can remedy injuries, while others may not. *See, e.g., Orr v. Orr*, 440 U.S. 268, 272 (1979) (state can respond to holding that denial of a benefit is discriminatory either by offering the benefit to the excluded class or by denying the benefit to all).

¹⁴⁶ *See* Pushaw, *supra* note 63, at 496 (suggesting that Court has converted ripeness doctrine from a discretionary doctrine to a constitutional barrier); *see also, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–62, 571–78 (1992) (invalidating, for the first time, a congressional grant of standing and requiring a detailed showing of injury).

¹⁴⁷ *See, e.g.,* Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 200 (describing the Court's opinion in *Printz* as "decidedly formalist"); Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 2 (2001) (arguing that "the continuing allure of formalism dominates constitutional law"); Andrew S. Gold, *Formalism and State Sovereignty in Printz v. United States: Cooperation By Consent*, 22 HARV. J.L. & PUB. POL'Y 247, 247 (1998) (describing *Printz* as replacing functionalism with "structural formalism" in the "state sovereignty context"); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1395 (1999) ("Since the end of the Cold War, courts have once again begun to craft [foreign relations] doctrines in formalistic terms . . ."); Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1766 (1985) (arguing that "the new formalism" challenges the "functionalist approach"). *But see* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1094 (2000) (characterizing the Court's affirmative and dormant Commerce Clause jurisprudence as "cast[ing] aside the categories and methods of 'formalism' and 'realism'"); Kathleen M. Sullivan, Comment, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 94 (1995) (detecting a trend toward functional analysis in recent separation of powers cases).

This does not mean that every decision of the Court falls into the formalist category. No judge or court is completely free of either functionalist or formalist considerations. *See, e.g.,* Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1087–88 (1987) (arguing that the Burger Court followed an "originalist methodology" in cases testing the limits of congressional power, while emphasizing functional "policy considerations" in cases involving presidential actions); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1255 (1988) (noting that the Court has not adopted a "uniform approach to separation of powers questions"); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (arguing that "[t]he Supreme Court has vacillated over the years between using a formalistic approach . . . and a functional approach" in certain separation of powers

A formalist approach emphasizes the use of formal legal rules articulated at a high level of abstraction to resolve cases.¹⁴⁸ The *Clinton* case discussed in this Article's Introduction provides an example. While formalists often claim that the text of legal documents (such as the Constitution) creates the rules they apply,¹⁴⁹ formalist reasoning can sometimes create rules noticeably at odds with text.¹⁵⁰ The leading contemporary example of formalist reasoning departing from text comes from the Court's sovereign immunity jurisprudence.¹⁵¹ The text of the Eleventh Amendment bars diversity suits by a citizen of one state against another state in federal court.¹⁵² The text does not limit suits in state court or suits brought by a citizen against her own state.¹⁵³ Notwithstanding the lack of explicit textual limitation, the Court has held that the Constitution bars suits in state courts, and that it does so even if the plaintiff is a citizen of the defendant state.¹⁵⁴

cases); cf. E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, The Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 125–26 (discussing tension between “abstract formulas” and consideration of “practical effects” in constitutional law).

¹⁴⁸ See, e.g., KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 5–6 (1960) (discussing the “Formal Style” of judicial reasoning prevalent in the late nineteenth century); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 123–64 (1998) (discussing the formalist style and ideology of the “*Lochner*” period).

¹⁴⁹ See, e.g., Elliott, *supra* note 147, at 132 (suggesting that the formalist *Chadha* opinion incorrectly asserts that the framers defined legislative, executive, and judicial powers in the Constitution).

¹⁵⁰ See, e.g., *New York v. United States*, 505 U.S. 144, 156 (1992) (stating that the Tenth Amendment's limits on congressional power are not derived from the Amendment's text).

¹⁵¹ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (forbidding private damage actions against the states under the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91–92 (2000) (holding state immune from suit under the Age Discrimination in Employment Act); *Alden v. Maine*, 527 U.S. 706, 754 (1999) (invalidating enforcement of the Fair Labor Standards Act by a private individual against his own state in state court); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (invalidating federal abrogation of state immunity from private suit for false and misleading advertising); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 691 (1999) (invalidating federal abrogation of state immunity from private suit for patent infringement); *Seminole Tribe v. Florida*, 517 U.S. 44, 58–59 (1996) (striking down an order that Florida negotiate with the Seminole Indian tribe under the Indian Gaming Act). See generally Symposium, *State Sovereign Immunity and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 817 (2000).

¹⁵² See U.S. CONST. amend. XI; *Seminole Tribe*, 517 U.S. at 54 (text of the Eleventh Amendment “would appear to restrict only” federal court diversity jurisdiction); cf. *Hans v. Louisiana*, 134 U.S. 1 (1890) (extending the Amendment's bar to suits by citizens of the defendant state in federal court). See generally Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 9–13 (1988) (exploring the Amendment and its interpretation prior to the recent development of still broader sovereign immunity).

¹⁵³ See U.S. CONST. amend. XI.

¹⁵⁴ See *supra* note 151.

The formal legal rule from which the Court derives this result simply provides that states retain their sovereignty.¹⁵⁵ The Court purports to derive this state sovereignty rule from the structure and history of the Constitution, not from the text of the Eleventh Amendment.¹⁵⁶ And the rule of state sovereign immunity has been controversial among legal scholars.¹⁵⁷ Nevertheless, the rule of state sovereign immunity stems from formalist reasoning, which derives results from broad abstract principles.¹⁵⁸

Functionalists tend to have a more pragmatic bent. They express skepticism about the capacity of “[g]eneral propositions” to decide “concrete cases,” in the words of Justice Holmes.¹⁵⁹ They believe that the resolution of cases involves some element of judgment in which an appreciation of the consequences of rulings should play a prominent role.¹⁶⁰

In the separation of powers area, Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁶¹ provides a paradigmatic example of the functionalist approach.¹⁶² In contrast, Justice Black’s opinion for the majority¹⁶³ exemplifies a formalist approach.¹⁶⁴

In *Youngstown*, the Court rejected President Truman’s seizure of steel mills in support of the Korean war effort on separation of powers grounds.¹⁶⁵ Justice Black offered a formalist reason to reject the Presi-

¹⁵⁵ See *Alden*, 527 U.S. at 713 (describing sovereign immunity as a fundamental attribute of state sovereignty predating the Constitution); *Seminole Tribe*, 517 U.S. at 54 (every state is sovereign and immunity from suit is an inherent part of sovereignty).

¹⁵⁶ See *Alden*, 527 U.S. at 713 (declaring the term “Eleventh Amendment immunity” a “misnomer” because the immunity comes from history, structure, and precedent, not the Amendment’s text).

¹⁵⁷ See, e.g., *State Sovereign Immunity and the Eleventh Amendment*, *supra* note 151.

¹⁵⁸ The Court has not limited formalist reasoning to sovereign immunity cases. These cases employ the same sort of formalism that Professor Caminker has noted in the state sovereignty case of *Printz v. United States*, 521 U.S. 898 (1997). See Caminker, *supra* note 147, at 200–01. Like the *Printz* decision, sovereign immunity cases exhibit “doctrinal formalism”—the formation of a categorical rule that does not admit of “any case-by-case balancing”. See *id.* at 200. They also employ “interpretive formalism,” in that “‘essential postulates’” (i.e., state sovereignty implies sovereign immunity) drive the reasoning. See *id.* at 201 (quoting *Printz*, 521 U.S. at 918).

¹⁵⁹ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁶⁰ See Elliott, *supra* note 147, at 125–26 (discussing tradition of considering practical effects in resolving separation of powers issues); cf. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 462 (1899) (declaring that “different rights . . . stand on different grounds”).

¹⁶¹ 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

¹⁶² See Swire, *supra* note 147, at 1768 (associating Justice Jackson’s *Youngstown* concurrence with a major shift to functionalism).

¹⁶³ *Youngstown Sheet & Tube Co.*, 343 U.S. at 582–89.

¹⁶⁴ See Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87, 88 (2002) (explaining that constitutional law textbooks use the majority opinion as an example of formalist reasoning and the concurrences as examples of functionalism).

¹⁶⁵ See *Youngstown Sheet & Tube Co.*, 343 U.S. at 585–89.

dential seizure. Since Congress did not authorize the seizure, the President could not carry it out.¹⁶⁶ The President's executive power did not justify the seizure, because he had not executed any law passed by Congress.¹⁶⁷ Hence, the seizure violated separation of powers.

Justice Jackson provided a more functional and contextual rationale for the same result.¹⁶⁸ He offered a rather fluid framework for analysis, under which presidential power would be "at its lowest ebb" when Congress seemed to disapprove of his actions.¹⁶⁹ Because Congress rejected granting the power to seize plants in debates about labor legislation, Justice Jackson rejected the seizure.¹⁷⁰ Justice Jackson suggested, however, that the case might be stronger for presidential authority if Congress were silent about the matter before the Court, and would be quite strong if Congress approved of his actions.¹⁷¹ Hence, Justice Jackson grounded his functionalist opinion upon contextual constitutional judgment, whereas Justice Black relied upon a categorical rule.

This tendency toward formalist-merits adjudication raises questions about justiciability doctrines that aim to provide context for adjudication. Since formalists do not need or benefit from context, increasing use of formalist merits analysis might indicate less of a need for justiciability barriers aimed at providing a context. Conversely, one might argue that the justiciability doctrines raise questions about formalist merits adjudication that ignores context. If concrete context is essential to adjudication, as the justiciability case law suggests, then perhaps the courts should focus on concrete context, rather than formalist postulates, in adjudicating the merits.

D. Models of Abstraction and Concreteness

While scholars and courts seem virtually unanimous in their stated desire to avoid abstraction and embrace concreteness,¹⁷² neither defines these concepts.¹⁷³ A model, however, will help clarify common understandings of concreteness.

¹⁶⁶ See *id.*; cf. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586–87 (1985) (identifying formalism with "reliance on formal categories"); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 21 (1996) (stating that "[r]easons are by their nature abstractions").

¹⁶⁷ See *Youngstown Sheet & Tube Co.*, 343 U.S. at 585–89.

¹⁶⁸ See *id.* at 634–55 (Jackson, J., concurring).

¹⁶⁹ *Id.* at 637 (Jackson, J., concurring).

¹⁷⁰ See *id.* at 639 (Jackson, J., concurring).

¹⁷¹ See *id.* at 635–37 (Jackson, J., concurring).

¹⁷² See *supra* note 11.

¹⁷³ Cf. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979) (stating that "[t]he difference between an abstract question and a 'case or controversy' is . . . not discernible by any precise test").

Concreteness involves contextualized judgment. It often means that facts influence results, not just theories.¹⁷⁴ Facts tend to influence judgments because they evoke a somewhat visceral response.¹⁷⁵ This need not mean that the decisionmaker eschews thought.¹⁷⁶ But it does mean that shared intuitions about justice cause an emotional response to certain facts.

I. *The Private Law Model*

Trials before juries probably offer the best example of concrete judgments. Juries deciding, for instance, whether a defendant's injury constitutes a disability entitling him to compensation under a disability insurance policy must make a judgment about a specific set of facts. People have experience with jobs.¹⁷⁷ Their view of whether a particular ailment disables somebody reflects a concrete judgment about whether the disability might make it unduly difficult or impossible to perform a job.¹⁷⁸

The case of *Aetna Life Insurance Co. v. Haworth*,¹⁷⁹ an early forerunner of the modern standing doctrine, shows that the Court accepts something like the model of concreteness I have identified.¹⁸⁰ In that case, the Court upheld the Declaratory Judgment Act, finding the issue of an insured's disability sufficiently concrete to justify adjudication at the behest of the insurance company (rather than the claimant).¹⁸¹ This holding suggests that the Court considers a case

¹⁷⁴ See Sunstein, *supra* note 166, at 20–21 (associating concrete judgments with minimal reasoning).

¹⁷⁵ See, e.g., Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 354 (2003) (discussing the effects of "concrete" facts regarding a victim on juries and finding a correlation between such concrete data and sentencing outcomes).

¹⁷⁶ See generally MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 1–7 (2001) (explaining that emotions reflect beliefs and values); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 282–293 (1996) (same).

¹⁷⁷ See, e.g., *N.Y. Life Ins. Co. v. Jones*, 17 So. 2d 879, 882–83 (Ala. Ct. App. 1943) (suggesting that jurors understand the duties of a receptionist, and thus expert opinion of a doctor regarding alleged disability should not have been admitted), *rev'd on other grounds*, 17 So. 2d 883 (Ala. 1944); cf. *Conley v. Allegheny County*, 200 A. 287, 293–94 (Pa. Super. Ct. 1938) (disallowing expert testimony, because understanding of the limitation on ability to compete in labor market for people with obviously damaged organs is common knowledge).

¹⁷⁸ Cf., e.g., *Equitable Life Assurance Soc'y v. Davis*, 164 So. 86, 89 (Ala. 1935) (holding that a doctor may not testify about capacity of laborer with loss of one arm to do work, as this "invade[s] the province of . . . [the] jury in dealing with matters of common knowledge").

¹⁷⁹ 300 U.S. 227 (1937).

¹⁸⁰ See *id.* at 240–41 (commenting that the controversy in question must be "definite and concrete, touching the legal relations of parties having adverse legal interests").

¹⁸¹ See *id.* at 239–42.

concrete when the judgment required rests upon an examination of the parties' experience.

In private law litigation, resolution of the merits usually requires some assessment of both the plaintiff's and defendant's experience.¹⁸² In tort and contract, for example, the plaintiff must show injury and that the defendant breached a duty in order to recover more than nominal damages.¹⁸³ Thus, juries deciding these cases focus upon facts and experience for the most part.¹⁸⁴

2. *Concreteness in Public Law*

Judges and scholars see a range of abstraction in public law cases. Such cases involve a mixture of formalist and functional elements.¹⁸⁵ Decisions heavily influenced by the litigants' experience might approximate jury trials in concreteness, whereas cases relying more upon logical syllogism appear abstract.¹⁸⁶

The Court has suggested that facts framing the issues, sharpening arguments, and clarifying the consequences of public law decisions make such decisions concrete.¹⁸⁷ This idea of facts serving three functions appears to be based on a private law model.¹⁸⁸ In a jury trial involving disability, for example, the facts would clarify the consequences of the decision, frame the issue, and form the grist for the closing argument. Indeed, the typical jury decision focuses largely upon how to characterize the experience of the litigant. A jury might ask, for example, whether the back pain the litigant experienced made it impossible to do a job. Even if the facts perform only one or two of the three functions in a public law case, then perhaps such a case nonetheless becomes more concrete than a case like *Clinton*, in which facts about the litigants' experience were almost wholly irrele-

¹⁸² See Fiss, *supra* note 39, at 17 (describing a private law model which posits a judge observing the two parties, plaintiff and defendant, and deciding which individual is right and which is wrong).

¹⁸³ See RESTATEMENT (SECOND) OF CONTRACTS § 346 (1981); RESTATEMENT (SECOND) OF TORTS § 281 (1965); *cf.* Fiss, *supra* note 39, at 22 (noting that the private law model relies upon "[t]he concept of a wrongdoer").

¹⁸⁴ See Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002) (describing tort adjudication as focused upon "the harm to plaintiff").

¹⁸⁵ See *supra* note 147.

¹⁸⁶ *Cf.* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586-87 (1985) (linking reliance upon formal categories and abstraction to formalism and contrasting abstraction with "practical attention to substance").

¹⁸⁷ See *supra* text accompanying note 72.

¹⁸⁸ Many scholars have noted the private law model's influence on public law. See, e.g., Bandes, *supra* note 73, at 229 (noting that the implicit acceptance of the private rights model leads to a failure to address "collective rights and collective harms"); Fallon, *supra* note 88, at 20-23 (linking standing requirements to the "private-rights face" of *Marbury v. Madison*); Fiss, *supra* note 39, at 17 (sketching a private dispute resolution model); Monaghan, *supra* note 77, at 1365-66 (tracing a private rights model of public law to *Marbury v. Madison*).

vant, but remains less concrete than a typical jury trial in a private law case.¹⁸⁹

One can see this model of concreteness (and abstraction) at work in the famous debate about neutral principles. Herbert Wechsler criticized *Brown v. Board of Education's*¹⁹⁰ principle that separate is inherently unequal for its lack of neutrality.¹⁹¹ He argued that Supreme Court decisions should rest upon abstract "neutral principles" that would apply to all cases and make sense regardless of context.¹⁹² Many scholars, however, have praised *Brown* as an appropriate response to the facts of desegregation.¹⁹³ And these commentators call for greater judicial responsiveness to the experience of litigants in public law cases.¹⁹⁴

While almost all scholars claim to favor concrete cases,¹⁹⁵ the influence of Wechsler's neutral principles idea should caution us to take this claim with a grain of salt. For Wechsler's idea seems to reject the kind of contextualized judgment that the private law model suggests.¹⁹⁶ Wechsler asks the Court to develop a general rule, which might be articulated at a high level of abstraction.¹⁹⁷ And he asks the Court to test that rule by imagining how it might apply in future hypothetical cases not presently before the Court.¹⁹⁸

¹⁸⁹ Cf. Tushnet, *supra* note 77, at 1708 (defining abstract cases as those litigated "in the absence of good information about the operation of the challenged legal rule in the real world" (footnote omitted)).

¹⁹⁰ 347 U.S. 483 (1954).

¹⁹¹ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19, 31-35 (1959).

¹⁹² See *id.* at 19 (arguing that reasons must "in their generality and their neutrality transcend any immediate result that is involved").

¹⁹³ See, e.g., Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1750 (1993) (stating that *Brown* appropriately recognized that segregation subordinated blacks).

¹⁹⁴ See, e.g., Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 4-5 (1985) (arguing that while proponents of neutrality believe that it supports equality, neutrality in fact can harm equality).

¹⁹⁵ See generally Frederick Schauer, *The Generality of Rights*, 6 LEGAL THEORY 323, 324-28 (2000) (discussing strong support for the concept of concrete individual cases among legal realists, and their distrust of abstraction).

¹⁹⁶ Exposition of common law principles apart from jury trials may also involve elements of abstraction. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES *379-80 (arguing that "[i]t is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, . . . should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them").

¹⁹⁷ See Wechsler, *supra* note 191, at 15 (insisting on grounds of "adequate neutrality and generality").

¹⁹⁸ See *id.* (arguing that principles in cases must be "tested not only by the instant application but by others that the principles imply"). Cf. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 809-10 (1983) (expressing doubt about judicial capacity to imagine all future cases in which an announced principle might apply).

The simple model of a highly contextualized private law jury case leads the Court to conclude that public law should enjoy at least some of the concreteness this model suggests.¹⁹⁹ This private law model helps explain why the justiciability doctrines governing public law cases reflect a view that facts provide a valuable context that defines issues, leads to good clear arguments, and makes plain the consequences of the decision the Justices must make.²⁰⁰ This view amounts to the creation of a public law model of concreteness—a vision of how factual context will influence public law merits decisions—derived from a private law model of concreteness.

While the private rights model sketched above helps make sense of the decision to make “injury-in-fact,” rather than invasion of a legal interest, the basis of standing, I do not claim that this model exhausts possible understandings of concreteness and abstraction.²⁰¹ Indeed, I have already pointed out that the case law also reflects a concept of remedial concreteness, with cases producing judicial orders that prevent real actions, not just hypothetical ones. Other conceptions are possible as well. But the conception I offer provides an adequate vehicle for exploring the concreteness paradox and captures important elements of the Court’s understanding of concreteness. In the next Part, I examine whether the application of standing doctrine has produced the sort of concreteness the Court seeks for public law through its standing jurisprudence.

¹⁹⁹ See *Flast v. Cohen*, 392 U.S. 83, 100 (1968) (citing the private law *Aetna* case to justify a standing requirement aimed at avoiding abstractness as it decides whether to adjudicate a public law establishment clause claim). Similarly, *Baker v. Carr* referred to a case demanding a trial in a common law action to justify its demand for “concrete adverseness.” 369 U.S. 186, 204 (1962) (quoting *Liverpool N.Y. & Phila. S.S. Co. v. Emigration Comm’rs*, 113 U.S. 33, 39 (1885)). The *Liverpool* Court declined to adjudicate a common law *assumpsit* action. *Liverpool*, 113 U.S. at 34–39. This private law action raised a public law issue, the constitutionality of a congressional enactment authorizing collection of “head monies.” *Id.* at 36. The Court insisted that a trial must establish a link between the private law action and the public law issue sought to be adjudicated, by showing that the Steamship Company had collected “head monies” under color of state law, rather than taking money for some other purpose. *Id.* at 39. The Court remanded the case for a new trial on that issue. *Id.*

²⁰⁰ See *id.* at 100 (linking desire for concreteness to clear definition of issues); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (claiming that the injury requirement tends to make the “consequences of judicial decision” clear to the Court); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (linking “concrete adverseness” to sharp presentation of issues). All of these features of a concrete case evolved from the *Flast* Court’s concern with abstractness, and thus its implicit reference to the private law model in *Aetna*. See *Flast*, 392 U.S. at 100.

²⁰¹ See, e.g., Bickel, *supra* note 74, at 53 (suggesting that for an absolutist, a bare minimum of facts make a case concrete); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 650 (1995) (suggesting a very closely related ideal of concreteness, that of common law decision-making by judges).

II

DOES THE INJURY REQUIREMENT MAKE ADJUDICATION OF
THE MERITS CONCRETE?

Most commentators say little about the Court's view that the standing requirement makes litigation more concrete. The few commentators who have said something about it disagree among themselves. Alexander Bickel and Cass Sunstein, for example, make conflicting claims, with Bickel claiming that standing makes litigation more concrete²⁰² and Sunstein denying it.²⁰³ They both seem to take the correctness of their views for granted, with little supporting analysis.²⁰⁴ Mark Tushnet states that "[i]t is . . . entirely unclear that standing rules add anything to the concreteness of the case."²⁰⁵ While he provides analytical support for this view, he does not systematically examine the relationship between injury and the merits in a large sample of cases, as this Article does.²⁰⁶

²⁰² See BICKEL, *supra* note 11, at 115.

²⁰³ See Sunstein, *supra* note 107, at 1448.

²⁰⁴ Professor Sunstein relies upon a single case, *Sierra Club v. Morton*, 405 U.S. 727 (1972), to support this view and provides only conclusory analysis of that case. See Sunstein, *supra* note 107, at 1448. He does not consider other cases that might support or contradict his view. In fairness, though, his remark on this point constitutes a small part of a much larger argument. See *id.* at 1432–34 (outlining a broad thesis about the Court's failure to embrace a public law model and the need to repudiate Article III as a basis for standing requirements).

The cases Professor Bickel mentions do not support his conclusion that standing requirements make litigation more concrete. For example, Bickel explains that standing did not exist in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), but did exist in *Tennessee Electric Power Co., v. Tennessee Valley Authority*, 306 U.S. 118 (1939). See BICKEL, *supra* note 11, at 119–20. In both cases, petitioners sought to litigate constitutional questions regarding congressional authority to create the Tennessee Valley Authority (TVA). See *Tenn. Elec.*, 306 U.S. at 134–35; *Ashwander*, 297 U.S. at 317, 319. Bickel explains that the *Ashwander* plaintiffs, stockholders in the Alabama Power Company, which had a contract with the TVA, experienced no injury while the Tennessee Electric Power Co. experienced an injury as a competitor. See BICKEL, *supra* note 11, at 119–21. But Bickel does not show that a competitor's suit would create a more valuable context for a decision about the TVA's constitutionality than that of stockholders in a company with which the TVA had a contract. Both fact patterns would illustrate something about the actualities of the TVA that the Court might consider in a case about the TVA's constitutionality. The contract giving rise to the *Ashwander* case directly related to the TVA's allegedly unconstitutional activities, creating and selling electric power. See *Ashwander*, 297 U.S. at 315 (explaining that contract involved sale of transmission line and substations, sale of TVA's electric power, and agreements about the service area); cf. *Tenn. Elec.*, 306 U.S. at 136 (noting that sale of electricity gave rise to appellant's claim). Indeed, the concrete context that the *Ashwander* contract provided narrowed the issue under review, notwithstanding the lack of injury to the petitioners. See *Ashwander*, 297 U.S. at 326 (defining issue in terms of the constitutionality of construction of the Wilson Dam and the sale of energy from that dam alone); cf. *Tenn. Elec.*, 306 U.S. at 136 (defining issue as the constitutionality of federal sale of electricity, not just electricity from a single dam, at wholesale rates).

²⁰⁵ See Tushnet, *supra* note 77, at 1714.

²⁰⁶ See *id.* at 1714–16.

This Part offers an extensive review of the case law to see whether Bickel or Sunstein and Tushnet have the better argument. As we shall see, Sunstein and Tushnet's view that standing does not contribute to concreteness proves correct in most instances, but Bickel's contrary vision properly characterizes some significant cases.

A. Cases Not Explicitly Linking Injury to the Merits

In three very important classes of cases—administrative law cases, facial constitutional challenges based on individual rights, and structural constitutional litigation—explicit linkages between injuries and merits adjudication seldom arise. The requirement of injury-in-fact in such cases usually does nothing to make litigation more concrete.

1. *Administrative Law Cases*

In the leading contemporary standing case, *Lujan v. Defenders of Wildlife*,²⁰⁷ the Court rejected a challenge to a rule refusing to apply the consultation requirements of the Endangered Species Act of 1973 to overseas projects.²⁰⁸ The Court held that plaintiffs who had indicated only vague intentions to visit the places whence endangered species might vanish lacked injury-in-fact sufficient for standing, even though they had visited these places in the past.²⁰⁹

Justice Stevens' concurrence, approving of standing, but ruling against *Defenders of Wildlife* on the merits, clearly shows that injury would not have "illuminated"²¹⁰ the merits in any way.²¹¹ Justice Stevens explained that congressional intent governs the question of the Endangered Species Act's extraterritoriality.²¹² Accordingly, Justice Stevens' merits analysis never mentions the injuries he found sufficient for standing.²¹³ He rests his analysis upon case law's presumption against extraterritorial application of a statute,²¹⁴ the lack of explicit statutory language pointing overseas,²¹⁵ the position of implementing agencies,²¹⁶ the statute's structure,²¹⁷ and its general purpose.²¹⁸ Because the intent of Congress governed the question,

²⁰⁷ 504 U.S. 555 (1992); see William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 252 (2001) (characterizing *Lujan v. Defenders of Wildlife* as the "base text" of modern standing law).

²⁰⁸ See *Defenders of Wildlife*, 504 U.S. at 557–58, 578.

²⁰⁹ See *id.* at 562–64; *id.* at 579 (Kennedy, J., concurring in part).

²¹⁰ See *supra* text accompanying note 47.

²¹¹ See *Defenders of Wildlife*, 504 U.S. at 585–89 (Stevens, J., concurring).

²¹² See *id.* at 585 (Stevens, J., concurring).

²¹³ See *id.* at 585–89 (Stevens, J., concurring).

²¹⁴ *Id.* at 585–86 (Stevens, J., concurring).

²¹⁵ *Id.* at 586 (Stevens, J., concurring).

²¹⁶ *Id.* at 587 (Stevens, J., concurring).

²¹⁷ *Id.* at 588 (Stevens, J., concurring).

²¹⁸ *Id.* at 588–89 (Stevens, J., concurring).

subsequent experience and injury to aggrieved parties, no matter how concrete or dramatic, was quite irrelevant to the merits.

This disconnect between injury and merits does not come from some quirk in Justice Stevens' analysis. A majority of the Court employed a similar approach with equally little reference to injury in *Equal Employment Opportunity Commission v. Arabian American Oil Co.*²¹⁹ In that case, an alleged victim of racial discrimination by an Arabian American Oil Company subsidiary in Saudi Arabia, a person with obvious standing, asked the Court to apply Title VII of the Civil Rights Act abroad.²²⁰ The Court's analysis in subsequent extraterritoriality cases, some of which employ a weaker presumption against territoriality, make equally little reference to injuries.²²¹

The lack of linkage between the merits and standing in *Defenders of Wildlife* does not stand alone. Rather, this pattern prevails in almost all cases litigating the question of whether agency action conforms to a governing statute.²²² Indeed, in the overwhelming majority of statutory administrative law cases that come before the Court in which standing is litigated, injuries have no impact on the merits, and therefore no impact on the concreteness of the merits litigation. I use the term "statutory administrative law cases" to refer to cases in which the principal claim is that an agency action conflicts with a governing statute, as opposed to a claim that the agency's reasons for its exercise of

²¹⁹ 499 U.S. 244 (1991), *superseded by statute as stated in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).

²²⁰ See *id.* at 246–47.

²²¹ For an overview of extraterritoriality, see William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85–89 (1998) and James E. Ward, Comment, "Is That Your Final Answer?" *The Patchwork Jurisprudence Surrounding the Presumption Against Extraterritoriality*, 70 U. CIN. L. REV. 715, 717–29 (2002).

²²² See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 176 (2000) (describing merits claim that polluter exceeded permit limits, a claim which does not require proof of harm to anyone); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 875–79 (1990) (describing claim that "land withdrawal review program" violated the Federal Land Policy and Management Act and the National Environmental Policy Act); *Bryant v. Yellen*, 447 U.S. 352 (1980) (evaluating claim about the application of reclamation laws to certain lands through statutory construction with no reference in the merits analysis to the injuries of the farmers bringing suit); *Sierra Club v. Morton*, 405 U.S. 727, 730 & n.2 (1972) (describing legal claims about planned ski resort in the Mineral King Valley that almost surely would have been resolved with no reference to injuries); *cf. Andrus v. Allard*, 444 U.S. 51, 55–64 (1979) (failing to consider injury to plaintiffs, but using the specifics of their actions to frame the statutory issue of whether the Secretary of Interior may bar the sale of parts of birds killed before federal protections applied to the birds). Compare *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (holding that the respondents' injury conferring standing stemmed from their inability to obtain information that would help them evaluate candidates for public office), with *Akins v. Fed. Election Comm'n*, 101 F.3d 731, 740–44 (D.C. Cir. 1996) (en banc) (engaging in merits analysis without reference to the litigants' injuries, focusing instead on the interpretation of the term "political committee" in a disclosure statute in light of First Amendment concerns), *vacated by* 524 U.S. 11 (1998).

discretion are arbitrary and capricious or not supported by substantial evidence.²²³

The Supreme Court's response to claims that agency action was either arbitrary and capricious or not supported by substantial evidence uses the agency record to provide the context for decision.²²⁴ Parties play a role in creating this record through their comments and submissions. Although these comments can document the parties' potential injuries, they often focus more generally on the effects of agency action on the public or its interaction with pertinent public policies. Very often arbitrary and capricious review does not directly address the injuries parties expect to incur because of the challenged action.²²⁵ But sometimes facts about the petitioner's projected future

²²³ In practice, litigants and courts often combine these types of claims. See *Arent v. Shalala*, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995). In principle, however, they are somewhat separable. See 42 U.S.C. § 706(2)(A) (authorizing reversal of agency action that is "arbitrary and capricious" or "otherwise not in accordance with law" (emphasis added)). Contrary-to-law claims assert that agency actions conflict with the statute. Cf. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (associating "contrary to law" claim with statutory interpretation). Arbitrary and capricious claims, by contrast, do not assert that the substantive statutory provision governing the agency action at issue prohibits the particular action taken, but rather suggest that the reasons behind the agency's decision were arbitrary and capricious. See, e.g., *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Comm'n*, 45 F.3d 481, 484-86 (D.C. Cir. 1995) (upholding decision as adequately reasoned). Resolution of a contrary-to-law claim could, in theory, foreclose taking the prohibited action. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120 (2000) (holding that the FDA may not regulate tobacco). Resolution of an arbitrary and capricious claim, however, allows the agency to take the same action again, if the agency provides a reasonable justification the second time around. See *Competitive Enter. Inst.*, 45 F.3d at 484-86 (upholding agency reaffirmance of a rule previously set aside under the arbitrary and capricious standard).

These categories, however, tend to blend. See *Arent*, 70 F.3d at 616 n.6 (discussing overlap between the doctrines dealing with unreasonable statutory interpretation and arbitrary and capricious decisions); see, e.g., *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 731 (1998) (noting that complaint alleged that the agency's actions were both contrary to the authorizing statute as well as arbitrary and capricious).

²²⁴ See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69 (1962) (holding that any review of agency action must be based on the record before the agency, not "post hoc rationalizations"); cf. *Ohio Forestry Ass'n*, 523 U.S. at 736-37 (expressing view that review of site-specific plans would offer more concrete context for review than a plan for an entire national forest).

²²⁵ See, e.g., *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 246-48 (2002) (resolving complaint about aggregation method's tendency to overestimate a restaurant's Federal Insurance Contribution Act obligation for tip income, although restaurant did not claim injury from overestimation in its case); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378-85 (1989) (engaging in arbitrary and capricious review regarding agency's decision not to prepare supplemental environmental impact statement and discussing only importance of new information in a scientific study); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983) (adjudicating insurance company challenge in terms of the agency's rationale for rescinding safety standard, rather than focusing on the impact on insurance company revenues); *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 169-170 (1982) (upholding regulation authorizing due-on-sale clauses in federal savings and loan association mortgage contracts with no reference to potential injury to homeowners who signed such contracts); *FCC v. Nat'l Citizens Comm. for Broad.*,

injury do frame issues for resolution.²²⁶

While cases arising from agency adjudication and enforcement of rules usually present no serious standing issues, the injuries in these cases do frequently make merits adjudication concrete.²²⁷ But even in this context, policy issues arise that make the direct experience of participants in agency adjudication irrelevant to merits analysis.²²⁸

2. *Structural Constitutional Law Cases*

The line item veto decisions exemplify a category of cases addressing the structure of government. This category includes separation of powers cases and federalism cases.²²⁹ The separation of powers cases address questions regarding the limits of the powers of various branches of the federal government.²³⁰ Federalism cases often address questions regarding the limits of federal power imposed to preserve a sphere of state sovereignty.²³¹ In these structural consti-

436 U.S. 775, 802–09 (1978) (upholding FCC decision to “grandfather” in existing cross ownership to prevent disruption of service in challenge brought by primarily by broadcasters, not the consumers who might experience disruption).

²²⁶ See, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (deciding that EPA’s issuance of a discharge permit to an Arkansas polluter was not arbitrary and capricious, and in doing so addressing the relevance of further polluting an already degraded river). I was able to find only one “arbitrary and capricious” decision in which the Supreme Court decided an issue of standing. Because of this, my analysis of injury’s role in the resolution of arbitrary and capricious claims, see *supra* note 225, could not employ the technique much of this Article has used to analyze injuries’ role in merits analysis, a comparison of the injury described for purposes of standing with the Court’s analysis of the merits. Instead, my arbitrary and capricious analysis here infers the nature of the injury that made standing too obvious to litigate from the party’s identity and the nature of the challenged rule.

²²⁷ See, e.g., *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 277–79 (1978) (using criminal charges against a company to frame the issue of whether Congress intended to apply criminal sanctions to violations of emission standards); *Balt. & Ohio R.R. Co. v. Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87 (1968) (using information about cost structure of companies to frame issues and reach outcome in adjudication of challenge to ratemaking).

²²⁸ See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794–96 (1990) (relying upon context provided by a range of NLRB cases and general policies of National Labor Relations Act to uphold NLRB’s refusal to presume that strike replacements are anti-union).

²²⁹ See MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 37–38 (1982); see, e.g., *Clinton v. City of New York*, 524 U.S. 417, 452–53 (1998) (Kennedy, J., concurring) (noting that the separation of powers and federalism doctrines are relevant in adjudicating the constitutionality of the line item veto); *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that Congress cannot compel states to dispose of radioactive wastes).

²³⁰ See PERRY, *supra* note 229, at 49; see, e.g., *Clinton*, 524 U.S. 417 (adjudicating validity of executive power to use a line item veto); *Mistretta v. United States*, 488 U.S. 361 (1989) (adjudicating validity of judicial rulemaking regarding sentencing by analyzing the separation of powers and nondelegation doctrines, not the experience of criminals under sentencing guidelines); *INS v. Chadha*, 462 U.S. 919, 944–59 (1983) (adjudicating the validity of a veto exercised by only one House of Congress).

²³¹ See *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding that Congress’s interstate commerce authority does not authorize creation of a federal remedy for gender-based violence); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that

tutional law cases, individual injury almost never significantly influences the merits.²³²

3. *Facial Individual Rights Cases*

Facial challenges to statutes based upon individual rights claims also rarely contain express links between injury and result.²³³ Litigants making claims that the government has violated some provision of the Bill of Rights often have a choice regarding how they frame the issue for litigation.²³⁴ They may either argue that the statute challenged is unconstitutional on its face or that it is unconstitutional as applied to the plaintiff's conduct.²³⁵ The Court tends to disfavor facial challenges.²³⁶ Indeed, the Court has often stated that litigants seeking declarations of facial invalidity must show that no application of the statute conforms to the Constitution,²³⁷ although the Court has

Congress's constitutional grant of authority to regulate interstate commerce does not allow for federal restrictions on gun possession near schools); *New York*, 505 U.S. at 156 (noting that the states maintain a degree of sovereignty despite broad congressional powers); *PERRY*, *supra* note 229, at 38.

²³² See, e.g., *Clinton*, 524 U.S. 417 (barely mentioning injuries of litigants in the merits analysis section of the opinion); *New York*, 505 U.S. at 174–76 (holding that offering state a choice between either taking title to low level radioactive waste or regulating such waste in a manner dictated by Congress commandeers state government); *Mistretta*, 488 U.S. at 412 (analyzing the case based on history and text of Constitution, not the likely experience of criminals under sentencing guidelines).

²³³ See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002) (explaining how a particular facial takings claim eliminates the need to consider "the actual impact of the regulation on any individual"); *Carey v. Brown*, 447 U.S. 455, 459–71, 461 n.5 (1980) (determining whether an ordinance banning certain picketing unconstitutionally discriminates between different types of speech without focusing on particular type of picketing giving rise to suit).

²³⁴ See *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

²³⁵ See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321–23, 1335–39 (2000); see, e.g., *Virginia v. Black*, 123 S. Ct. 1536, 1550 (2003) (noting that respondents were not making an as-applied argument, but rather were contending that the cross-burning ban was facially invalid); *Tahoe-Sierra*, 535 U.S. at 320 (noting that the a landowner bringing this takings claim sought a categorical rule that any moratorium on building constitutes a facial taking); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379–80 (1992) (teenagers accused of burning a cross on a black family's yard mounted a facial challenge to the ordinance under which they were charged).

²³⁶ See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (noting in the context of takings claims that facial challenges are particularly difficult); *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Facial challenges, however, are more commonly recognized. See Dorf, *supra* note 96, at 236 (arguing that the Supreme Court has not actually applied the strict *Salerno* test to facial challenges); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 421–56 (1998) (arguing that the Court's openness to facial challenges varies with the legal doctrine involved in the challenge).

²³⁷ See *Salerno*, 481 U.S. at 745; see also *Reno v. Flores*, 507 U.S. 292, 301 (1993) (citing *Salerno*); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (same). But see *City of Chicago v.*

invalidated statutes facially in many cases in which the litigants have not made that showing.²³⁸

Judicial opinions addressing facial challenges rarely focus on the influence of the challenged statute upon the plaintiff.²³⁹ Rather, they tend toward abstract general reasoning.²⁴⁰ When they do consider concrete situations, they often consider the situations of people other than the plaintiffs.²⁴¹

For example, in *County of Riverside v. McLaughlin*,²⁴² the Court upheld the standing of arrested plaintiffs to litigate in a class action the question of whether county post-arrest probable cause determinations were prompt enough to satisfy Fourth Amendment requirements.²⁴³ One would think that the question of whether a probable cause determination was sufficiently prompt to satisfy a constitutional requirement regarding the reasonableness of searches and seizures might invite narrow framing in terms of the length of time plaintiffs actually remained in jail and the reasons for lack of immediate determinations in the case before the Court. The context the Court considered, however, comes not from the experience of the named representatives of the class, but from a "County policy," the content of which is never resolved in the litigation.²⁴⁴ The Court does not even state how long the named plaintiffs remained in jail awaiting a probable cause determination.

Morales, 527 U.S. 41, 55 n.22 (1999) (Stevens, J.) (characterizing the *Salerno* formulation as dictum).

²³⁸ See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999) (holding the Patent Remedy Act invalid on state sovereign immunity grounds); *Morales*, 527 U.S. at 60–64 (holding an anti-loitering statute facially invalid); see also *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (noting in the context of First Amendment cases that a facial challenge may be permitted because of the lack of any valid application, or because the statute is so broad that it inhibits third parties' speech).

²³⁹ See, e.g., *Morales*, 527 U.S. at 60–64, 62 n.34 (striking down ordinance with only a single reference to defendants' experience in a footnote); cf. *Zablocki v. Redhail*, 434 U.S. 374, 387–91 (1978) (considering plaintiff's injury along with hypothetical injury others may experience from statute prohibiting marriage without payment of prior child support, but focusing analysis on state's justification for the statutory restrictions on the right to marry).

²⁴⁰ See, e.g., *Nyquist v. Mauclet*, 432 U.S. 1, 7–12 (1977) (basing decision to grant aliens educational benefits upon analysis of level of scrutiny for alienage discrimination under Equal Protection Clause).

²⁴¹ See, e.g., *Zablocki*, 434 U.S. at 387 (discussing not only the actual litigant, but also other persons hypothetically affected by statute).

²⁴² 500 U.S. 44 (1991).

²⁴³ See *id.* at 50–52.

²⁴⁴ See *id.* at 47–48 (noting dispute about whether County policy requires probable cause determination within seven days or ten days). The Court assumed that the ordinance provided for a "probable cause determination [] at arraignment", which implied a wait of no more than seven days, for "present purposes." *Id.*

In the end, the Court issued a ruling based on policy considerations. The majority established a presumption that detention for longer than forty-eight hours without a probable cause determination was invalid.²⁴⁵ It established this period as presumptive, rather than mandatory, in order to implement a policy of "flexibility" to accommodate varying state administrative needs.²⁴⁶ Justice Scalia, relying more heavily upon historical understanding of the Fourth Amendment, advocated a more stringent rule.²⁴⁷ None of the Justices relied upon the concrete facts regarding the injuries to named plaintiffs. As a consequence, it is not clear that the decision offers relief (or a denial of relief) to the named plaintiffs. The opinion, in many respects, uses a vague hypothetical to announce a general rule, even though injured plaintiffs brought the action.²⁴⁸

This tendency toward abstraction in facial challenges exists even when the precise scope of injuries and the factual context they provide are quite clear. For example, in *R.A.V. v. City of St. Paul*,²⁴⁹ the Court adjudicated a teenager's claim that his arrest for burning a cross on a black family's yard violated his free speech rights.²⁵⁰ The Court's merits discussion, however, paid no attention at all to the teenager's conduct or precise injury. Rather, the Court focused on the question of whether the ordinance under which he was charged, which outlawed fighting words based on race, religion, or gender, constituted content discrimination.²⁵¹ For the cross burner had wisely framed his case as a facial overbreadth challenge under the First Amendment, rather than as a challenge to the statute's application to his appalling conduct.²⁵²

At times, however, injury makes even rulings invalidating entire statutes more concrete. For example, in *Zablocki v. Redhail*,²⁵³ the Court invalidated a statute requiring parents to meet their child support obligations in order to obtain a marriage license.²⁵⁴ Because the applicant who brought the case was indigent and thus could not meet

²⁴⁵ See *id.* at 56–57.

²⁴⁶ See *id.* at 53–54 (citing need to encourage "'flexibility and experimentation by the States'" (quoting *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975))).

²⁴⁷ See *id.* at 60–70 (Scalia, J., dissenting) (proposing a rule requiring probable cause determinations within 24 hours absent extraordinary circumstances).

²⁴⁸ This case is not an isolated example. See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52–56 (1987) (deciding the issue of whether a citizen suit lies for wholly past violations, even though the complaint alleged that a polluter remained in violation at the time of trial).

²⁴⁹ 505 U.S. 377 (1992).

²⁵⁰ *Id.* at 379–80.

²⁵¹ See *id.* at 380–91.

²⁵² Cf. *id.* at 379–80, 396 (conceding that the conduct involved was both punishable under other laws and "reprehensible").

²⁵³ 434 U.S. 374 (1978).

²⁵⁴ See *id.* at 375, 390–91.

his child support obligation, the Court analyzed the statute as a substantial infringement upon the right to marry that was not well supported by the state's interest in collecting child support.²⁵⁵ Thus, an injury to a plaintiff can make clear that a statute wholly negates the right at issue, even though the statute on its face appears merely only to burden that right. While injury often fails to make facial challenges concrete, it sometimes concretizes rulings about the validity of a statute when the Court uses the injury to examine the statute's practical implications.

B. As-Applied Individual Rights Claims Often Link Injury to the Merits

Individual injuries often influence resolution of as-applied individual rights claims. They often make as-applied challenges somewhat concrete in several ways. First, the nature of the plaintiff's injury frequently helps frame and limit the issue for resolution.²⁵⁶ Second, the Court sometimes uses the facts regarding the litigant's injury to illuminate the consequences of the challenged government action.²⁵⁷ This in turn informs the discussion of whether the Court should hold the government conduct unconstitutional.

Cases involving allegations of police misconduct violating individual constitutional rights provide a good example of injury informing the judgment.²⁵⁸ The Court has sometimes denied standing to litigants who, in its view, failed to adequately allege personal injury at the hands of the police.²⁵⁹ But in cases in which the Court does reach the

²⁵⁵ See *id.* at 378, 387–91.

²⁵⁶ See, e.g., *Meese v. Keene*, 481 U.S. 465, 479 n.14 (1987) (framing issue of labeling films "political propaganda" under the Foreign Agents Registration Act of 1938 in terms of potential reputation harm that may befall appellee); *Andrus v. Allard*, 444 U.S. 51, 64–68 (1979) (framing takings issue in terms of loss of opportunity to sell artifacts of protected birds); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14, 289 (1978) (plurality opinion) (Powell, J.) (injury of inability to compete for all one hundred places in medical school leads to framing case in terms of "a line drawn on the basis of race"); *Bigelow v. Virginia*, 421 U.S. 809, 821–22 (1975) (examining the particular contents of an advertisement for abortion services to determine if the editor who published it enjoyed First Amendment protection); *Ruiz v. Hull*, 957 P.2d 984, 998 (Ariz. 1998) (using experience of legislators challenging English-only ballot initiative to illustrate its First Amendment implications).

²⁵⁷ See, e.g., *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 & n.4 (1987) (using the *Arkansas Times'* situation as perhaps the only publication to pay a tax to show that the tax unconstitutionally singled out a small group within the press); cf. *Meese*, 481 U.S. at 488–490 (Blackmun, J., dissenting in part) (objecting to Court's failure to use facts presented to prove injury to evaluate effects of Foreign Agents Registration Act upon free speech).

²⁵⁸ See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 366–367 (1976) (discussing allegations of police misconduct in resolving the case); *Allee v. Medrano*, 416 U.S. 802, 804–09, 814–15 (1974) (same).

²⁵⁹ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (finding case-or-controversy requirement unmet in suit for injunctive relief where possibility that respondent

merits, it has relied upon documentation of plaintiffs' injuries, at least in part, to establish a constitutional violation.²⁶⁰

In other cases, one might say that the injury conferring standing frames the issue, because the case defines the injury in terms of the right asserted, rather than the plaintiff's concrete experience.²⁶¹ In these cases, however, we might just as accurately state that the legal claim defines the injury that creates standing.²⁶² This understanding would suggest that the lawyer, not the client's experience, frames the issue. In such cases, plaintiffs with standing arguably add no concreteness to the litigation; plaintiffs without standing who frame the same legal issue would present equally concrete or abstract cases.

Some of these cases involve two injuries—the invasion of a third party's right that the Court focuses upon, and a second, more obvious injury-in-fact that receives little discussion, because constitutional standing is obvious.²⁶³ And this injury-in-fact creating constitutional standing figures not at all in the merits analysis.²⁶⁴

Surprisingly, facts about injury sometimes have no influence upon the merits even in as-applied individual rights cases.²⁶⁵ For ex-

would experience future injury as a result of police practice was speculative; a showing of past injury was deemed insufficient); *cf. Rizzo*, 423 U.S. at 371–73 (expressing doubt that injuries experienced by the plaintiffs provided sufficient evidence of future harm).

²⁶⁰ See, e.g., *Allee*, 416 U.S. at 804–808, 814–15 (discussing the experiences of union members and sympathizers with law enforcement policy of harassment).

²⁶¹ See *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (noting that injury may exist “solely by virtue” of “invasion” of statutorily created rights (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))); see, e.g., *Powers v. Ohio*, 499 U.S. 400, 410–16 (1991) (finding that a convicted white defendant's standing to challenge striking of black jurors rests on the right to a proceeding that appears fair); *Holland v. Illinois*, 493 U.S. 474, 476–78 (1990) (allowing alleged invasion of white litigant's right to have a venire composed of “a fair cross section of the community” to create standing to challenge constitutionality of peremptory challenges to strike prospective black jurors (quoting *Taylor v. Louisiana*, 419 U.S. 522, 526 (1979))); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 8–10 (1988) (holding a private club has standing to challenge municipal prohibition based on its “associational rights”); *McCleskey v. Kemp*, 481 U.S. 279, 291 n.8 (1987) (stating that standing to challenge disparate sentencing based on the victim's race stems from claim that the state violated equal protection).

²⁶² See, e.g., *Gratz v. Bollinger*, 123 S. Ct. 2411, 2423 (2003) (describing rule that in an equal protection case, the denial of equal treatment itself constitutes injury, so that a showing of denial of a tangible benefit is not required).

²⁶³ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991) (stating that a party asserting a right of a third party must also suffer and demonstrate a concrete injury of her own); see, e.g., *Miller v. Albright*, 523 U.S. 420, 432–33 (1998) (plurality opinion) (Stevens, J.) (evaluating discrimination against plaintiff's father and statute's impact on the plaintiff); *Powers*, 499 U.S. at 428 (Scalia, J., dissenting) (suggesting that the injury creating constitutional standing for a white defendant to challenge striking of black jurors stems from the punishment meted out upon conviction).

²⁶⁴ See *Miller*, 523 U.S. at 433–45 (plurality opinion) (Stevens, J.) (discussing whether statute discriminates between unwed citizen fathers and mothers in the transfer of citizenship, with little mention of injury to the plaintiff, the child of an unwed citizen father).

²⁶⁵ See, e.g., *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299, 312–14 (1979) (resolving claim that procedures delaying elections unconstitutionally denied sea-

ample, in *Renne v. Geary*,²⁶⁶ the Supreme Court rejected a challenge to California's restriction of endorsements in nonpartisan elections on standing and ripeness grounds.²⁶⁷ The majority explained how awaiting a challenge by different litigants might add context to the case by showing "the nature of the endorsement, how it would be publicized, [and] the precise language" used.²⁶⁸ The Court did not, however, explain how any of these details would influence the merits of the First Amendment challenge.²⁶⁹ Justice White's dissent, in fact, proposed a resolution of this "as-applied" First Amendment issue that rested upon an assessment of the state's interest and public forum analysis, not the facts that the majority believed were necessary to make the case justiciable.²⁷⁰ A subsequent lower court case also demonstrates the irrelevance of the context that the *Geary* majority found so important, by employing an analysis similar to Justice White's.²⁷¹ And the Supreme Court itself resolved a similar issue—whether a state may prevent candidates for elected judgeships from announcing their views on political and legal questions—without reference to any specific censored statements in *Republican Party of Minnesota v. White*.²⁷²

sonal farm worker's rights to participate in union election by holding that compulsory collective bargaining is not a constitutional right, a holding requiring no reference to facts about the election procedure's influence on farmworker participation); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 166, 171–79 (1972) (focusing upon state action question in merits adjudication with little mention of plaintiff's injury, being denied service as a guest of a private club on grounds of race).

²⁶⁶ 501 U.S. 312 (1991).

²⁶⁷ *See id.* at 316–24.

²⁶⁸ *Id.* at 321–22.

²⁶⁹ *See id.* at 341–42 (Marshall, J., dissenting). Justice Marshall also points out that "[t]he form of future disobedience can only matter in ripeness analysis to the extent that it bears on the merits of a plaintiff's pre-enforcement challenge." *Id.* (Marshall, J., dissenting).

²⁷⁰ *See id.* at 328, 332–34 (White, J. dissenting); *cf. id.* at 343–49 (Marshall, J., dissenting) (proposing a resolution of the case based on facial overbreadth). Justice White defined the issue as whether the deletion of candidate endorsements from voters' pamphlets violated the First Amendment. *See id.* at 328–30 (White, J., dissenting). He found that it did not, because the voter pamphlet is not a public forum and the state's interest in "impartial . . . government, prevention of corruption, and the avoidance of the appearance of bias" sufficiently justified the restriction. *See id.* at 333 (White, J., dissenting).

²⁷¹ *See Cal. Democratic Party v. Lungren*, 919 F. Supp. 1397, 1400–05 (N.D. Cal. 1996) (striking down restriction on party endorsements for candidates of nonpartisan offices as violative of the First Amendment because it serves no compelling state interest).

²⁷² 536 U.S. 765 (2002) (striking down Minnesota rule prohibiting judicial candidates from announcing their views on disputed legal and political issues as a violation of the First Amendment). The *White* dissenters claimed that "the Court's entire analysis has a hypothetical quality" stemming from the unavailability of specific statements from the candidate to make the litigation more concrete. *Id.* at 799 n.2 (Stevens, J., dissenting). In fact, however, the Court relied upon injuries that were not part of the case before it to make the case more concrete. The plaintiff claimed that the rule under review forced him to refrain from announcing his views on legal and policy issues in a 1998 campaign for judicial office. *Id.* at 769–70. But the injury incurred in 1998 could not create a concrete context for litigation of the sort sought in *Geary*, because the plaintiff declined to specify what state-

Third party standing cases cast doubt on the hypothesis that injured litigants make cases more concrete than as-applied challenges predicated upon the injuries of others. For these cases show that litigants may make cases more concrete by introducing facts that demonstrate how challenged practices injure people other than the litigant.²⁷³ For example, defendants seeking to challenge searches or seizures predicated upon violations of others' privacy rights have used the facts pertaining to those searches to make litigation more concrete.²⁷⁴ The Court's third party standing doctrine has limited criminal defendants' ability to adjudicate the validity of searches invading the rights of others,²⁷⁵ but even cases denying standing have become more concrete because of information about injuries to third parties.

For example, Jack Payner, a criminal defendant, challenged the validity of a search that uncovered a document that helped prove that he falsified his income tax return in *United States v. Payner*.²⁷⁶ The factual record in the case, presumably developed by Payner's lawyers, made this allegation quite concrete by demonstrating that IRS agents had stolen the briefcase of a banker to obtain the key document without obtaining a warrant.²⁷⁷ Indeed, the district court found that the government counseled its agents to deliberately violate the Fourth Amendment rights of innocents in order to obtain incriminating in-

ments he wished to make in the 1998 campaign. *See id.* at 769. The Court, however, created some concrete context by referring to the subjects the plaintiff addressed during a prior campaign for judicial office in 1996. *See id.* at 771. The plaintiff probably did not base his complaint on the events of 1996, because the Minnesota Lawyers Professional Responsibility Board had dismissed an ethics complaint against him under the challenged rule, *see id.* at 768-69, which could have created a mootness argument. Arguably, the real injury in 1998 produced no factual context and the non-injury in 1996 did create useful context. *Cf. id.* (notwithstanding dismissal of ethics complaint in 1996, candidate withdrew from that election out of fear of additional complaints). In many other cases, however, nothing about the plaintiff's concrete experience influences the merits. *See supra* note 265 and accompanying text.

²⁷³ *See* *Campbell v. Louisiana*, 523 U.S. 392, 400 (1998) (stating that a white defendant would be an effective advocate for excluded black grand jurors).

²⁷⁴ *See, e.g., United States v. Padilla*, 508 U.S. 77 (1993) (holding that conspirator had no standing to seek exclusion of evidence seized in violation of co-conspirator's expectation of privacy); *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980) (holding that defendant had no standing to challenge seizure of drugs he placed in another person's purse, since he had no reasonable expectation of privacy to assert); *United States v. Salvucci*, 448 U.S. 83, 86-87, 95 (1980) (repudiating automatic standing for criminal defendants to challenge seizure of evidence that constitutes "an essential element of the offense charged" obtained in violation of others' privacy expectations); *United States v. Payner*, 447 U.S. 727, 728-32 (1980) (refusing a defendant standing to contest unconstitutional seizure of documents from another person). This rule has antecedents in earlier cases. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 133-40 (1978) (holding that the exclusionary rule does not apply unless the contested evidence was seized in violation of the defendant's own constitutional rights).

²⁷⁵ *See supra* note 274.

²⁷⁶ 447 U.S. at 728-29.

²⁷⁷ *See id.* at 729-30.

formation about a suspect.²⁷⁸ The Supreme Court used this record and characterization to frame the issue in the case as whether “a federal court should use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant’s constitutional rights.”²⁷⁹ The Court began its analysis with a concrete allusion to the specific facts, stating that “[n]o court should condone . . . this ‘briefcase caper.’”²⁸⁰ But the Court concluded that the importance of “ascertain[ing] the truth in a criminal case” counseled against allowing litigants to assert others’ Fourth Amendment rights, even in this context.²⁸¹ *Payner* illustrates that lawyers can develop facts about other people’s situations to make litigation more concrete and implies that even without an injured client, litigation can become concrete through the development of context. Of course, Payner’s lawyer had a motivation to seek out this information, since his client faced real jeopardy. But an ideological plaintiff’s desire to win her case would likewise motivate her to seek out concrete facts to help bolster her case.²⁸² So, *Payner* does support the more general lesson that noninjured parties, if represented by good lawyers, can develop factual information making a case concrete.²⁸³ In other types of individual rights litigation as well, injuries to people other than the plaintiffs can make litigation concrete.²⁸⁴ In general, as-applied constitutional litigation involves some cases in which individual injury does make litigation more concrete, but also others in which it does not.²⁸⁵

²⁷⁸ See *id.* at 730.

²⁷⁹ *Id.* at 733. The lower courts agreed that Payner had no protectable privacy interest in the documents taken from the banker’s briefcase. *Id.* at 732.

²⁸⁰ *Id.* at 733 (footnote omitted).

²⁸¹ *Id.* at 734–36.

²⁸² See Tushnet, *supra* note 77, at 1708–09, 1713 (suggesting that ideological plaintiffs with a sufficient interest in the subject matter often will be able to present a sufficiently detailed factual record).

²⁸³ Cf. FED. R. CIV. P. 26(b), 30(a)(1), 31(a)(1), 34(c) (authorizing discovery against non-parties); cf., e.g., *Grutter v. Bollinger*, 123 S. Ct. 2325, 2338–41 (2003) (affirming the importance of developing context in an equal protection analysis, and then proceeding to examine a record built by parties and amici that included far more than the particulars of race relations and student performance at the University of Michigan Law School).

²⁸⁴ See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 56 (1992) (allowing state to assert injury to excluded jurors); cf. *Miller v. Albright*, 523 U.S. 420, 433–34 (1998) (plurality opinion) (Stevens, J.) (experience of a hypothetical female central to Court’s evaluation of an equal protection claim alleging discrimination against males).

²⁸⁵ Cf. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72–94 (1978) (describing for purposes of the merits analysis an injury that is different than the injury forming the basis for standing); Fiss, *supra* note 39, at 18 (arguing that in public law, the focus of judicial inquiry is upon a “social condition,” not “discrete events”).

C. Implicit Linkage

The lack of explicit consideration of facts regarding the alleged injury in the merits portions of an opinion provides evidence that those facts did not make that case more concrete. But this lack of explicit consideration does not rule out the possibility of implicit use of the facts regarding injury to improve the concreteness of judicial decision-making. Even when the merits portion of an opinion does not mention the plaintiff's injuries, those injuries might have silently shaped the case: providing facts that strengthened influential arguments made in the briefs not explicitly mentioned in the opinion, or elucidating the consequences that motivated the decision. This subpart therefore considers the likelihood and probable implications of this possibility.

If injury silently shaped cases where it had no explicit influence, this would raise significant issues. Silent influence would suggest that the judge writing the decision has not been wholly candid in revealing the grounds for the decision. Indeed, functionalists often suspect that facts influence even judges who do not mention them, and argue for increased candor about their influence.²⁸⁶ But this silent influence would have other, slightly less obvious implications as well.

The failure to mention the relevance of injury to the merits decision would often influence its precedential scope. For example, let us imagine that the Justices invalidated the line item veto in *Clinton v. City of New York*²⁸⁷ because they were concerned about declining medical care in New York hospitals that had lost federal funding through President Clinton's veto. This hypothetical suggests that a veto of line items for a different purpose, such as highway construction, might pass muster. But the Court did not provide any reasoning limiting its holding to the veto of Medicare funding, so this argument should not fly. The reasons given, not the silent motivation of judges, control the precedential scope of the decision. And the reasons given in *Clinton* rule out all line item vetoes.²⁸⁸

The wisdom and validity of the *Clinton* decision must rest on an assessment of the constitutional soundness of an order ruling out all line item vetoes. Thus, if concrete context is desirable because it aids sound judgment, as Bickel argues,²⁸⁹ it failed in that case. If the judgment is sound, it is for reasons having little to do with the injuries to New York hospitals.

²⁸⁶ See, e.g., Elliott, *supra* note 147, at 145 (suggesting that the Court's formalist opinion in *INS v. Chadha* "drives [policy judgments] underground" and arguing for "open and aboveboard . . . conclusions" regarding the legislative veto's effects).

²⁸⁷ 524 U.S. 417 (1998).

²⁸⁸ See *supra* text accompanying note 25.

²⁸⁹ See *supra* text accompanying notes 96–97.

1. *Implicit Framing*

The above analysis regarding explicit linkages touched upon the problem of implicit framing. For that analysis did not confine itself to cases in which the Court explicitly said, "We use the injury to frame the question before us." Instead, that analysis considered any framing of issues that in fact corresponded to the scope of an injury that helped justify standing to be an example of explicit linkage.

But the frequent lack of correspondence between injury and the framing arising in many cases calls attention to some fundamental issues that need analysis. Injuries do not frame litigation; lawyers and judges do.²⁹⁰ Ultimately, the Court determines how to define the issue it addresses in its opinion.²⁹¹ Lawyers seek to frame issues in a manner helpful to their case, and to convince the Court to adopt that framework.²⁹² The possibility of facial challenges to statutes demonstrates that litigants need not confine their challenges to those applications that injure only them.²⁹³ Even injured litigants can make ideological choices about which issues to raise. And judges can employ discretion in deciding how to frame issues as well.²⁹⁴

Lawyers' propensity to frame issues to advantage their clients does not imply that the wise lawyer will always seek a ruling confined

²⁹⁰ See *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (stating that petitioners largely frame the issue upon which they wish to seek certiorari, but that the Court may rephrase the question); see also *Troxel v. Granville*, 530 U.S. 57 (2000) (framing issue in several different ways, with some Justices framing the challenge as facial and some framing it as an as-applied claim). Professor Isserles has argued that a court's choice about "the scope of the appropriate invalidation" is "more or less predetermined from the outset." See Isserles, *supra* note 236, at 452. But it is not clear that this statement should be taken literally, for he argues that an integral connection exists between "doctrinal tests" and decisions about "how much of a statute ought to be preserved." *Id.* This suggests that a court's view about how much of a statute to preserve might influence doctrinal tests. Regardless, so many cases involve disputes between Justices about how an issue should be framed, as was the case in *Troxel*, that a claim of predetermination seems at best exaggerated: Isserles himself qualifies it. See *id.* at 452–53.

²⁹¹ See, e.g., Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 791 (suggesting that the Court could have, and should have, decided *INS v. Chadha* on narrower grounds).

²⁹² See, e.g., Levinson, *supra* note 184, at 1314–15 (discussing how the two sides arguing a hypothetical takings claim would frame the issue differently, and how the Court in an actual case with similar facts chose one position over the other); Strauss, *supra* note 291, at 791–92 (suggesting that none of the lawyers arguing *Chadha* found a narrow framing of the issues to be in their clients' interest, and accordingly did not urge the Court to adopt a narrow approach).

²⁹³ Cf. Tushnet, *supra* note 77, at 1712 (arguing that Hohfeldian plaintiffs "can induce the courts to adjudicate cases in ways that bind future courts and litigants to . . . abstract decisions").

²⁹⁴ See, e.g., *Yee*, 503 U.S. at 535–37 (acknowledging that the Court has "on occasion rephrased the question presented" or asked the parties to address an issue not raised, and subsequently construing the issue before it more narrowly than the petitioner had); Levinson, *supra* note 184, at 1332–75 (discussing how judicial views about the appropriate framing of a transaction influence constitutional decisions).

to the context that the client's injury provides. A broad ruling will encompass the client's injury as well as a narrow one.²⁹⁵ And sometimes a wide framing of an issue can help the client.²⁹⁶ In *Clinton*, a good argument existed that all line item vetoes were invalid.²⁹⁷ It would be very hard to construct an argument narrowly targeting the veto of funding for New York hospitals. Furthermore, ideological clients who have experienced injury may prefer broader frames to get at the larger problem that really upsets them. And repeat players may seek rulings not only addressing their injuries, but also resolving all conceivable problems that might arise in the future.²⁹⁸ Injury's influence on framing does not always confine.

2. Consequences

It is impossible to know whether the injuries that justified standing influence the merits of a case when the Court does not mention them in its merits analysis. The *Clinton* case would suggest, however, that the undisclosed consideration of injuries may occur less frequently than many functionalists might suspect. After all, the Justices deciding *Clinton* probably did not care about the hospital's loss of funds. It is hard to imagine that the case would have gone the other way if no worthy beneficiary of pork barrel spending had come before the Court. It seems quite likely that the Court shared the public's concern about pork barrel spending, exemplified in the *Clinton* case by the tax break given to the farmers' cooperative,²⁹⁹ but simply found the line item veto inconsistent with the clauses governing legislation in the Constitution.³⁰⁰

Just as lawyers and judges control the framing of issues before the court, they also control the introduction and use of facts. Lawyers with injured clients may place facts regarding these injuries in the record and use those facts to try to win sympathy. But lawyers with concretely injured clients can choose to argue abstractly about the constitutional questions, and in cases like *Clinton* they probably will.

²⁹⁵ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 291–92 (1987) (stating that black defendant appealing his own sentence broadly argued that Georgia's capital punishment statute violated the Equal Protection Clause, because the death penalty applied more often to black defendants and white murder victims than to white defendants and black murder victims).

²⁹⁶ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379–80 (1992) (finding in favor of a teenager who facially attacked the hate speech ordinance under which he was charged after burning a cross on a black family's lawn).

²⁹⁷ See *supra* text accompanying notes 24–36.

²⁹⁸ See Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 6–7 (2000) (arguing that “repeat player[s]” have greater incentives than normal litigants to consider the future precedential value of litigation).

²⁹⁹ See *Clinton v. City of New York*, 524 U.S. 417, 423–27, 432 (1998).

³⁰⁰ See *supra* text accompanying notes 24–30.

Even when lawyers choose to bring up the consequences of the laws or regulations they wish to challenge, they need not confine themselves to the injuries their clients have experienced.³⁰¹ They can, and often do, discuss the ramifications for other people or even society as a whole.³⁰² And judges can decide whether the client's context, a broader context, or no context at all aids wise decision-making.³⁰³ So an injured client offers no guarantee that facts will illuminate the consequences of judicial decisions or influence the arguments of lawyers. Ultimately, injured clients cannot guarantee concrete merits litigation.

D. The Structure of Linkage

The evidence so far presented suggests a structure to the pattern of linkage between injury and the merits. Structural constitutional cases, significant administrative law cases, and facial challenges predicated upon individual rights rarely become concrete because of a litigant's injury. By contrast, as-applied individual rights challenges more often use individual injury as a concretizing device.

The failure of injury alone to control the framing or resolution of issues raises interesting normative and structural questions. It invites inquiry into the structural reasons for the observed pattern of linkages between injury and merits analysis. And it raises the normative question of whether the facts giving rise to injury should influence the Court's decisions, and what the Court should do about the possibility of value flowing from such influence. Analysis of these questions helps illuminate the structure of public law and the theoretical consequences of the paradox.

III

THEORETICAL IMPLICATIONS

This Part explains why injuries giving rise to standing have so little impact upon the merits analysis of most cases and assesses the broader implications of this failure of the standing requirements to

³⁰¹ See *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (noting that a "court's judgment may benefit others collaterally").

³⁰² For a recent, well-publicized example of such litigation tactics, see *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001), *rev'd sub nom.* *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). As a part of their challenge to Texas's law criminalizing homosexual conduct, the defendants, both men, raised the issue of whether the law discriminated on the basis of gender, and specifically discussed how the law would apply to two women. *Id.* at 357.

³⁰³ See Tushnet, *supra* note 77, at 1723 (arguing that "jurisprudential doctrine" will not prevent the Court from formulating a broad, abstract rule if it wants to); see, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590-91 (1985) (considering the broad context of commercial disputes over data about pesticide ingredients impeding health and safety regulation in upholding mandatory arbitration of such disputes under Article III of the Constitution).

improve the concreteness of litigation. It also analyzes the nature of public law and its structure to help explain the paradox of injury having so little influence on the merits. It then develops the normative implications of this paradox.

A. The Nature of Public Law

Little doubt exists that a formalist approach to merits adjudication tends toward abstraction. It does not follow, however, that the formalist approach constitutes the only or even the most important reason for injury's failure to produce widespread concreteness in public law litigation. A more careful examination of public law's nature is necessary to see if the tendency to ignore injuries really comes solely from a formalist reasoning style.

Typically, public law cases become much more abstract than jury trials. *Marbury v. Madison*³⁰⁴ described judicial review as an exercise in resolving a conflict of laws claim, laying the Constitution alongside an Act of Congress to see whether the statute runs afoul of the Constitution.³⁰⁵ *Marbury* appeared quite abstract to contemporaries steeped in the norms of the common law. President Jefferson, while not an objective observer, complained about the abstractness of *Marbury*.³⁰⁶ But some degree of abstraction is inherent in determining whether two laws conflict, especially if one or both are phrased in broad terms.³⁰⁷ And abstraction is also inherent in any legal problem that requires a court to interpret broadly worded grants of power.

We law professors may find this point more difficult to appreciate than our students do. Because we are quite used to legal analysis based on logical arguments about whether two propositions set out in legal documents conflict, such arguments appear more concrete to us than they might to first-year law students, a jury, or even many trial judges. But this mode of analysis is inherently more abstract than the type of contextualized judgment found in a jury trial.³⁰⁸

In the public law context, details about the plaintiff's experience that would lend context to private law adjudication can become irrelevant to merits analysis. The *Marbury* Court adjudicated the question of whether Secretary of State Madison had breached a legal duty to

³⁰⁴ 5 U.S. (1 Cranch) 137 (1803).

³⁰⁵ See *id.* at 177-78.

³⁰⁶ See Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), in 1 S.C. HIST. & GENEALOGICAL MAG. 3, 9-10 (1900) (referring to Chief Justice Marshall's "obiter dissertation" in *Marbury*).

³⁰⁷ Cf. Pushaw, *supra* note 63, at 500 (suggesting that a "'lack of judicially discoverable and manageable standards' seemingly exists in many constitutional clauses" (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

³⁰⁸ See Schauer, *supra* note 201, at 658 (arguing that "reason-giving is the kin of abstraction" and can check "maximal contextualization" and "case-by-case determination[s]").

make Marbury a Justice of the Peace.³⁰⁹ The Court, however, did not discuss how much the loss of this commission meant to Marbury, as it might have had the loss of a commission constituted some kind of tort giving rise to damages dependent upon the extent of injury.³¹⁰ Instead, the Court devoted most of its attention to the question of whether it had authority to adjudicate Marbury's claim³¹¹ and also concluded that Madison had breached a duty to Marbury.³¹² The context that details about Marbury's suffering might have provided became irrelevant.

Something like the *Marbury* model of constitutional litigation also applies to a large class of administrative law claims. Many litigants claim that an agency action, often promulgation of a rule, conflicts with a governing statute.³¹³ Such a claim requires a court to set the statute alongside the agency decision to see whether the two conflict. In this way, claims that an agency action are contrary to law tend toward *Marbury*-type abstraction.

Therefore, the predominance of conflict of laws questions in public law often makes injuries to litigants irrelevant to the resolution of the merits.³¹⁴ In conflict of laws cases, textual analysis matters. The intent of the framers of the trumping document—the Constitution in constitutional cases, the statute in administrative cases—matters. But injuries to litigants may not matter. They will matter only to the degree that the court cares about the consequences of its decisions for the litigants.

Conflict of laws claims form the backbone of public law. They encompass the broadest constitutional and statutory rulings.³¹⁵ Claims that an agency action or statute conflict with a trumping docu-

³⁰⁹ See *Marbury*, 5 U.S. at 153–62.

³¹⁰ Cf. *id.* at 164 (describing the injury as one of loss of an “office[] of trust, of honor or of profit”).

³¹¹ See *id.* at 162–80.

³¹² See *id.* at 162 (stating that the withholding of Marbury's commission was “not warranted by law, but violative of vested legal right”).

³¹³ See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 462–71, 476–86 (2001) (resolving claim that EPA's rule establishing new national ambient air quality standards conflicted with the Clean Air Act); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 164, 172 (1978) (resolving claim that construction of Tellico Dam would violate the Endangered Species Act).

³¹⁴ I use the term “conflict of laws” here in a general sense to describe any claim that two laws conflict. I do not mean to use the term in the narrow sense common in the legal profession, as referring only to the question of which jurisdiction's law applies in an interstate case.

³¹⁵ See, e.g., *Am. Trucking*, 531 U.S. at 464–71 (holding that the EPA may not consider cost in promulgating national ambient air quality standards under the Clean Air Act); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto then found in numerous statutes as violating the constitutional requirements of bicameralism and presentment); *Buckley v. Valeo*, 424 U.S. 1, 6–8, 11, 143 (1976) (per curiam) (greatly limiting campaign finance restrictions as in conflict with free speech guarantee of the First Amendment).

ment require interpretation of the trumping document. Since both the Constitution and statutes govern not just the case before the Court, but a range of future cases, these rulings tend to define public values.³¹⁶ And they necessarily have consequences for nonlitigants, not just the litigants before a court.³¹⁷ As a result, conflict of laws claims draw the court's attention away from the litigants before it into questions of interpretation and of the broader implications of the ruling.³¹⁸

Typically, cases become more abstract as they move up the appellate ladder. Again, we law professors may be poorly qualified to see this, because we live in the world of appellate cases. But an appeal of sufficient merit to generate an opinion typically abstracts a single issue or a small number of issues from the contextual soup of trial. And a successful petition for certiorari usually tears a single issue (or a very small group of issues) from the context of trial and even intermediate appellate review.³¹⁹ The petition becomes an exercise in characterizing the issue and the holdings of other circuits in such a way that a circuit conflict appears.³²⁰ Alternatively, a certiorari petition can emphasize the importance of the issue, not to the litigant, but to the nation as a whole.³²¹ And the Supreme Court issues pronouncements at such a high level of abstraction³²² that its decisions often fail to

³¹⁶ See Fiss, *supra* note 39, at 2 (arguing that judges deciding constitutional individual rights cases "give meaning to our public values"); cf. *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (noting that the American judiciary cannot be completely separated from the enterprise of representative government because judges make common law and "shape the States' constitutions").

³¹⁷ See Pushaw, *supra* note 63, at 479 (stating that the *Marbury* "Court recognized that its decision had ramifications far beyond redressing *Marbury's* injury" (footnote omitted)); see also *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (noting the existence of statutes that authorize broad regulations and therefore permit judicial review before "the concrete effects" are felt); *id.* at 913 (Blackmun, J., dissenting) (agreeing with majority that if a plaintiff prevails in a challenge to "a rule of broad applicability," the court will invalidate the rule, and "not simply . . . its application to a particular individual").

³¹⁸ Cf. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985) (discussing interpretation of vague statutes, which draw meaning from "the purpose of the Act, its factual background, and the statutory context" (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946))).

³¹⁹ See *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992) (discussing how certiorari practice forces litigants to choose the most important issues from the many presented below).

³²⁰ See SUP. CT. R. 10 (listing conflicting decisions as grounds for certiorari).

³²¹ See Fallon, *supra* note 88, at 24 (arguing that the Court chooses issues requiring "attention in light of the public interest in achieving clarity and uniformity in constitutional law" (footnote omitted)); Sunstein, *supra* note 166, at 16 (arguing that the practice of granting certiorari for cases of national importance assures that the decision will "affect other cases"); cf. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1713-16 (2000) (describing tension between certiorari practice and the private rights model of adjudication).

³²² See Fallon, *supra* note 88, at 24 (noting that "the Court routinely issues broad pronouncements, not rulings narrowly tailored to the case before it" (footnote omitted)).

resolve the case before the Court, instead causing a remand so that lower courts can figure out whether a general principle enunciated by the Court should influence the outcome of the case.³²³

A simple model of abstraction and concreteness would suggest an inherent concreteness to private law trials and inherent abstraction in public law litigation, especially at the Supreme Court level.³²⁴ This distinction begins to explain why insistence upon injury does not often produce concrete litigation. But it does not explain why relatively concrete adjudication occurs in some cases, but not others.

B. The Structure of Public Law

Some simple insights into the structure of public law help to explain the patterns of concreteness and abstraction described in Part II. They help explain, for example, why injury plays such a small role in resolving the merits of administrative law and separation of powers cases, but has more influence in as-applied individual rights challenges. The structure of legal problems, rather than the existence of injury, determines whether injury to plaintiffs makes the litigation more concrete. And elucidation of this structure helps to explain the observed pattern.

1. *The Adler-Fallon Debate*

The explanation which follows sheds light upon and expands a recent debate regarding the nature and structure of constitutional law.³²⁵ Mathew Adler argues that constitutional law is about the validity of legal rules, not about the rights of individuals to take certain actions.³²⁶ He takes as his point of departure an individual rights case, *Texas v. Johnson*,³²⁷ which invalidated a prohibition upon flag

³²³ See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001) (remanding case rather than resolve question of whether or not a takings had occurred); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (holding that interest on client trust fund accounts constitutes private property of the client and remanding to resolve underlying takings claim); *County of Riverside v. McLaughlin*, 500 U.S. 44, 59 (1991) (remanding after announcing a general presumption regarding the length of appropriate pre-arraignment detention). But see *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (resolving issue left open in *Phillips*).

³²⁴ See Scalia, *supra* note 65, at 896 (claiming that judges are “instructed to be governed by a body of knowledge that values abstract principle above concrete result”).

³²⁵ Compare Matthew D. Adler, *Personal Rights and Rule-Dependence: Can the Two Coexist?*, 6 LEGAL THEORY 337 (2000) [hereinafter Adler, *Personal Rights and Rule-Dependence*], Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371 (2000) [hereinafter Adler, *Response*], and Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998) [hereinafter Adler, *Moral Structure*], with Fallon, *supra* note 235.

³²⁶ See Adler, *Moral Structure*, *supra* note 325, at 3.

³²⁷ 491 U.S. 397 (1989).

burning.³²⁸ He asks whether we should understand this case as protecting the act of flag burning or as prohibiting the law against desecrating the flag.³²⁹ He argues that since flag burning leading to a conflagration could still be outlawed as arson, we should understand this individual rights case as a decision about the validity of legal rules—specifically, the flag desecration statute.³³⁰ *Texas v. Johnson* does not, argues Adler, insulate the act of flag burning from legal consequences.³³¹ Hence, this case does not protect the individual from injury (in the form of arrest for flag burning). By implication, constitutional law does not protect certain individual actions; it invalidates improper legal rules.³³² This insight leads Adler to the startling conclusion that “[t]here is no such thing as a true as-applied constitutional challenge.”³³³

Richard H. Fallon, Jr., challenged this statement, arguing that as-applied challenges remain the norm.³³⁴ He also questioned the notion that all constitutional challenges should be understood as “rights against rules.”³³⁵

For this Article’s purposes, the points of consensus that emerge from this debate matter more than the differences. First, both Fallon and Adler agree that many, although not all, individual rights cases are properly, and importantly, understood as cases about the validity of legal rules.³³⁶ Second, they agree that some constitutional challenges invalidate only some applications of a rule, instead of all of them.³³⁷ This latter agreement lies concealed behind varying definitions of as-applied challenges.³³⁸ Third, they agree that the results of

³²⁸ See Adler, *Moral Structure*, *supra* note 325, at 3–7.

³²⁹ See *id.* at 5–6.

³³⁰ See *id.* at 3–5 (claiming that Johnson could be constitutionally prosecuted for arson or other general offenses connected with flag burning, but not for violating the flag desecration statute).

³³¹ See *id.* at 4–5.

³³² See *id.* at 3.

³³³ See *id.* at 157 (footnote omitted).

³³⁴ See Fallon, *supra* note 235, at 1368 (“[A]s-applied challenges . . . remain the . . . primary mode of constitutional attack on a statute.”).

³³⁵ See *id.* at 1364–68.

³³⁶ See Adler, *Response*, *supra* note 325, at 1374–75 (agreeing that Fallon is “absolutely correct” that some types of rights challenges “do not entail the existence of a particular type of rule”); Fallon, *supra* note 235, at 1325 (accepting “Adler’s important insight that many . . . constitutional rights are rights against rules”); see also Christopher L. Eisgruber & Lawrence G. Sager, *Religious Liberty and the Moral Structure of Constitutional Rights*, 6 LEGAL THEORY 253, 257 (2000) (understanding of the extent to which Adler’s view is correct can provide “important insight into the moral structure of constitutional rights . . .”).

³³⁷ See Adler, *Response*, *supra* note 325, at 1387 (distinguishing between complete and partial repeal of a rule); Fallon, *supra* note 235, at 1334–35 (articulating an understanding of as-applied challenges as invalidating “subrules” while leaving other subrules intact).

³³⁸ See, e.g., Adler, *Response*, *supra* note 325, at 1387 n.56 (addressing criticism by Fallon and stating that “‘as-applied’” challenges “vindicat[ing] the personal rights of claimants [] do not exist, but “‘as-applied’” challenges” partially invalidating rules do exist).

Supreme Court litigation typically bind, at least indirectly through the doctrine of precedent, parties not before the Court.³³⁹

The insights gleaned from this debate lay the foundation for a structural account of public law adequate to illuminate the paradox. Yet, to do this, the concept of litigation about the validity of legal rules needs more elaboration.

On the surface, the idea that constitutional law should be understood as about the validity of legal rules, rather than about individual rights, would seem to have a fatal flaw. The Court requires a showing of personal injury before it will adjudicate a case and often says that constitutional rights are individual rights.³⁴⁰ In this sense, at least, constitutional law is not about the validity of legal rules. But one should understand Adler's claim as a descriptive claim about the content of merits adjudication.³⁴¹ This descriptive claim raises the normative issue this Article explores—why should injury matter so much to justiciability, when it plays no role in many merits decisions?³⁴² Fur-

³³⁹ See *id.* at 1412 (stating that a Supreme Court "order invalidating a statute" can oblige officials "not to enforce the statute against anyone"); Fallon, *supra* note 235, at 1362 (remarking that "a constitutionally illegitimate law is no law at all and thus cannot supply a lawful predicate for the imposition of a harm or sanction"); see also Warth v. Seldin, 422 U.S. 490, 499 (1975) (stating that "the court's judgment may benefit others collaterally"). See generally Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1 (1978) (describing the Supreme Court as possessing the characteristics of both a court and a legislature, insofar as the Court is a body that creates general law).

³⁴⁰ See Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 154 (the law of standing reflects the view that "[j]udicial capital should be expended" to "vindicat[e] individual rights"); Fallon, *supra* note 88, at 22 (principle that court should only adjudicate constitutional questions to protect the rights of individuals finds "abundant expression" in post-*Marbury* judicial opinions); Nichol, *supra* note 58, at 1920 (describing "the protection of private rights" as the "trigger of judicial power"); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 513 (1993) ("In much of constitutional law, both substantive and procedural doctrines require that harms be individuated." (footnote omitted)).

³⁴¹ This is the correct reading of Professor Adler's article for two reasons. First, Professor Adler sees himself as addressing "the moral content of constitutional rights," Adler, *Moral Structure*, *supra* note 325, at 2, which suggests a focus upon merits adjudication. Second, Adler defines standing as "extrinsic" to his central claim. See *id.* at 122. To be sure, Adler discusses the tension between Article III and his concept of constitutional law as adjudication of the validity of legal rules. See *id.* at 132–45. But he does this to rebut possible institutional objections to his theory. See *id.* at 132. Adler does claim that his account of the structure of moral constitutional rights should influence standing doctrine, *id.* at 153, because courts should construe Article III in ways that comport with the structure of constitutional rights, *id.* at 140–41. This Article, in part, begins working out the implications of some of Adler's insights for our conception of adjudication and hence for standing doctrine.

³⁴² Cf. *id.* at 153 (noting that this theory has implications for doctrine governing "the proper parties to litigate" rules challenges). Commentators have been intrigued by Adler's argument, but some have been skeptical about its doctrinal value. See, e.g., Eisgruber & Sager, *supra* note 336, at 254 (expressing skepticism about the theory's value in constructing free exercise jurisprudence).

thermore, the concept needs extension beyond the individual rights cases upon which Adler and Fallon focus. Public law includes not just individual rights claims, but structural claims about the distribution of power and nonconstitutional claims about the validity of agency actions under governing statutes.³⁴³ Professor Fallon has argued that constitutional law rarely conforms to simple characterizations of the whole, but rather involves varying structures based on the legal doctrines at issue.³⁴⁴ The following analysis applies this insight to extend understanding of public law beyond the individual rights cases by discussing how structures vary across areas of public law.

2. *Structural Constitutional Law*

Structural cases often involve facial claims implicating entire statutory provisions, if not entire statutes. The statutory provisions under attack tend to have broad and uncertain substantive impact, since they only specify procedures, not outcomes.³⁴⁵ Their impact upon individuals tends to be largely incidental, the result of the substantive decisions that the actors empowered to make the decision took. One can rarely know whether relocating power to a different branch or level of government would obviate or exacerbate the particular injuries that might motivate a litigant to sue.

It hardly seems surprising that the pattern found in the line item veto cases is typical of structural constitutional cases.³⁴⁶ The standing inquiry seems utterly ritualistic and the litigants tend to vanish from view as the Court debates great issues of structure. The litigants' injuries typically contribute little or nothing to the concreteness, or any other aspect of the litigation, for the doctrines of separation of powers and federalism aim to protect institutions. To be sure, protecting institutions from each other aims to advance the welfare and liberty of the individuals who created the government.³⁴⁷ But any particular choice of institutional arrangement will affect an individual indirectly and unpredictably, making it hard to separate the effects of institu-

³⁴³ See *supra* Part III.A.

³⁴⁴ See Fallon, *supra* note 235, at 1327 (stating that constitutional doctrines are too diverse to conform to "any elegant unifying theory"). He is, of course, not alone in offering this insight. See, e.g., Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY 269, 270 (2000) ("[C]onstitutional rights are heterogeneous, and properly so.").

³⁴⁵ See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (invalidating Line Item Veto Act); *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (recognizing as constitutional statute creating Sentencing Commission to promulgate sentencing guidelines); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (invalidating statute authorizing legislative vetoes).

³⁴⁶ See *supra* text accompanying notes 22–36.

³⁴⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty. . .").

tional arrangements from the effects of substantive political decisions that might occur irrespective of institutional structure.³⁴⁸

3. *Individual Rights*

Individual rights cases, by contrast, involve claims that the actions of government officials transgress constitutional limits enacted to protect individuals from government. Since individual rights aim to protect individuals directly, as opposed to institutions, the Court sometimes considers the impact upon individuals relevant to decisions in this area.³⁴⁹

Yet, as Professor Adler points out, even in this area, legal rules are often (but not always) at stake.³⁵⁰ Legal rules impact many people.³⁵¹ Hence, the Court often turns away from consideration of the impact upon the individual before it, especially if the lawyers choose to frame the litigation broadly, for example, as a facial challenge.³⁵² In this area, however, the experience of litigants often bears some relationship to the assessment of the merits. So, at least in the case of as-applied challenges, the experience of litigants sometimes plays a role in making the litigation more concrete.

Examination of the relationship between merits adjudication and injuries justifying standing, however, helps clarify the structure of individual rights litigation. Some legal tests make the degree of injury relevant to resolution of an individual rights claim. Examples include takings claims, which depend upon the degree of economic harm suffered by the plaintiff,³⁵³ and procedural due process claims, which require assessment of the weightiness of the plaintiff's interest and the

³⁴⁸ See PERRY, *supra* note 229, at 53 (arguing that "it is most unlikely that the Court" could specify how the resolution of a separation of powers challenge would affect individual freedom); Dorf, *supra* note 96, at 246 ("Structural provisions may, in the long run, preserve individual liberty, but they do not inevitably do so in every case."); see also Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 579–80 (1985) (defining relegation of claim to a non-Article III forum as an injury different from any particular monetary loss that hypothetically could flow from adjudication in the wrong forum); Nichol, *supra* note 58, at 1938–39 (application of standing to federalism and separation of powers cases has "seriously eroded" the claim that "constitutional review" only protects "private rights").

³⁴⁹ See Eisgruber & Sager, note 336, at 258 ("Some constitutional claims may focus primarily on the claimant's immediate circumstances . . .").

³⁵⁰ See *supra* text accompanying notes 326–36.

³⁵¹ See Schauer, *supra* note 201, at 655 (suggesting that an opinion supported by fairly general reasoning provides an advisory opinion for cases not yet before the court); Tushnet, *supra* note 77, at 1711 ("Absent parties often benefit when a litigant . . . convince[s] a court to adopt a new legal rule . . .").

³⁵² See *supra* text accompanying note 239.

³⁵³ Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (holding that depriving a landowner of "all economically beneficial uses" of the property constitutes a taking); Penn Cent. Transp. Corp. v. New York City, 438 U.S. 104, 124 (1978) (making the economic impact on the plaintiff a relevant factor in ad hoc factual inquiry governing takings claims).

risk of error in a particular proceeding.³⁵⁴ In such cases, injury often makes the litigation more concrete. While such cases can establish whether a plaintiff has a right to be free of a rule, they often require such context-specific analysis that they may leave general questions about a rule's validity quite open and have limited impact upon subsequent cases.³⁵⁵

Other legal tests, however, focus upon defendant's conduct or other factors, making individual experience rather irrelevant. And the Court has tended to gravitate increasingly toward these tests. Thus, for example, the Court has moved away from a test that often exempted religious exercise from generally applicable rules—a test that uses injury as a framing device—to a test that often permits neutral, general rules, even if they impinge on free exercise incidentally.³⁵⁶ This formalist doctrinal change means that the general intent of the rule's framers will matter much more than individual injury in resolving the merits.³⁵⁷ This move converts a personal right to engage in a practice into a right against rules aimed at discouraging religious practice.³⁵⁸ And it tends to convert an as-applied challenge into something more like a facial challenge.³⁵⁹ Resolution of such a facial claim can easily invalidate an entire statute.³⁶⁰

4. *Administrative Law*

The most significant administrative law cases involve claims that an agency action violated a governing statute. Such claims require a

³⁵⁴ See *Mathews v. Eldridge*, 424 U.S. 319, 341–47 (1976) (establishing as factors to be considered in a procedural due process challenge “the degree of potential deprivation” of a right or liberty or property interest, the risk of error in a proceeding, and the cost of providing additional procedures).

³⁵⁵ Compare *Fuentes v. Shevin*, 407 U.S. 67 (1972) (granting right to a hearing before goods are seized from a delinquent creditor) with *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (denying right to a hearing before goods are seized from a delinquent creditor). See also *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18, 32–34 (1981) (holding that question of whether a mother has a right to counsel in a proceeding to terminate her parental rights varies based on fact-specific circumstances).

³⁵⁶ Compare *Employment Div., Dep’t of Hum. Res. v. Smith*, 494 U.S. 872, 876–90 (1990) (allowing a generally applicable criminal prohibition on the use of peyote to include within its bounds religiously inspired use), with *Wisconsin v. Yoder*, 406 U.S. 205, 215–16, 234 (1972) (holding that state must exempt Amish respondents from the application of a compulsory education statute in order to protect their free exercise of religion).

³⁵⁷ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (considering, in a post-*Smith* facial challenge to a statute on free exercise grounds, “the object of the law” rather than its application); Isserles, *supra* note 236, at 435 n.341 (discussing progression from *Yoder* to *Smith* to *City of Hialeah*).

³⁵⁸ See Adler, *Personal Rights and Rule-Dependence*, *supra* note 325, at 342.

³⁵⁹ See *City of Hialeah*, 508 U.S. at 533–35 (examining text of ordinance and the context of its passage to determine whether it has a discriminatory purpose).

³⁶⁰ See *id.* at 533 (stating that lack of “facial neutrality” toward religion is grounds for invalidation).

comparison of the agency's action with congressional intent.³⁶¹ Injury typically plays no role at all in resolving the merits of such disputes.³⁶² Narrower claims that an agency exercised its discretion arbitrarily or without substantial evidentiary support usually do not implicate injury either, as they typically involve only an assessment of the quality of agency reasoning.³⁶³ To the extent that the case focuses upon agency responses to comments about a party's injury, injury might help frame issues. One would expect such comments to often make administrative adjudication more concrete, but to play this role less often in more broadly significant rulemaking, where the parties may rely on hypothetical rather than real injury to test the logic of agency rulemaking.³⁶⁴

5. *Problems on the Border*

In cases along the conceptual border between individual rights and structural litigation, the insistence upon personal injury contributes nothing to resolution of the merits. Perhaps the law regarding redistricting offers the most striking example. In this area, the Court seeks to employ an individual rights framework, rooted in the Equal Protection Clause of the Fourteenth Amendment, to decide upon the structure of government through review of redistricting decisions.³⁶⁵ Redistricting, according to the Court, can injure individuals by stigmatizing them on account of race or depriving their votes of impact.³⁶⁶ The Court generally allows voters to challenge the constitutionality of their own districts, but denies standing to voters whose challenges seem rooted in complaints about neighboring districts.³⁶⁷ Yet redistricting affects groups and usually does not aim at any individual

³⁶¹ See *supra* note 222 and accompanying text.

³⁶² See *id.*

³⁶³ See *supra* note 225 and accompanying text.

³⁶⁴ See *supra* notes 227–28.

³⁶⁵ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 607–08 (2002) (describing how the Warren Court framed “federal constitutional oversight of the political process in the . . . language of individual rights”).

³⁶⁶ In this area, some scholars have found the concept of injury itself extremely abstract. See Pildes & Niemi, *supra* note 340, at 506–16 (arguing that the Court’s rejection of oddly shaped electoral districts designed to enhance minority voting strength inflicts an “expressive harm[]”).

³⁶⁷ See *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (denying standing to voter whose challenge was primarily aimed at unconstitutionality of neighboring district); *Bush v. Vera*, 517 U.S. 952, 957–58 (1996) (plurality opinion) (allowing residents of allegedly gerrymandered districts to challenge their constitutionality); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (stating that generally only voters of a challenged district will have standing); *United States v. Hays*, 515 U.S. 737, 739 (1995) (denying standing to voters residing outside of gerrymandered district).

voter.³⁶⁸ Because the lines influence the structure of government—who gets to elect whom—linking individual harms to the redistricting decision seems difficult.³⁶⁹

The individual experience of injury that the Court envisions becomes completely irrelevant to analysis of the merits in this area.³⁷⁰ When the Court reaches the merits it focuses upon questions about legislative motive, geography, political boundaries, demography, and transportation corridors.³⁷¹ Surely a requirement of individual injury does nothing to improve the concreteness of these abstract cases.³⁷²

C. Should Injury Influence Public Law Outcomes?

For a formalist, injuries to litigants in conflict of laws cases should not matter. In its most extreme form, formalism cares not a jot about the consequences of legal decisions, for litigants or anybody else. Rather, formalist judges often believe that the answers to public law questions come from pure textual exegesis.³⁷³ When they do not believe that, they often believe that the intention of the framers of the Constitution provides the correct answers to the questions before them.³⁷⁴

Several of the Justices on the formalist Rehnquist Court have expressed an unwillingness to let the experience of litigants influence their judgments, especially through the medium of intuitions about justice. They often expressly repudiate a contextual model of adjudication.

A good example comes from Justice Scalia's statements regarding the unprincipled nature of rulings relying upon a judge's sense of fair-

³⁶⁸ Cf. Issacharoff, *supra* note 365, at 606 (describing how a conception of equal protection limited to individual rights produced a failure to outlaw "the categorical denial of registration to all black voters in Alabama" in *Giles v. Harris*, 189 U.S. 475 (1903)).

³⁶⁹ See Issacharoff, *supra* note 365, at 608–09 (arguing that "the individual-rights-based . . . approach" fails to "capture the nature of the constitutional insult").

³⁷⁰ See, e.g., *Vera*, 517 U.S. at 959–83 (plurality opinion).

³⁷¹ See, e.g., *id.*; Pildes & Niemi, *supra* note 340, at 527–86 (discussing methodology for addressing geographic "district compactness" concerns).

³⁷² See Issacharoff, *supra* note 365, at 596 (linking early reapportionment cases to "a somewhat abstract right to 'full and effective participation'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964))). Issacharoff goes on to describe a major component of merits analysis in this area as "indeterminate to the point of incoherence." *Id.* at 635 (quoting John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 496–98 (2002)).

³⁷³ See, e.g., Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 225 (2002) (calling Justice Black's majority opinion in *Youngstown* "a masterpiece of textual and formal analysis").

³⁷⁴ See, e.g., *Williams v. Florida*, 399 U.S. 78, 108 n.2 (1970) (Black, J., concurring in part and dissenting in part) (asserting that framers' intent and literal language should govern interpretation of the Bill of Rights).

ness. For example, in *Burnham v. Superior Court*,³⁷⁵ Justice Scalia rejected the use of judicial judgments about fairness as a touchstone for due process limits upon personal jurisdiction in a case upholding transient jurisdiction: jurisdiction through the service of process upon somebody only temporarily within the forum state.³⁷⁶ Scalia disapproved of the notion that judges' concrete response to the facts of the case before them should influence their judgments regarding due process.³⁷⁷ Instead, he called for reliance upon formal rules derived from history.³⁷⁸

A more functional view of the role of judicial review might suggest a greater need to take injury into account.³⁷⁹ But perhaps not. A functional view involves taking context into account. But that view does not establish that injury to the litigants before the Court provides important or even relevant context, even for a functionalist.³⁸⁰ Indeed, Professor Bickel, who so forcefully advocated justiciability criteria as a way of making cases more concrete, admonishes judges not to "do in each case what seems just for it alone."³⁸¹

Consider Justice Jackson's functionalist approach in *Youngstown*. Justice Jackson's analysis depends upon context, but not a personal injury context.³⁸² Rather, the relevant context involves expressions of congressional policy regarding the matter at hand.³⁸³ The injuries that the steel makers might incur through presidential seizure played no role in his opinion.³⁸⁴

³⁷⁵ 495 U.S. 604 (1990).

³⁷⁶ See *id.* at 622–27 (plurality opinion).

³⁷⁷ See *id.* (plurality opinion).

³⁷⁸ See *id.* at 621–22 (plurality opinion).

³⁷⁹ See Fiss, *supra* note 39, at 12 (suggesting that a judicial response to concrete facts might produce a "true account" of "constitutional value[s]").

³⁸⁰ Cf. Brown, *supra* note 340, at 126 (distinguishing consequences "involving separation of powers" from "those related to individual rights"); Elliott, *supra* note 147, at 150–56 (suggesting that, from a functionalist perspective, the systemic effects of the legislative veto provide the correct context for considering its constitutionality).

³⁸¹ See BICKEL, *supra* note 11, at 55. Bickel links this argument to an endorsement of the idea of neutral principles and Kant's categorical imperative. See *id.* Bickel understands that his arguments about justiciability limiting the Court to a concrete context are in tension with the ideas of neutral principles. He writes, "The function of judicial review arises in the limiting context of cases, to be sure; but while the Court should not surmount the limitation, it must rise above the case." *Id.* at 50. Bickel does not, however, explain how the context of cases limits judicial review if the Court "rise[s] above the case." *Id.*

³⁸² See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

³⁸³ See *id.* (Jackson, J., concurring); see also *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985) (discussing the role of statutory context, rather than individual injury context, in construing statutory meaning); cf. Monaghan, *supra* note 77, at 1372–73 (acknowledging that "constitutional questions" can "turn[] on certain legislative facts," such as "facts bearing on matters of economic or social organization" (footnote omitted)).

³⁸⁴ See *Youngstown Sheet & Tube Co.*, 343 U.S. at 634–55 (Jackson, J., concurring) (passing over takings claim to address issue of whether President had authority to issue the

Nevertheless, it would be myopic to suggest that injuries to litigants never influence judges, even in public law cases. But the more important question for a functionalist judge would be the normative one: *should* injuries to an individual litigant influence results in a public law case?

The adage that hard cases make bad law³⁸⁵ raises some questions about the value of having litigants' injuries influence the outcome of cases. A hard case often refers to a case in which instincts about justice collide with the requirements of formal rules.³⁸⁶ This collision can occur, for example, when a case presents an unusual fact pattern.³⁸⁷ Because the designers of the rule may have created it with typical cases in mind, application of a perfectly good rule to an abnormal fact pattern can create unjust results.³⁸⁸ A hard case can produce bad law, because the court will often modify the law to bring about a just result for an unusual fact pattern when a straightforward application of the rule would be unjust.³⁸⁹ In so doing, the court may make

seizure order); see also J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENT. 37, 44 (2002) (arguing that "the Court in *Youngstown* blew past the takings issue" the steel mill owners presented in order "to reach the separation-of-powers" issue). Similarly, Justice White's functionalist dissent in the Court's Tenth Amendment opinion in *New York v. United States*, 505 U.S. 144 (1992), relied upon the context of state participation in federal law-making, rather than individual injury, to create relevant context. See *New York*, 505 U.S. at 189-94 (White, J., concurring in part and dissenting in part) (describing the enactment of the statute before the Court as federal adoption of a politically negotiated compromise between states).

³⁸⁵ See, e.g., *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). Although Justice Holmes is credited with this famous adage, it was first introduced to the American courts by Justice Harlan. See *United States v. Clark*, 96 U.S. 37, 49 (1877) (Harlan, J., dissenting) (quoting Lord Campbell as saying that "it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law" (quoting *E. India Co. v. Paul*, 13 Eng. Rep. 811, 821 (P.C. 1849))); Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 965-66 (1998) (explaining the origins of the adage).

³⁸⁶ See Phillip J. Closius, *Rejecting the Fruits of Action: The Regeneration of the Waste Land's Legal System*, 71 NOTRE DAME L. REV. 127, 131 (1995) (stating that "[s]ympathetic fact patterns are perceived as a judicial nightmare" because of the tension between societal values and the need to follow legal precedent).

³⁸⁷ See, e.g., Andrew R. Klein, *A Legislative Alternative to "No Cause" Liability in Blood Products Litigation*, 12 YALE J. ON REG. 107, 108-09 (1995) (describing hard cases as those in which courts have relaxed traditional rules of causation to permit hemophiliacs who contracted HIV from transfusions to collect damages from pharmaceutical companies).

³⁸⁸ See Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1642 n.57 (1988) (stating that what is unjust may not be the law, but the law's application to a particular case, such as the imposition of a prison sentence upon an elderly drug addict).

³⁸⁹ See Bhagwat, *supra* note 385, at 968 (stating that "[b]ad law" is the "distortion" of a clear rule to reach a "just" result) (internal quotation marks omitted); Markita D. Cooper, *Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication*, 72 NOTRE DAME L. REV. 373, 402-03 (1997) (explaining how judges and juries, when presented with egregious mistreatment of employees by their employers, are tempted to bend the law to afford victims compensation).

the law function poorly with respect to more typical fact patterns, thereby disserving the law's purposes in most cases.³⁹⁰ This quandary suggests that allowing plaintiffs' injuries to strongly influence outcomes can prove problematic.

In public law this problem can prove especially acute. Constitutions and statutes aim to influence a wide range of future conduct. If a particularly sympathetic plaintiff secured a favorable statutory and constitutional interpretation just because of her particular experience, this might have pernicious effects upon many other individuals and institutions.

The notion that the content of the injury should influence public law outcomes raises some difficult issues. The most straightforward explanation as to why injury might influence outcomes would rely upon the judge's response to the injury. If the injury seemed bad enough, the judge might strike down the law producing it. If the injury seemed trivial, the judge would uphold it.

This model suggests that the judge's own values, not those of the Constitution or statute she interprets, would control the outcome of the case. Not only that, but the values in play would come from the litigant's plight, not from the legally relevant sources or even the judge's own views about the matters made relevant by those sources. Thus, *INS v. Chadha*,³⁹¹ which struck down a legislative veto deporting Chadha, might hinge not upon an assessment of the relevant constitutional text, general concerns about congressional bills conflicting with fact-specific findings of executive branch officials, or the effects of legislative vetoes upon democratic accountability and constitutional structure, but upon the Justices' feelings about the seriousness of deportation.³⁹² And *Clinton v. City of New York*³⁹³ might hinge upon one's view about the value of extra Medicare funding for New York hospitals, rather than the separation of powers concerns that seem relevant to the constitutionality of line item vetoes. Surely such an

³⁹⁰ See Schauer, *supra* note 201, at 655–56 (discussing the problem of a “‘result-oriented’” decision in one case causing too much harm in subsequent cases controlled by that case’s reasoning).

³⁹¹ 462 U.S. 919 (1983).

³⁹² Chadha’s counsel argued that a favorable ruling would make him “‘a citizen by the 4th of July.’” BARBARA HINKSON CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 211 (1988). He went on to explain the hardship his client would experience if forced to rely upon his wife’s status as a citizen as the basis for seeking citizenship. Such an approach would involve a long uncertain bureaucratic process, leaving Mr. Chadha in limbo. See *id.* Justice White in his dissent suggested that something in the facts of Mr. Chadha’s case may have influenced the Court’s decision. See *Chadha*, 462 U.S. at 974 (White, J., dissenting) (suggesting the Court had improvidently struck down all legislative vetoes based on an “atypical” case).

³⁹³ 524 U.S. 417 (1998).

approach would raise some questions about legitimacy.³⁹⁴ It is not at all clear that injury should influence all public law rulings.

On the other hand, the Court's civil rights jurisprudence lends some support to the idea that individual injury should influence merits decisions. Numerous cases showing that particular instances of segregation disadvantaged black people brought the Court to the point where it invalidated segregation altogether in *Brown v. Board of Education*.³⁹⁵ But the Court did this not by allowing the individual injuries of the *Brown* plaintiffs to make the case more concrete by framing the issue narrowly, but by acquiring the conviction that a broad factual finding about the state of the entire society was in order.³⁹⁶ Thus, the *Brown* Court held that "[s]eparate educational facilities are inherently unequal."³⁹⁷

Surely, equal protection law gained something from taking litigants' experiences of inequality into account.³⁹⁸ Most scholars would agree that the conditions minorities experienced under apartheid should inform assessment of whether segregation afforded minorities equal protection.

This may explain why Professor Bickel believed that standing requirements would make litigation more concrete, in spite of the fact that the cases he cited to support this idea cast doubt on that conclusion.³⁹⁹ He may have had then-recent civil rights litigation in mind,

³⁹⁴ See Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 826 (1985) (linking reliance upon the values of adjudicators to illegitimacy).

³⁹⁵ 347 U.S. 483, 493-94 (1954) (drawing on history of segregation in graduate schools); see, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 345 (1938) (noting that the denial of black student's application to law school violates equal protection when state provides no law school for blacks); *Norris v. Alabama*, 294 U.S. 587, 591, 598-99 (1935) (invalidating conviction in county that had never called a black juror to serve, after examining detailed record on county practices); *Nixon v. Condon*, 286 U.S. 73, 82, 88-89 (1932) (declaring state delegation of authority to determine party membership to political parties unconstitutional, when Democratic Party used that authority to prohibit blacks from voting); *Guinn v. United States*, 238 U.S. 347, 364-65 (1915) (declaring that statute subjecting citizens who are not descendants of people with voting rights prior to 1866 to a literacy test violates Fifteenth Amendment, because it tends to deny suffrage to blacks); cf. *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (declaring a statute "forbid[ding] negroes to take part in a primary election" facially invalid). Of course, the *Brown* Court did not rely solely upon the experience of case law. See *Brown*, 347 U.S. at 494 n.11 (citing social science studies).

³⁹⁶ See *Brown*, 347 U.S. at 494 & n.11 (citing to social science literature in order to help justify a broad finding that separate is inherently unequal).

³⁹⁷ *Id.* at 495.

³⁹⁸ See, e.g., *Chambers v. Florida*, 309 U.S. 227 (1940) (reversing conviction of black defendants based on a coerced confession after examination of a detailed record); *Brown v. Mississippi*, 297 U.S. 278, 279, 287 (1936) (reversing conviction of black defendants based on confession extracted through torture); *Powell v. Alabama*, 287 U.S. 45, 50, 73 (1932) (reversing conviction of black defendants who were denied counsel after a full trial).

³⁹⁹ See *supra* notes 202-04 and accompanying text.

even though he used less controversial and inapposite cases to support his point.

All of this suggests several conclusions. Consideration of injury is sometimes desirable, but not always. And the question of whether injury should matter to the merits would vary depending on the type of public law involved.

D. Implications for Standing Doctrine and Justiciability

The frequent failure of the injury requirement to make litigation concrete and its incapacity to do so under many judicial doctrines raises doubts about the constitutional foundation of standing doctrine.⁴⁰⁰ The Court, at times, seems to recognize that experience has crumbled the theoretical foundation for standing doctrine. Justice Scalia's law review article on standing disagrees with the standard view that a requirement of injury helps assure vigorous argument. He believes that an ideological plaintiff will likely litigate equally vigorously.⁴⁰¹ The claim that standing fosters better "'presentation of issues,'" which Scalia has disavowed,⁴⁰² supports the Court's traditional view that standing aids the concreteness of litigation.

While the Court has never disavowed the link between concreteness and its Article III standing doctrine, recent cases place less emphasis on it than older cases. Indeed, direct references to "concrete adverseness" nowadays often appear in dissenting or concurring opinions.⁴⁰³

⁴⁰⁰ Scholars have expressed doubts about standing on nonfunctional grounds as well. See, e.g., Pushaw, *supra* note 63, at 480–82 (arguing that a case historically required no individualized injury).

⁴⁰¹ See Scalia, *supra* note 65, at 891; see also Monaghan, *supra* note 77, at 1385 (arguing that "there is no necessary connection between a personal interest and the sharp presentation of issues").

⁴⁰² Scalia, *supra* note 65, at 891.

⁴⁰³ See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 121 (1998) (Stevens, J., concurring) (arguing that standing is meant to ensure "'concrete adverseness'"); *Lewis v. Casey*, 518 U.S. 343, 399 (1996) (Souter, J., concurring) (citing need for a "concrete factual context"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583–84 (1992) (Stevens, J., concurring) (claiming that standing should be granted because allegations are adequate to establish concrete adverseness); *Allen v. Wright*, 468 U.S. 737, 770 (1984) (Brennan, J., dissenting) (reciting requirement of "'concrete adverseness'" (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))); cf. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (standing requirements help court to avoid "abstract, intellectual problems," in favor of "concrete, living contests between adversaries" (internal quotation marks and citations omitted)). Justice Scalia has argued in dissent that the separation of powers concept of standing displaced the concept of standing as means of assuring concrete adverseness in *Allen v. Wright*. See *Wyoming v. Oklahoma*, 502 U.S. 437, 472 (1992) (Scalia, J., dissenting). The Court has not endorsed Scalia's view, which distorts the case law. First, while the *Allen* Court emphasized separation of powers, it linked that concern to the need for framing concrete issues for judicial resolution, a function the Court identifies with concrete adverseness. See *Allen*, 468 U.S. at 759 (linking separation of powers to need for suits on "identifiable Government violations of law" as well as "particular" agency "programs"). Sec-

I have already claimed that the Court has not come up with any other explanation as to why separation of powers concerns or Article III require injury-based standing. And I have suggested that other doctrines serve interests in avoiding *improper* interference in the work of the other branches better than standing does. The standard rationales the Court offers support some sort of limitation on jurisdiction, but do not really explain why the Court requires injury-based standing.

Nevertheless, the Court, in *Spencer v. Kemna*, suggested that a separation of powers rationale provides support for standing doctrine apart from that which concrete adverseness seeks to provide.⁴⁰⁴ While the Court has never explained how separation of powers considerations would support standing without reference to the ideas of abstraction and concreteness this Article focuses upon, Justice Scalia's law review article seems to offer an alternative theory rooted in separation of powers.⁴⁰⁵ But Scalia's theory does not justify injury-in-fact based standing, conflicts with the central thrust of the Court's statements about separation of powers, and does not add up.

Justice Scalia argues that standing should confine courts to their "traditional . . . role of protecting individuals and minorities" from majority rule, as opposed to serving the interest of majorities.⁴⁰⁶ This concept has influenced the Court's decisions to raise the standing bar, even though the Court has not endorsed the concept explicitly.⁴⁰⁷ Scalia himself recognizes that this concept would require imposition of new requirements going beyond those embraced in the injury-

ond, the Court has reaffirmed the importance of concrete adverseness repeatedly since *Allen*. See *Gollust v. Mendell*, 501 U.S. 115, 125-26 (1991) (unanimous opinion); *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 78 (1991) (unanimous opinion), *superseded by statute on other grounds as stated in* *Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180 (10th Cir. 1998); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 65 & n.5 (1987); *UAW v. Brock*, 477 U.S. 274, 289 (1986); *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); see, e.g., *Akins*, 524 U.S. at 20 (referring to concrete adverseness indirectly by contrasting abstract disputes with living contests between adversaries). But the Court has endorsed the more limited proposition that assuring concrete adverseness to sharpen presentation of issues is not the only function standing doctrine performs, which is consistent with this Article's recognition of remedial concreteness. See *Spencer v. Kemna*, 523 U.S. 1, 11 (1998) (Scalia, J.); see also *Clinton v. City of New York*, 524 U.S. 417, 462-63 (1998) (Scalia, J., concurring in part and dissenting in part) (claiming that the view of standing as only supporting concrete adverseness has been superseded).

⁴⁰⁴ See *Spencer*, 523 U.S. at 11 (stating that concrete adverseness is not the only function that standing performs).

⁴⁰⁵ See Scalia, *supra* note 65, at 894-99.

⁴⁰⁶ See *id.* at 894.

⁴⁰⁷ See, e.g., *Defenders of Wildlife*, 504 U.S. at 561-62 (Scalia, J.) (noting that standing is more difficult to establish when the plaintiff is the not the object of the regulation).

based standing doctrine.⁴⁰⁸ Indeed, this conception makes injury-in-fact beside the point, since the central inquiry should compare a litigant's interest to that of the majority to figure out whether a litigant was in the minority.⁴⁰⁹

The antimajoritarian thrust of this theory is noticeably at odds with the standing cases' emphasis upon avoiding improper interference with the democratic branches of government. Presumably, Scalia would answer this by saying that proper interference serves the interests of minorities, not majorities.⁴¹⁰ But it seems odd to say that it is improper to interfere with executive branch violations of law at the behest of beneficiaries of legislative enactments.⁴¹¹ It suggests that the judiciary need not enforce the law and that Congress must rely on the relatively weak tool of jawboning (through legislative oversight) or the disruption of funding cutoffs in order to secure executive branch compliance with the constitutional duty to faithfully execute the law.⁴¹² This seems at odds with traditional notions of separation of powers, since it emphasizes congressional enforcement, rather than enactment of law, and, in many cases, denies a judicial role in enforcement.

Not only does Justice Scalia's countermajoritarian theory fail to justify current doctrine, it does not add up on its own terms, for reasons central to the general problem of formalist merits adjudication. Scalia claims that courts should not protect the majority interest because they are no good at it.⁴¹³ He argues that the judiciary's tendency to "value[] abstract principle above concrete result" is fitting for the protection of individuals, but not protection of majority interests.⁴¹⁴ He does not explain why merits adjudication in individual rights cases would be (or should be) based on abstract principle, or

⁴⁰⁸ See Scalia, *supra* note 65, at 895 (arguing that not all injury would justify standing under this conception).

⁴⁰⁹ But see *id.* (claiming that his conception explains the injury requirement).

⁴¹⁰ See *id.* at 894.

⁴¹¹ Scalia's article suffers some problems of clarity on this point, because his concept of majority and minority interests lacks definition. He suggests that the harm of under-enforcement of law is a majoritarian harm. *Id.* This would suggest, for example, that beneficiaries of environmental law are in the majority and regulated industries in the minority (which raises issues under a system where money has influence and many people benefit from corporate production). But he then suggests that a worker deprived of the benefit of a particular OSHA regulation becomes a minority oppressed by the majority. *Id.* at 895. But individuals make up majorities as well as minorities. Scalia does not explain why this worker is not simply one of the individuals in the majority that secured passage of the relevant legislation. Scalia seems to conflate lack of individual injury with membership in a majority coalition and existence of injury with participation in a minority coalition.

⁴¹² Cf. Bandes, *supra* note 73, at 262 (arguing that the Court's emphasis on avoiding improper interference involves a choice not to fulfill "the Court's role of [e]nsuring that the political branches do not exceed *their* powers").

⁴¹³ See Scalia, *supra* note 65, at 896.

⁴¹⁴ *Id.*

why adjudication on behalf of majority interests would require emphasis upon concrete results. The analysis presented in this Article suggests that Scalia basically has it backwards; individual rights cases frequently become somewhat concrete, while adjudication of majority interests, for example in the enforcement of statutes, involves somewhat abstract legal inquiries.⁴¹⁵ Of course, adjudication of "minority" interests in less vigorous enforcement of statutes involves equally abstract inquiries, for this minority interest relies upon the same sort of contrary to law claims that advocates of stricter regulation must advance to prevail in court. At bottom, Scalia fails to appreciate the difference between a political decision to enact a law (which might well be oriented to concrete results) and a judicial decision about how it should be enforced (which is basically interpretive).

Justice Scalia has also suggested the possibility of relying upon Article II as a source of standing doctrine.⁴¹⁶ But that position has not commanded a majority of the Court.⁴¹⁷ While thorough discussion of this theory would require another article, a brief indication of why this argument may not prove satisfactory seems worthwhile. The Article II theory begins with the premise that the Executive's power to "take Care that the Laws be faithfully executed"⁴¹⁸ limits other parties' capacity to sue.⁴¹⁹ Historical evidence contradicts the thesis that the executive power to execute law is exclusive, for the states played a greater role in executing federal law than did the executive branch of

⁴¹⁵ Scalia puts forward environmental law as an example of law serving a majority interest. See *id.* at 896-97.

⁴¹⁶ See, e.g., *Vt. Agency of Nat'l Res. v. United States*, 529 U.S. 765, 778 n.8 (2000) (Scalia, J.) (mentioning the possibility of Article II limitations upon standing); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting) (arguing that if "the citizenry at large could sue to compel Executive compliance with the law," then the courts, rather than the executive branch, would have "the primary responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Scalia, J.) (arguing that the congressional creation of citizen standing to vindicate public interest would "transfer" the President's duty to take care that the law be faithfully executed to the courts); see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 209 (2000) (Scalia, J., dissenting) (noting that the question of Article II's potential limitations "had not been argue[d]," but noting Article II concerns implicated by the majority opinion).

⁴¹⁷ See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998) (Scalia, J.) (stating that standing jurisprudence "derives from Article III and not Article II").

⁴¹⁸ U.S. CONST. art. II, § 3.

⁴¹⁹ See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994) (discussing Article II); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (analyzing relationship between Articles II and III); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (criticizing formalist approaches to separation of powers); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (discussing theory of unitary executive).

the federal government in the early days of the Republic.⁴²⁰ Such an interpretation would disregard the historic role of state, territorial, and tribal governments in executing laws, not to mention private parties.⁴²¹

An exclusive executive enforcement power would not justify an injury-in-fact theory of standing. It would instead require disallowance of all private, state, tribal, and territorial actions litigating federal public law questions, including actions brought by seriously injured parties.⁴²²

Furthermore, all litigants seeking judicial review, whether on statutory or constitutional grounds, claim that the executive branch has not faithfully executed the law. It is hard to see how the responsibility to execute the law faithfully should limit claims that the executive branch has violated the law.⁴²³

Standing doctrine's frequent failure to perform the purposes justifying its place under Article III suggests that the Court ought to reconsider standing doctrine. Injury's contribution of concreteness to as-applied individual rights cases cannot justify standing as an overarching constitutional requirement governing a wide variety of cases where injury is substantively irrelevant.⁴²⁴

⁴²⁰ See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2005-07 (1993) (discussing extensive reliance upon state officials to enforce federal law prior to the advent of a large federal bureaucracy); see also Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2199 (1998) (discussing framers' expectation that federal government could rely upon state executive officers to enforce federal law).

⁴²¹ See *Vt. Agency of Nat. Res.*, 529 U.S. at 774-77 (recognizing the historic pedigree of private *qui tam* actions to enforce federal law); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-90 (1981) (recognizing and approving the "cooperative federalism" arrangement which allowed states to establish their own regulation with some minimal standards set by federal government pervading environmental law); *Nance v. EPA*, 645 F.2d 701, 712-15 (9th Cir. 1981) (upholding delegation of federal authority to Indian Tribe).

⁴²² Cf. Buzbee, *supra* note 207, at 283 (pointing out the incongruity of Justice Scalia's suggestion of an Article II basis for standing without even arguing that citizens can never enforce statutory law).

⁴²³ See Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 647 (1999) (arguing that permitting suits brought by citizens to allege that an executive branch official has violated the law "does no violence to Article II"); Sunstein, *supra* note 107, at 1471 (arguing that the "'take Care'" clause "do[es] not authorize the executive branch to violate the law"); see also Buzbee, *supra* note 207, at 274-77 (discussing how citizen suits can only enforce detailed political judgments embodied in regulations and statutes).

⁴²⁴ Numerous critics have suggested that standing requirements under Article III should yield to a principle of allowing Congress to create causes of action as it sees fit. See Buzbee, *supra* note 207, at 283 ("[L]ogic argues strongly for standing analysis tied merely to the presence or absence of a statutorily conferred cause of action." (footnote omitted)); Fletcher, *supra* note 72, at 223 (proposing to "abandon the idea that Article III requires a showing of 'injury in fact'"); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1169 (1993) (arguing that "nothing in the Constitution de-

Of course, standing doctrine has never been applied consistently, as many critics have frequently noted.⁴²⁵ Such inconsistency raises the possibility that standing requirement demands might vary with doctrinal needs for concreteness.⁴²⁶ Current practice does not vary standing demands in such a systematic fashion. For example, some observers claim that the Court has been especially demanding in environmental cases, even though individual injury has little to do with the merits of many environmental claims reaching the Supreme Court.⁴²⁷

The suggestion that standing might vary with the need for concreteness in individual cases might support retention of ripeness jurisprudence, but abandonment of standing requirements. For the ripeness doctrine does engage in an inquiry into a particular case's need for concrete context.⁴²⁸ Even without an injured litigant, the Court could dismiss a case in which the law has not been applied to clarify the scope of the challenger's claim. And mootness could still function to bar abstract orders, that is, cases in which ideological plaintiffs seek orders that remedy hypothetical misconduct that seems unlikely to occur.

mands a private rights model of adjudication"); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L. J. 1170, 1178 (1993) ("[T]he Court had consistently respected indications of congressional intent to confer standing on individuals with particular interests in the outcome of agency proceedings." (footnote omitted)); Sunstein, *supra* note 107, at 1461-62 (stating that Article III does not limit authority to adjudicate congressionally created causes of action). This Article shows that a functional approach also supports the conclusion that courts should not impose standing limitations under the Constitution.

⁴²⁵ See, e.g., Bandes, *supra* note 73, at 266 (stating the injuries similar to those found insufficient in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), *Laird v. Tatum*, 408 U.S. 1 (1972), and *Sierra Club v. Morton*, 405 U.S. 727 (1972), have justified standing in other cases); Fletcher, *supra* note 72, at 221 ("The structure of standing law in the federal courts has long been criticized as incoherent."); Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 212 (1980) (criticizing judicial manipulation of redressability requirement); Nichol, *supra* note 424, at 1142-43 (discussing the Court's departure from prior standing doctrine in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

⁴²⁶ See Bandes, *supra* note 73, at 269 (arguing that adversity and concreteness "are matters of degree" and that the "requisite quantity [of these attributes] should vary according to the nature of the case" (footnote omitted)).

⁴²⁷ See Katherine B. Steuer & Robin L. Juni, Note, *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation*, 15 HARV. ENVTL. L. REV. 187, 188 (1991) (asserting that the Supreme Court's decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), renders the injury-in-fact requirement of standing more difficult to meet in environmental citizen suits).

⁴²⁸ See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 529-31 (1966) (suggesting that flexible application of the ripeness doctrine reflects the Court's view that some cases require more factual context than others). Some of the cases analyzed in this Article, however, suggest that the Court often imagines that concrete facts will clarify a case even though an analysis of the relevant substantive law suggests that they would not. See *supra* notes 268-75 and accompanying text.

The expansion of certiorari jurisdiction since Professor Bickel's time lessens the need for justiciability doctrine to avoid or postpone decision at the Supreme Court level.⁴²⁹ But justiciability remains an important tool for limiting or postponing decisions in the lower federal courts.⁴³⁰ So, passive virtues should continue to play some role, albeit a reduced one.

Since a litigant without injury can bring concreteness to a case by discovering facts about others' injuries, there seems to be no strong need for a standing doctrine even in cases where concreteness does help. The Court can demand concreteness through its approach to the merits of a claim. As long as the Court responds to injuries on the merits, lawyers will bring somebody's concrete experience into their cases.

Of course, all of these arguments assume that standing law should perform some function.⁴³¹ Standing doctrine will likely persist, precisely because of the Court's formalist tendencies. Standing doctrine establishes a set of formal rules. Those rules have no basis in the text of the Constitution, which, after all, authorizes jurisdiction over cases and controversies, terms that collectively may embrace a wide range of judicial proceedings.⁴³² And, in light of the long tradition of relator and public actions requiring no injury, many commentators have concluded that standing has no basis in original intent either.⁴³³ Still, at this point, *stare decisis* supports standing. Because of *stare decisis*, recognition of standing doctrine's futility may not lead the Court to kill the doctrine outright or even to confine it to as-applied individual rights challenges that use injury to create a context for resolution of

⁴²⁹ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 80–81 (2000) (Stevens, J., dissenting) (arguing that the Court should have denied certiorari on the issue of whether the Constitution limits visitation rights of grandparents because there was “no pressing need” to do so). I am grateful to Harry Wellington for this suggestion.

⁴³⁰ I am grateful to Richard Fallon for emphasizing this.

⁴³¹ See Scharpf, *supra* note 428, at 534 (“Professor Bickel’s justification of the passive virtues is, at bottom, a functional one.”).

⁴³² See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (suggesting that the literal language of the Constitution cannot justify standing doctrine by pointing out that an “executive inquiry” can be called a “‘case’” and that a “legislative dispute” can be called a “‘controversy’”); Pushaw, *supra* note 83, at 480–82, 526–27 (arguing that, both historically and in present times, cases do not necessarily involve controversies between adverse parties).

⁴³³ See Raoul Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (calling “the notion that the Constitution demands injury to a personal interest . . . historically unfounded”); Nichol, *supra* note 424, at 1151–52 (discussing lack of historical requirement of injury under Article III); Pushaw, *supra* note 63, at 477–85 (arguing that a neo-federalist approach would allow standing without injury-in-fact, if Congress or the Constitution authorized suit); see also Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989) (examining the long history of *qui tam* actions, which do not require injury).

the merits.⁴³⁴ But recognition of standing's dysfunctional nature should, at a minimum, lead to more liberal treatment of injury, which might include less use of heightened pleading requirements to screen out injured plaintiffs and more generous application of the doctrine that a court should view a plaintiff's challenged allegations of injury in the light most favorable to the plaintiff on summary judgment.⁴³⁵ Lowering these barriers to presentation of facts might increase the flow of concrete experience into the courtroom and therefore might do more to improve concreteness than the standing doctrine ever did.⁴³⁶

E. Passive Virtues Revisited: The Active Virtues

Since standing doctrine has not realized its promise to make litigation more concrete, we should revisit our vision of passive virtues. The hope that doctrines limiting which parties can get into court would significantly improve the wisdom and quality of judicial decision-making on the merits seems,⁴³⁷ well, rather indirect.⁴³⁸ A litigant with standing will almost always come along sooner or later seeking adjudication of an issue.⁴³⁹ The Court's decisions in *Bush v. Gore*,⁴⁴⁰

⁴³⁴ See generally Schauer, *supra* note 201, at 655 (explaining that reliance on general reasoning affecting multiple hypothetical cases makes the requirement of a "concrete case seem [] peculiar").

⁴³⁵ See *Defenders of Wildlife*, 504 U.S. at 590–93 (Blackmun, J., dissenting) (suggesting that the Court did not properly apply summary judgment principles in denying standing); *Warth v. Seldin*, 422 U.S. 490, 528 (1975) (Brennan, J., dissenting) (arguing that the Court denied standing through application of a heightened pleading standard); cf. Nichol, *supra* note 424, at 1167 (describing how the Court has "bolstered standing requirements [over] two decades"); Winter, *supra* note 70, at 1373 (arguing that standing law has "increasingly . . . restrict[ed] citizens' claims against their government").

⁴³⁶ See *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2557–58 (2003) (Stevens, J., concurring) (stating that the need for a fuller factual record justifies dismissal of writ of certiorari for case decided below on the pleadings after briefing and oral argument). See generally Patricia M. Wald, *Summary Judgment At Sixty*, 76 TEX. L. REV. 1897, 1942–43 (1998) (raising the issue of whether summary judgment and increased emphasis on pleadings are cutting federal courts off from human experience).

⁴³⁷ See Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709, 1713 (1998) (describing Bickel's passive virtues as focused upon avoiding decisions through denials of certiorari and doctrines of standing, ripeness, and political questions).

⁴³⁸ Standing doctrine may have emerged as a reaction against *Lochnerism*, since rejected on the merits. See Winter, *supra* note 70, at 1455–57 (suggesting that standing doctrine allowed liberals to avoid *Lochner*-era vices).

⁴³⁹ See Scharpf, *supra* note 428, at 536 (asserting that standing and other justiciability restraints, apart from the political question doctrine, avoid a case, not the constitutional issue involved).

⁴⁴⁰ 531 U.S. 98 (2000) (per curiam) (holding that Florida should not recount ballots in the 2000 Presidential election); see also Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1407 (2001) (noting that *Bush v. Gore* has "shaken the faith of many legal academics in the Supreme Court and in the system of judicial review" because of its highly partisan nature).

United States v. Lopez,⁴⁴¹ and *United States v. Morrison*⁴⁴² may demonstrate that standing cannot effectively constrain an activist judiciary.⁴⁴³ The ideal of judicial practices designed to improve the concreteness of public law does have merit, even if some public law can never be terribly concrete because of its fundamental structure.⁴⁴⁴ But these practices must address how the Court handles the merits when it does reach them, not just how the Court might postpone the day when it reaches the merits.⁴⁴⁵

1. *Confining Decisions to Briefed Issues*

The Court often emphasizes that standing and other judicial doctrines assure adverse presentations helping to define and illuminate the issues before it. Even if the Court has proper litigants (however defined) before it, the adverse presentation does the Court no good if it decides issues that the parties have not briefed.⁴⁴⁶

The Court's doctrine demands that the Court confine itself to briefed issues.⁴⁴⁷ But the Court often ignores this doctrine.⁴⁴⁸ In-

⁴⁴¹ 514 U.S. 549, 567–68 (1995) (holding, for the first time since the New Deal, that Congress has exceeded its authority under the Commerce Clause); see also William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 111 (2001) (“*Lopez* was the first case in more than fifty years to find that Congress had exceeded the bounds of the Commerce Clause.”).

⁴⁴² 529 U.S. 598, 605, 627 (2000) (holding that Congress lacked the authority under the Commerce Clause and the Fourteenth Amendment to enact the Violence Against Women Act); see also Buzbee & Schapiro, *supra* note 441, at 111 (characterizing *Morrison* as “the first case [in more than fifty years] in which the Court rejected an explicit congressional finding that an activity had a substantial effect on interstate commerce”); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 135 (2000) (noting that *Morrison* is only the second case since Reconstruction to invalidate a federal antidiscrimination statute).

⁴⁴³ Because the litigants in all of these cases had standing, the Court was able to interpret aggressively constitutional constraints on legislative power.

⁴⁴⁴ See Tushnet, *supra* note 77, at 1706–07 (suggesting several procedural devices to serve standing’s goal of aiding the understanding of a decision’s consequences).

⁴⁴⁵ See Katyal, *supra* note 437, at 1713–15 (linking “the constructive uses of silence[s]” and the giving of advice in merits opinions to Bickel’s passive virtues) (quoting Sunstein, *supra* note 166, at 7 (footnote omitted)); Sunstein, *supra* note 166, at 51 (linking minimalist reasoning on the merits to Bickel’s “passive virtues”); see, e.g., Elliott, *supra* note 147, at 131 (suggesting that even if the Court had avoided deciding *Chadha*, “other cases challenging legislative vetoes” on the Court’s docket would have forced it to address the issues of the technique’s constitutionality).

⁴⁴⁶ See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 121 (1998) (Stevens, J., concurring) (criticizing parts of the majority opinion not informed by parties’ briefing as not “benefit[ing] from the ‘concrete adverseness’ that the standing doctrine is meant to ensure”); cf. Fiss, *supra* note 39, at 13 (“The judge is entitled to exercise power only after he has participated in a dialogue about the meaning of . . . public values.”).

⁴⁴⁷ See, e.g., *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 734 & n.8 (1997) (refusing to address the issue of whether a litigant making a takings claim had exhausted available state procedures, because the issue was not briefed).

⁴⁴⁸ See, e.g., Devins, *supra* note 110, at 261–62 (explaining that the Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), overruled *Swift v. Tyson* even though no party

deed, justiciability doctrines undermine the practice of resolving only issues briefed by the parties.⁴⁴⁹ For they require that the Court consider jurisdictional defects whether or not the parties raise them.⁴⁵⁰ The Court should adopt a simple solution to this problem. When it sees a potential jurisdictional defect not adequately briefed by the parties, it should order briefing.⁴⁵¹ It should not decide those issues, or any other, without briefing.

A less obvious problem comes from judicial selection of rationales for resolution of briefed issues. The Court sometimes chooses rationales that neither party has briefed.⁴⁵² This practice carries with it some of the same risks of unwise decision-making that come from deciding unbriefed issues. The Court can address this problem by requesting supplemental briefing when it sees the need to venture beyond the rationales offered by the parties. But even this may not suffice if none of the parties has an interest in the rationale that the Court believes serves the purposes of the law.⁴⁵³

Current doctrine, however, allows the Court to use rationales not offered by the parties, so long as the Court confines itself to issues the

sought that ruling); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 915 n.16 (1990) (Blackmun, J., dissenting) (chiding the majority for addressing ripeness when it was not briefed or argued).

⁴⁴⁹ See, e.g., *County of Los Angeles v. Davis*, 440 U.S. 625, 637 (1979) (Powell, J., dissenting) (chiding majority for mootness dismissal when defendant below did not argue this point); see also *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 230–31 (1990) (finding a lack of standing, though neither party raised the issue). The *Dallas* case shows how this failure makes litigation abstract. Because both parties thought no standing issue existed, the record lacked facts demonstrating standing. See *id.* at 234–35. Dallas's attorney believed that some of the petitioners had lost their licenses to run adult entertainment businesses under the provisions they sought to challenge. *Id.* at 235. If so, then the Court decided the standing issue based on a hypothetical set of facts constructed from an inadequate record, rather than the facts of the living contest that gave rise to the litigation. Cf. *id.* at 249 (Stevens, J., concurring) (declaring that he would remand for an evidentiary hearing, rather than order dismissal on standing grounds).

⁴⁵⁰ See *Devins*, *supra* note 110, at 258 (asserting that if the plaintiff lacks standing, the judiciary must dismiss the case, whether or not the defendant raises a standing defect); see also *Lewis v. Casey*, 518 U.S. 343, 393–94 (1996) (Souter, J., concurring in part and dissenting in part) (chiding majority for its treatment of standing in a case where neither party raised it); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (noting that the Court may raise nonjurisdictional ripeness defect “on [its] own motion”).

⁴⁵¹ See, e.g., *Arizonans for Official Eng. v. Arizona*, 520 U.S. 43, 64 (1997) (noting that the Court called for briefing on standing when it granted the petition for certiorari). Compare *Reno*, 509 U.S. at 57 n.18 (resolving ripeness claim only briefly touched upon in the briefs), with *id.* at 67–68 (O'Connor, J., concurring) (chiding the Court for reaching a decision on ripeness).

⁴⁵² See SUP. CT. R. 14(1)(a) (“The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.”).

⁴⁵³ See, e.g., *Devins*, *supra* note 110, at 262 (arguing that “the Justices [deciding *Erie*] understood that neither party would call for the overruling of *Swift*—even if the Court specifically requested briefing on the issue”).

parties raised.⁴⁵⁴ Because the line between an issue and a rationale can be very blurry,⁴⁵⁵ allowing original rationales can undermine the rule limiting the Court to briefed issues.

2. *Preferring Narrow Grounds for Decision*

Whether or not the plaintiff experiences injury, judges make choices about whether to choose narrow or broad grounds for decisions.⁴⁵⁶ An injured plaintiff under current doctrines licenses the Court to decide the case on any grounds it finds sensible, although the Court usually chooses to confine itself to questions presented by litigants.⁴⁵⁷ And it can choose broad grounds for decision-making if it wants to.⁴⁵⁸

Narrow decisions tend toward concreteness. They rely less on general abstractions about law and more upon specific reasons for particular outcomes in a case. Narrow decisions could have another benefit: they might lessen the number of concurring decisions.⁴⁵⁹ These days, multiple Supreme Court opinions, each offering a differ-

⁴⁵⁴ See *id.* at 282 (arguing that once an issue is before the Court, the Court should look to “the law, not just the arguments of the parties” to resolve the case).

⁴⁵⁵ For example, in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985), the Court addressed a First Amendment challenge to the exclusion of advocacy organizations from a government charitable solicitation drive. See *Cornelius*, 473 U.S. at 790. The Court declined to resolve the “issue” of whether the government excluded the NAACP Legal Defense and Educational Fund “because it disagreed with their viewpoints,” since that issue “was neither decided below nor fully briefed before this Court.” *Id.* at 812. If the Court had defined the issue as whether the exclusion violated the First Amendment, then the “issue” of motivation might become an argument about broader free speech, rather than a separate issue. See *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 333–34 (2002) (identifying four theories that were separate issues not before the Court and three theories as “fairly encompassed” within the facial takings claim before the Court); *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 734 (1997) (dividing the question of the ripeness of a takings claim into two sub-issues: whether an agency has made a final land use decision and whether the applicant has sought compensation through available administrative procedures).

⁴⁵⁶ See Sunstein, *supra* note 166 (discussing judicial “minimalism”).

⁴⁵⁷ See Pushaw, *supra* note 83, at 489–93 (noting that cases confer upon judges the “right [to] expound[] the law” (internal quotation marks and footnote omitted)); see, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (acknowledging that the Court has occasionally asked litigants to brief issues not raised in the petition for certiorari); cf. *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885) (announcing rule forbidding formulation of a “rule of constitutional law broader than is required by the precise facts to which it is to be applied”); *Renne v. Geary*, 501 U.S. 312, 330 (1991) (White, J., dissenting) (citing *Liverpool* rule); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (same); *Broadrick v. Oklahoma*, 413 U.S. 601, 609–15 (1973) (declining to find facial overbreadth when alleged overbreadth appears insubstantial).

⁴⁵⁸ See Fallon, *supra* note 88, at 24 (noting that “the Court routinely issues broad pronouncements” and “occasionally renders alternative holdings” to achieve “doctrinal clarification on multiple fronts” (footnotes omitted)); Sunstein, *supra* note 166, at 15 (claiming that no consensus exists on the appropriateness of minimalism).

⁴⁵⁹ Cf. Sunstein, *supra* note 166, at 17, 20 (suggesting that concrete narrow decisions can bring together a multi-member court).

ent rationale for the same result, seem fairly common.⁴⁶⁰ Such opinions can leave the law in a state of confusion.⁴⁶¹ If judges directed substantial energy toward finding narrow grounds for agreement, one might see shorter, clearer opinions—and fewer of them—in some cases.⁴⁶²

Judges care about matters other than the concreteness of their decisions for perfectly good reasons. Narrow decisions can lead to incoherence in the law through the proliferation of numerous individual results tied together by no coherent set of principles.⁴⁶³ Dormant Commerce Clause jurisprudence regarding interstate taxation offers perhaps the best example of this problem.⁴⁶⁴

⁴⁶⁰ See, e.g., *Burnham v. Superior Court*, 495 U.S. 604 (1990) (addressing the question of transient jurisdiction in a case generating three opinions); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (generating no majority opinion and four separately articulated opinions).

⁴⁶¹ See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2335–37 (2003) (describing lower court confusion in the wake of multiple opinions in *Bakke* and acknowledging difficulty of applying the test for interpreting such opinions); *Seminole Tribe v. Florida*, 517 U.S. 44, 63–64 (1996) (describing lower court confusion in the wake of the *Union Gas* Court's failure to agree upon a rationale).

⁴⁶² See, e.g., *Lewis v. Casey*, 518 U.S. 343, 394 (1996) (Souter, J., concurring in part and dissenting in part) (asserting that the Court's decision to address a standing issue prevented issuance of a unanimous opinion on the question forming the basis for certiorari); *Yee*, 503 U.S. at 539 (Blackmun, J., concurring) (writing separate concurrence due to unnecessary remarks in the majority opinion regarding an issue the Court had concluded was not within the scope of the question presented); *id.* (Souter, J., concurring) (same).

⁴⁶³ See *Grutter*, 123 S. Ct. at 2351–53 (Thomas, J., dissenting) (arguing that making diversity a compelling state interest in one context, but not in another, is unprincipled); *cf.* Sunstein, *supra* note 166, at 16 (discussing Justice Scalia's view that broad rules serve rule of law values).

⁴⁶⁴ See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610–11 & nn.2–3 (1997) (Thomas, J., dissenting) (calling Dormant Commerce Clause jurisprudence “unworkable” and citing numerous statements by Justices remarking on its incoherence); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 234 (1985) (describing this jurisprudence as “appear[ing] arbitrary, conclusory, and irreconcilable with the constitutional text”); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 439 (2d ed. 1988) (describing the jurisprudence as “ad hoc” and not based on “consistent application of coherent principles”); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 217 (discussing the ubiquity of Dormant Commerce Clause rulings); Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37, 44 (1987) (chiding the Court for drawing a line “discernible, if at all, only to itself”). I am not suggesting that Dormant Commerce Clause cases rely upon injury to produce concreteness. *Cf.* *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343–44, 353–54 (1977) (injuries focus on economic burdens, while resolution of merits focuses on lack of consumer benefits associated with those burdens). Indeed, Dormant Commerce Clause jurisprudence combines narrow rulings with abstraction. See, e.g., *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 568–69, 575–76, 595 (stating that limitations on tax exemption available for charities benefitting out-of-state residents facially discriminates and therefore violates the Dormant Commerce Clause, in spite of lack of impact on national markets).

Furthermore, narrow decisions can raise transaction costs.⁴⁶⁵ Decisions at a high degree of generality, such as the Court's much maligned sovereign immunity jurisprudence and its celebrated *Brown* decision, can clarify the contours of a large number of situations at once.⁴⁶⁶

Hence, the decision about whether to prefer narrow grounds of decision will necessarily involve many considerations.⁴⁶⁷ But it does offer a potential means of increasing the concreteness of decisions.

The desire to write narrow decisions can conflict with the desire to address the precise issues briefed. If the litigants frame the issues broadly, then a narrow decision may not benefit from party presentation of the issues.⁴⁶⁸ The narrowly framed issue can lose, to use a poorly chosen term, concrete adverseness. But the Court can solve this problem by adopting a practice of asking for supplemental briefing on narrowly defined questions when litigants frame a dispute too broadly.⁴⁶⁹

The Court's practice of disfavoring facial challenges serves the function that the Court wrongly assigns to the standing doctrine: avoidance of improper interference with democratic decisions.⁴⁷⁰ It does this, however, with sensitivity to doctrine-specific needs to interfere sufficiently with democratic decisions to avoid abridgment of constitutional rights. This need justifies, for example, the Court's willingness to strike down laws as overly vague or broad under the First Amendment, even though such laws may have many valid applications.⁴⁷¹

⁴⁶⁵ See Sunstein, *supra* note 166, at 17 (linking narrow decisions to high costs for litigants and judges in subsequent cases).

⁴⁶⁶ Cf. Elliott, *supra* note 147, at 162 (suggesting the possibility that the broad opinion in *Chadha* might be a "wise exercise of judicial statesmanship").

⁴⁶⁷ See generally Sunstein, *supra* note 166 (discussing relevant considerations in the choice of whether or not to prefer narrow grounds of decision).

⁴⁶⁸ See, e.g., Strauss, *supra* note 291, at 791–92 (pointing out that the disputants in *Chadha* may not thought it to be in their best interest to define the issue narrowly).

⁴⁶⁹ See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (stating that the Court has occasionally asked litigants "to address an important question of law not raised in the petition for certiorari"); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 (1978) (plurality opinion) (discussing how the Court requested supplemental briefing on statutory civil rights claim in hopes of obviating the need to resolve a constitutional equal protection issue). A more modest, and probably insufficient cure, would rely upon narrow questions at oral argument. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992) (noting that the Court relied upon theory raised only in oral argument and a reply brief, and characterizing this consideration as proper). But see *id.* at 397–98 (White, J., concurring) (disagreeing with majority's decision to consider an issue so raised).

⁴⁷⁰ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (stating that "caution" is needed when considering facial challenges, because "invalidation may . . . unnecessary[ly] interfere[] with . . . state regulatory program[s]").

⁴⁷¹ See *Dorf*, *supra* note 96, at 261–79 (arguing the overbreadth doctrine protects against chilling of protected conduct); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); see also, e.g., *Virginia v. Hicks*, 123 S. Ct. 2191, 2196 (2003) ("We

The Court, however, at times, properly disallows as-applied challenges and limits litigants to facial challenges. For example, under the Commerce Clause, the Court, even after the revival of judicial limitation of congressional regulatory power under *Lopez* and *Morrison*, subscribes to the rule that a regulatory program remains constitutional even if a particular commercial application of that program would violate the Commerce Clause if viewed in isolation.⁴⁷² This rule also limits improper interference with political decisions of elected officials, by eschewing interference with programs addressing problems that substantially affect interstate commerce through the aggregation of seemingly local activities.⁴⁷³ One may question whether the Court has interfered improperly with democratic decision-making in spite of these limits and ask whether the Court should simply rely on the political decision-making process to restrain federal power in light of the history of arbitrary abstraction in this area.⁴⁷⁴ Still, this rule against facial challenges constrains interference and shows that the desire for concreteness in adjudication must sometimes yield to larger concerns. This exception to the preference for narrow grounds shows that the rule favoring narrow decisions must be subject to some bounds and remain flexible.

This Article's exploration of the paradox created by the Court's insistence upon proof of injury even as the Court's jurisprudence diminishes injury's relevance⁴⁷⁵ can help clarify the debate regarding facial versus as-applied challenges—a debate about when a Court should strike down a statute as invalid and when it should hold that a statute is only invalid as applied to a particular litigant. Several com-

have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech"); *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (striking down antiloitering ordinance as impermissibly vague on its face). See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (analyzing the Court's overbreadth doctrine).

⁴⁷² See *United States v. Lopez*, 514 U.S. 549, 558 (1995) (holding that when "'a . . . regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence'" (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968))); *United States v. Morrison*, 529 U.S. 598, 609 (2000) (reaffirming the *Lopez* framework); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (noting that the Court would have to consider regulated activity "in the aggregate" to adjudicate constitutionality of Clean Water Act jurisdiction under the Commerce Clause).

⁴⁷³ See *Lopez*, 514 U.S. at 561; see also John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 192-204 (1998) (discussing the aggregation issue in light of *Lopez*).

⁴⁷⁴ See *Morrison*, 529 U.S. at 628-55 (Souter, J., dissenting); *Lopez*, 514 U.S. at 603-07 (Souter, J., dissenting).

⁴⁷⁵ See, e.g., Isserles, *supra* note 236, at 435 n.340, 449-51 (discussing examples of doctrinal shifts away from consideration of the effects upon individuals in the free exercise area). See generally Eisgruber & Sager, *supra* note 336 (discussing conceptions of free exercise based on formal equality, as well as conceptions based on "privileges").

mentators have suggested that a continuum exists between pure as-applied challenges and facial challenges that ask a court to strike down rules in their entirety.⁴⁷⁶ This Article's analysis helps clarify the nature of the continuum.

The as-applied end of the continuum involves challenges in which the intensity of the injury or defendant misconduct influences the merits, as in takings cases and procedural due process cases.⁴⁷⁷ In such cases, even when a plaintiff challenges a formal legal rule, the result of the case is likely to have uncertain precedential significance for the challenged rule itself, because the intensity and nature of the injury can vary from case to case. In these instances, the injury makes the consequences of an application of a legal rule clear. The Court's focus on individual consequences, however, obscures the case's significance for the rule as a whole.⁴⁷⁸

In the middle of the continuum, the Court explicitly invalidates only part of a rule.⁴⁷⁹ The Court may categorize the injury in order to frame the issue it does resolve or the relief it offers, instead of exploring the injury's intensity.⁴⁸⁰ But because both the courts and lawyers can frame issues broadly, the injury does not determine the breadth of these holdings or the remedies.⁴⁸¹ Furthermore, the Court need not employ injury to frame the case at all. Instead, it may focus on the government defendant's identity or conduct,⁴⁸² the holding of a lower

⁴⁷⁶ See, e.g., *Dorf*, *supra* note 96, at 294 ("The distinction between as-applied and facial challenges may confuse more than it illuminates." (footnote omitted)).

⁴⁷⁷ See e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003) (degree of defendant misconduct measured, in part, by seriousness of plaintiff's injuries bears upon constitutionality of a punitive damages award); *Connecticut v. Doe*, 501 U.S. 1, 4, 14–16 (1991) (relying upon the potential injury, i.e., the risk of erroneous deprivation in a litigant's particular situation, to justify a holding that a prejudgment statute violated his due process rights).

⁴⁷⁸ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 71–72 (2000) (plurality opinion) (using information about parent's conduct in limiting grandfather's visitation and state trial court's reasoning to frame an as-applied challenge, thereby leaving the opinion unclear as to the overall validity of Washington's statute).

⁴⁷⁹ See, e.g., *United States v. Raines*, 362 U.S. 17, 23–26 (1960) (holding that Congress may proscribe state interference with voting rights under a statute that proscribed state or private interference with voting rights, noting that further inquiry into the constitutionality of the statute in other factual contexts was unwarranted).

⁴⁸⁰ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 402–06, 420 (1989) (framing the issue in terms of respondent's conduct, which was categorized as expressive).

⁴⁸¹ See, e.g., *id.* at 399, 403 n.3 (framing issue in terms of expressive conduct generally, not just demonstrations at the Republican National Convention like the conduct at issue in the case). See generally *Schauer*, *supra* note 195 (observing that "although rights might be more or less general, a degree of generality is a necessary feature of all rights"); *Schauer*, *supra* note 201 (explaining that reasons always go beyond the facts they relate to).

⁴⁸² See, e.g., *Dusenberry v. United States*, 534 U.S. 161, 168–69 (2002) (framing a challenge to the constitutional adequacy of notice in terms of the defendant's conduct in delivering a certified letter under a statute that authorized use of the mail generally); *Raines*, 362 U.S. at 25–26 (limiting challenge to statutory subrule framed by defendants' identity as

court,⁴⁸³ or its own view of the subrule it wishes to adjudicate.⁴⁸⁴ Because of this fluidity, many cases can be characterized as either challenges to rules or challenges to application of rules.⁴⁸⁵

Finally, many statutory challenges to administrative regulations, most structural constitutional law challenges, and a significant number of individual rights cases involve facial challenges, in which the principal issue is whether a rule violates some constitutional or statutory norm.⁴⁸⁶ As legal tests become more formal, facial challenges should become more common, because formal tests do not depend upon intensity of injury at all, but upon the formal properties of legal rules and resolution of conflict of laws claims.⁴⁸⁷

In another variant of the paradox between formalism and insistence on concreteness, the Court seems to be demanding more facial challenges at the same time that some of its members question their legitimacy on the basis of a private rights model. The *Salerno* rule, which suggests that a litigant must show that every application of a rule is invalid in order to prevail in a facial challenge,⁴⁸⁸ seems to reflect a view that constitutional litigation hinges upon the intensity of

state officials); *cf.* Isserles, *supra* note 236, at 433 (describing challenge to statute construed to conform to a particular context as an as-applied challenge).

⁴⁸³ See Isserles, *supra* note 236, at 429–30 (suggesting that challenges to statutes after they have been narrowed through judicial construction may be considered facial challenges).

⁴⁸⁴ See *Virginia v. Black*, 123 S. Ct. 1536, 1556–57 (2003) (Scalia, J., concurring in part and dissenting in part) (accusing plurality of incorrectly labeling an as-applied challenge as a facial one, and adjudicating it based on a construction implicit in a trial court's jury instruction).

⁴⁸⁵ See Adler, *Moral Structure*, *supra* note 325, at 4, 36, 37, 156–57 (characterizing most cases as involving “rights against rules”); Fallon, *supra* note 235, at 1368 (arguing that as-applied challenges remain the norm); Isserles, *supra* note 236, at 423–51 (characterizing many cases as involving as-applied challenges). Further inquiry might lead to a less agnostic position, but if so, this would likely require more elaborate definitions of as-applied and facial challenges than I can offer in this Article. I confine myself to describing the basic illumination that the concreteness paradox provides, without extensive further analysis.

⁴⁸⁶ See *Dorf*, *supra* note 96, at 260 (noting that the Court views the drawing of discriminatory lines as a constitutional violation, irrespective of their effects); Isserles, *supra* note 236, at 405 (equating facial challenges to regulations under a statute with facial challenges to the constitutionality of a statute); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 8 (arguing that facial invalidity involves the “relationship” between the rule and the “applicable constitutional law”); *see, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 76 (2000) (Souter, J., concurring) (noting that the lower court resolved a facial challenge to a statute allowing any person visitation rights when visitation serves the child's best interests “based on the text of the statute alone, not its application to any particular case” (footnote omitted)); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (holding that a prohibition on signs that are critical of a foreign government is an invalid content-based restriction of speech); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 101–02 (1972) (holding that a prohibition on all picketing of schools except peaceful labor picketing was an invalid content-based restriction).

⁴⁸⁷ See Isserles, *supra* note 236, at 363–64 (stating that a “‘valid rule facial challenge’” confronts a “constitutional defect inhering in the terms of the statute itself”).

⁴⁸⁸ See *United States v. Salerno*, 481 U.S. 739, 745 (1987).

injuries, though many cases involve some analysis of conflict of law claims.⁴⁸⁹ But in *Salerno* itself, the Court engaged in an abstract analysis that properly focused on the general issue of whether the Constitution permitted pretrial detentions based upon risks to the community's safety, rather than on the risk of pretrial flight.⁴⁹⁰ The broader perspective that this Article offers, by extending the rights-against-rules thesis beyond the area of individual rights, confirms that *Salerno* properly affirmed the legitimacy of adjudication of facial conflict of laws claims.⁴⁹¹ The preference for narrow decisions involves an eagerness to seize narrower grounds when they are available. It does not, however, suggest that broad decisions are per se illegitimate.⁴⁹²

Concreteness after the private law model requires that the Court frame issues in terms of the facts of the case, use those facts to examine the challenged law's effects, and provide rationales linking the case's results to those facts. This approach can work for a number of doctrinal tests in the individual rights area, especially when the doctrines permit consideration of effects. But it requires a court to choose that approach in the face of some reasons to become more abstract. That choice, unlike decisions about standing, can enhance the concreteness of litigation.

3. *Adding Context and Cultivating Humility*

These days, the Court seems quite confident, perhaps overly confident, in its ability to discern the meaning of the Constitution with respect to vexing issues of federalism and separation of powers.⁴⁹³ Although the Court recognizes functional considerations that invite examination of context, it sometimes makes judgments without good information about relevant context.

⁴⁸⁹ See Isserles, *supra* note 236, at 383 (concluding that *Salerno*'s test requires a "Herculean effort" to demonstrate that "each and every [hypothetical] application of a statute" is invalid). Professor Isserles, however, concludes that the *Salerno* test should be read as not requiring the hypothetical inquiry it seems on its face to call for. See *id.* at 386–88.

⁴⁹⁰ See *Salerno*, 481 U.S. at 747–51; see also *Washington v. Glucksberg*, 521 U.S. 702, 739–40 (1997) (Stevens, J., concurring) (stating that the Court has never applied the test *Salerno* suggests, not even in *Salerno* itself).

⁴⁹¹ Isserles, *supra* note 236, at 387 (pointing out that a facial challenge demonstrates that the terms of a statute contain a "constitutional infirmity" when "measured against the relevant constitutional doctrine").

⁴⁹² See *id.* at 421–23 (noting that the choice of whether to strike down a statute on its face or to adjudicate it more narrowly must rest upon an assessment of the "practical effects").

⁴⁹³ See, e.g., Buzbee & Schapiro, *supra* note 441, at 89 (discussing the Court's lack of deference toward legislative findings); Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power To "Say What the Law Is"*, 59 WASH. & LEE L. REV. 839, 843–44 (2002) (discussing the Court's declining deference to congressional interpretation of the Fourteenth Amendment).

For example, take the sovereign immunity cases. Making the states immune from private damage suits, as the Court's sovereign immunity jurisprudence does,⁴⁹⁴ raises functional issues under the Supremacy Clause.⁴⁹⁵ Since that clause requires that federal law remain supreme, even the modern Court agrees that states must comply with federal law.⁴⁹⁶ This raises the issue of whether disallowing private enforcement suits will liberate the states from compliance. The Court answered this question by assuming that states will comply with federal law even without private enforcement and by pointing out that federal enforcement (as opposed to private enforcement) remains available under the Court's sovereign immunity law.⁴⁹⁷ Yet the Court considered no data about the validity of the assumption that states will generally comply with federal law absent private enforcement.⁴⁹⁸ Thus, the Court obviously did not have an adequate basis for its conclusion that states will continue to comply with federal law, or that federal enforcement, which might be sporadic because of resource constraints, produces substantial state compliance.⁴⁹⁹ Hence, the Court's belief that sovereign immunity does not conflict with the Supremacy Clause appears suspect.⁵⁰⁰ The Court will likely make better judg-

⁴⁹⁴ See *Alden v. Maine*, 527 U.S. 706, 731–35 (1999).

⁴⁹⁵ *Seminole Tribe v. Florida*, 517 U.S. 44, 153–158 (1996) (Souter, J., dissenting).

⁴⁹⁶ See U.S. CONST. art. VI, cl. 2; *Alden*, 527 U.S. at 754–55; cf. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 278 (1997) (Kennedy, J.) (stating that “the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States”) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)).

⁴⁹⁷ See *Alden*, 527 U.S. at 755; *Seminole Tribe*, 517 U.S. at 71 n.14. In addition, suits for injunctive relief may lie against state officials acting in their official capacities. See *Alden*, 527 U.S. at 756–57 (noting that some suits against state officials are permitted); see, e.g., *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 648 (2002) (holding that a telecommunications company may sue state officials acting in their official capacities under federal law); cf. *Coeur d'Alene Tribe*, 521 U.S. at 281–88 (declining to authorize a suit against state officials when state title to land is at stake); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 510–41 (1997) (discussing “the availability of injunctive relief against state officers to prevent violations of federal law” (footnote omitted)). Congress may abrogate state immunity when acting under the Fourteenth Amendment. See *Alden*, 527 U.S. at 756; *Seminole Tribe*, 517 U.S. at 59; cf. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 634–35 (1999) (quoting language from *Seminole Tribe* in invalidating federal abrogation of state immunity from private suit for patent infringement); *City of Boerne v. Flores*, 521 U.S. 507, 517–36 (1997) (construing congressional enforcement power under the Fourteenth Amendment narrowly). In addition, states may consent to suit. See *Alden*, 527 U.S. at 755.

⁴⁹⁸ Cf. *Seminole Tribe*, 517 U.S. at 157 n.52 (Souter, J., dissenting) (expressing skepticism about the efficacy of the remaining remedies).

⁴⁹⁹ Cf. *Alden*, 527 U.S. at 757 (“Established rules provide ample means to correct ongoing violations of the law . . .”).

⁵⁰⁰ Cf. *id.* at 810 (Souter, J., dissenting) (expressing skepticism about the capacity of the federal government to enforce the Fair Labor Standards Act); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331 (2001) (discussing problems with the remedies remaining after the Court disallowed damage suits against states for violation of intellectual property law).

ments about the congruence of broad sovereign immunity and the Supremacy Clause if it remains aware of its information deficit and tries to compensate for it.

Contextual knowledge, such as knowledge about the behavior of state governments and the effects of enforcement (or lack thereof) comes slowly over time. This kind of knowledge is often important to wise constitutional judgment. Yet this sort of knowledge frequently goes far beyond the experience of most litigants.⁵⁰¹ Individual injury may be irrelevant or even distorting.⁵⁰² The Court may need information about institutional tendencies that experienced politicians or other government employees may understand much better than even the cleverest Supreme Court Justices (unless they had recent prior experience).⁵⁰³ And the Court, trapped as it is in a routine of considering lawyers' arguments, may get very distorted views of these sorts of questions.⁵⁰⁴ Similarly, judges should avoid misplaced concreteness—the rendering of a broad ruling responsive to atypical facts shown in the case before the Court, rather than through consideration of the full range of relevant factors.

This suggests that the Justices need humility about their capacity to make good judgments.⁵⁰⁵ Such humility should make Justices more eager to add context when they can or to defer to coordinate branches of government. And it should also lead the Justices to exercise more caution.

⁵⁰¹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 20 n.21, 21 n.23 (1976) (per curiam) (drawing on various sources of statistical information that go beyond the litigants' personal experience).

⁵⁰² See, e.g., *id.* at 34 n.40 (discussing the experience of small political parties in obtaining contributions, but conceding that their prior experience may not capture the future effects of a new campaign finance law); see also *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395 (1988) (declining to rely on lower court construction of statute prohibiting the sale of books "harmful to minors", because the bookstore owners who testified below were "unfamiliar with the statutory definition" of this term).

⁵⁰³ See Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998) (explaining why judges lack the capacity to give useful advice to legislative bodies); see, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (deferring to congressional finding that civil penalties deter future violations of the Clean Water Act); *Tigner v. Texas*, 310 U.S. 141, 148–49 (1940) (deferring to legislative judgment regarding what remedies adequately deter unlawful conduct).

⁵⁰⁴ See Mikva, *supra* note 503, at 1829 (contrasting the legislative and judicial processes for obtaining information and advice); cf. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1858 (1998) (explaining how the Court's reliance on lawyers led to a misunderstanding of legislative history in a landmark case); cf. Scharpf, *supra* note 428, at 524–27 (discussing approvingly a German practice of systematically incorporating a wide information base into constitutional litigation).

⁵⁰⁵ See Fiss, *supra* note 39, at 45 (arguing that "self-righteousness" limits a judge's capacity to perform adequately).

An insistence upon injured litigants cannot substitute for these sorts of habits. Wise adjudication ultimately depends upon the Court's wisdom when it reaches the merits.

CONCLUSION

Courts and commentators have exaggerated the functional value of requiring injured litigants in public law cases. Injured plaintiffs help define the merits of some controversies, but public law properly depends upon a mixture of formal legal analysis and pragmatic policy judgments that go far beyond the context that any litigant's experience provides. This conclusion has implications for justiciability doctrine, our understanding of public law, and the proper approach to merits adjudication in public law cases.

Understanding the limited role that injury plays in making cases more concrete eliminates, at least in many cases, the principal rationale linking the current doctrine of standing to the Constitution. Because injury often does not make significant public law litigation more concrete, requiring injured plaintiffs does not create a case or controversy conforming to the private law model. Courts regularly, and often quite properly, resolve cases or controversies without reference to individual injury. This shows that injury, in theory, should not be a constitutional requirement under Article III. At a minimum, courts should liberalize injury requirements, rather than require heightened pleading at the motion to dismiss stage or an extraordinarily detailed factual showing at the summary judgment stage.

Recognition of injury's failure to assure concrete litigation also leads to better understanding of public law's nature. Public law often involves conflict of law analysis and a context broader than that provided by an individual litigant. As a result, individual injury often properly plays a limited role in resolving the merits of public law cases. Injury's role varies, however, with the type of public law problem. The structure of public law problems helps explain this variation. Injury often helps frame as-applied individual rights cases, but rarely influences the resolution of administrative law cases or structural constitutional law cases. The structure of the legal problems, rather than information about parties' injuries, explains the variations.

Injury's failure to make cases concrete should lead courts to pursue "active virtues"—approaches to addressing the merits that can compensate for injury's failure. Courts should seek narrow grounds for decision, confine themselves as much as possible to briefed issues and rationales, and seek information needed to understand the broad institutional consequences of many public law decisions.

The "passive virtues" have assured neither passivity, nor virtue. While some of this failure stems from the Court's movement toward

formalism, justiciability doctrines never had the capacity to substitute for wise decision-making. Hopefully, understanding the paradox of demanding individualized concrete context for formalist public law adjudication will help improve justiciability doctrine and the Court's approach to the merits of public law controversies.