

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

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ABSTRACT

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, often the Supreme Court 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 in leading law reviews about whether constitutional litigation should be seen as about individual rights or the validity of legal rules. It also raises serious questions about the modern doctrine of standing.

Alexander Bickel's influential writing on the "passive virtues" views 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 as to constitutionality. Analysis of the reasons that information regarding injury often has no influence upon the merits of many public law cases casts doubt on justiciability doctrines' capacity to aid wise decision-making. Courts need to 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).<sup>1</sup> 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.<sup>2</sup> This pork barrel spending had made it very difficult to properly manage the federal budget.<sup>3</sup> Absent authority to veto each line item, the President could only combat pork barrel spending by vetoing the entire federal budget, which might well shut down the federal government.<sup>4</sup>

The day after the Act went into effect, six members of Congress brought suit to challenge the Act’s constitutionality.<sup>5</sup> After the District Court declared the Act unconstitutional, the Supreme Court agreed to hear the case under the statute’s provision for expedited review.<sup>6</sup>

The Supreme Court held that the Congressmen did not allege a

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<sup>1</sup> See Pub. L. 104-130, 110 Stat. 1200, codified at 2 U.S.C. § 691 *et seq.* (1994 ed., Supp. 1).

<sup>2</sup> See Mary E. Foster, *The Line Item Veto Act After Raines v. Byrd*, 20 T. JEFFERSON L. REV. 323, 323 (1998).

<sup>3</sup> 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 (1997) (discussion of conditions and budgetary outcomes associated with pork barrel spending).

<sup>4</sup> Anthony R. Petrilla, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 479 (1993) (Presidential veto of a budget bill laden with riders of dubious merit can shut down the federal government).

<sup>5</sup> See *Raines v. Bryd*, 521 U.S. 811, 814 (1997).

<sup>6</sup> See *id.* at 817 (citing 2 U.S.C. § 692(b),(c)).

“sufficiently concrete injury to have established Article III standing.”<sup>7</sup> 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.”<sup>8</sup> The Court contrasted a suit based on concrete injury with “amorphous general supervision of” government operations.<sup>9</sup> 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.<sup>10</sup>

Justice Souter wrote separately, in part, because he believed that the Congressmen’s injury might satisfy “the requirement of concreteness.”<sup>11</sup> Justice Souter, however, concurred in the end, because he thought it prudent to avoid immediate involvement in a dispute between two branches of the federal government and await a case involving more “concrete” injury.<sup>12</sup>

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*” is “concrete.”<sup>13</sup> Standing should exist, Breyer writes, because the plaintiffs ask the court to determine “a *concrete* living contest,” rather than an “abstract intellectual problem.”<sup>14</sup>

Litigants with sufficiently concrete injuries to justify standing subsequently challenged the Act in *Clinton v. City of New York*<sup>15</sup>. The majority opinion in *Clinton* describes the facts giving rise to these injuries

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<sup>7</sup> See *id.* at 830. Cf. Tracy Rottner Yu, *Note, 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 supporting this conclusion, but agreeing with the result); *Leading Case, Separation of Powers - Congressional Standing*, 111 HARV. L. REV. 217, 227 (1997) (criticizing Court’s confusion of the law of legislative standing); Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Bird*, 112 HARV. L. REV. 1741 (1999) (criticizing *Raines*).

<sup>8</sup> See *Raines*, 521 U.S. at 819 (citing *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

<sup>9</sup> See *id.* at 829 (quoting *United States v. Richardson*, 418 U.S. 166 (1974)).

<sup>10</sup> See, e.g., *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 297 (1979) (distinguishing between a case or controversy and “abstract questions.”); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-198 (2nd ed. 1986).

<sup>11</sup> See *Raines*, 521 U.S. at 831 (Souter J., concurring).

<sup>12</sup> See *id.* at 832-34.

<sup>13</sup> See *id.* at 839 (Breyer J., dissenting) [emphasis added].

<sup>14</sup> See *id.* at 839-40 [emphasis added].

<sup>15</sup> 524 U.S. 417 (1998).

in detail.<sup>16</sup> New York City and certain health care providers faced potential losses of federal monies financing medical care of the indigent, because of President Clinton's veto of a line item giving New York favorable treatment with respect to Medicaid.<sup>17</sup> A farmer's cooperative faced the loss of a potential tax benefit, because of another line item veto.<sup>18</sup> The Court found these economic injuries sufficiently concrete to justify standing.<sup>19</sup>

Waiting for plaintiffs with concrete injuries to sue, however, did not lead to especially concrete adjudication. Rather, *Clinton* treats the constitutionality of the line item veto as an "abstract intellectual problem," which the Court resolved through a formalist approach. 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."<sup>20</sup> Since the Constitution does not authorize Presidential repeal of legislation, reasoned the majority, the statute authorizing Presidential veto of line items conflicts with the Constitution.<sup>21</sup> It 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, § 7 of the Constitution.<sup>22</sup> This reasoning makes no reference to injuries, but only to the content of the constitution and the statute.

The *Clinton* majority refused to analogize the line item veto to the veto of a bill under Article I, § 7 of the Constitution. The Court explained that the traditional veto only applies to an entire bill and only after the President has signed it into law.<sup>23</sup> By contrast, the line item veto applies to parts of bills and comes before the bill is signed into law.<sup>24</sup> This formal distinction also depends not at all 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 it,<sup>25</sup> contains not a

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<sup>16</sup> See id. at 421-36.

<sup>17</sup> See id. at 422-23, 426, 430-31.

<sup>18</sup> See id. at 423-24, 426-27, 432-36.

<sup>19</sup> See id. at 429-436.

<sup>20</sup> See id. at 438.

<sup>21</sup> See id. at 438-39.

<sup>22</sup> See id. at 448-49.

<sup>23</sup> See id. at 439.

<sup>24</sup> See id.

<sup>25</sup> See id. at 448 ("our decision rests on the narrow ground" that the Constitution (continued...))

single reference to the injury that the Court found so necessary to its constitutional adjudication.<sup>26</sup>

The government analogized the line item veto act to delegation of discretionary power to the President, which the Court has upheld. It relied upon *Field v. Clark*,<sup>27</sup> 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. The government's analogy persuaded Justices Scalia, Breyer and O'Connor that the statute should be upheld.<sup>28</sup>

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 mention the injuries giving rise to justiciability in discussing the argument at the heart of the government's case,<sup>29</sup> and these injuries receive only cursory mention

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<sup>25</sup>(...continued)

does not authorize the Line Item Veto Act's procedures).

<sup>26</sup> See *id.* at 436-40.

<sup>27</sup> 143 U.S. 649 (1892).

<sup>28</sup> See *Clinton*, 524 U.S. at 463-69, 473-497 (dissenting opinions).

<sup>29</sup> The majority rejected the analogy to *Field v. Clark* for three reasons. First, the power to levy a tariff at issue in *Field* only came into play when a new condition arose, whilst exercise of the line item veto would occur without new conditions arising. See *id.* at 443. Second, while the Line Item Veto Act only *authorized* vetoes, the Tariff Act *required* 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 relies upon his own policy judgment in exercising the line item veto. 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 vetoes of a line item to show that Presidential judgment operates. See *id.* at 444 n. 35. But this does not amount to a reference to the injury giving rise to standing. In the end, the Court relied on a purely formalist acontextual argument to justify rejection the *Field* analogy. Unlike predecessor statutes, wrote the majority, the Line Item Veto Act "gives the President the unilateral authority to change the text of duly enacted statutes." *Id.* at 447.

The dissent's 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., dissenting). Justice Scalia then relies on the long history of authorization of discretionary spending to justify upholding the Act. See *id.* at 466-69. 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

(continued...)

in the discussion of subsidiary arguments<sup>30</sup>.

This case illustrates the paradox this article will explore. On the one hand, the Supreme Court has insisted on justiciability criteria that aim to make adjudication concrete, rather than abstract. On the other hand, it often relies upon abstract formalist reasoning to resolve cases on the merits, thereby getting 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

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<sup>29</sup>(...continued)

justiciable. He develops an illustration of his logic for rejecting the majority's conclusion from one of the particular line items President Clinton has vetoed, but does not refer to the injury the veto of that line item produced. *See id.* at 474 (Breyer J., dissenting). Moreover, he supplements this illustration with another example, from the law of trust and estates, that has no connection with the facts of the case at all. *See id.* at 476. Breyer reads the statute as allowing the President to exercise delegated authority as in *Field* for reasons having nothing to do with the injuries inflicted in the *Clinton* case.

Justice Kennedy's concurring opinion claims that the Act threatens 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. *See id.*

<sup>30</sup> The Court's refutation of one of the governments' 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 to argue against the characterization of the line item veto as a repeal of part of a statute. *See id.* at 440. Since that provision has a legal effect even after the line item veto's exercise - forbidding 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. The Court explained that the cancelled line items do withdraw 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. The validity of this argument in no way depends upon the deprivation of funds actually injuring anybody. Even if the hospital losing medicare funding escaped injury by making up the funding loss from new private donations, the statute would nevertheless have the feature that troubled the Court. And certainly nothing about the particular injury incurred by the hospital, the loss of funding for the indigent, matters at all to the lockbox argument. The Court rejects the lockbox argument on the grounds that a repeal of the expenditure alone does constitute at least a "partial repeal" of the line item. This argument rests upon abstract reasoning, not any particular injury. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (requiring plaintiff to have "particularized" injury).

The Breyer dissent's rejoinder to the majority's lockbox argument does not mention injury at all. *See Clinton*, 524 U.S. at 478-79. He accepts the government's argument that the lockbox feature does not constitute a repeal, and argues that it supports his conclusion that the Act delegates executive authority to the President. *See id.* at 478-80.

become concrete and well developed, and about formalism.<sup>31</sup> 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?<sup>32</sup> 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 one 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 two will test the hypothesis that the Line Item Veto 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 three 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.<sup>33</sup> The article closes with recommendation for a new set of “active virtues,” a set of practices to follow in resolving, rather than avoiding, the resolution of the merits of cases.

## I. CONCRETENESS AND ABSTRACTNESS IN CONSTITUTIONAL ADJUDICATION

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<sup>31</sup> See BICKEL, *supra* note 10, at 111-198 (chapter on the “passive virtues”).

<sup>32</sup> *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).

<sup>33</sup> I define public law as law creating obligations for government. *Accord* *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-68 (1982) (plurality opinion). This includes constitutional and most administrative law. By contrast private law involves questions of one individual’s liability to another. *Id.* at 69-70. This definition is not uncontroversial nor does it resolve all issues. See *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 600 (1985) (Blackmun 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).

This part describes the law of standing and several related justiciability doctrines. It then presents some 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.<sup>34</sup> 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.<sup>35</sup>

#### 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.<sup>36</sup>

In *Baker v. Carr*,<sup>37</sup> the Court asked whether the appellants have “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”<sup>38</sup> It described this inquiry as “the gist of the question of standing.”<sup>39</sup> Thus, the *Baker* Court set up assurance of “concrete adverseness” as the measuring rod for an adequate “personal stake” in a case.<sup>40</sup> Concrete adverseness, claims the *Baker* Court, “sharpens presentation of issues” to “illuminate difficult constitutional questions.”<sup>41</sup> The Court went on to grant standing to voters challenging redistricting under the equal protection clause.<sup>42</sup> In a separate passage, the Court formulated the modern political question doctrine and held that the constitutionality of redistricting under the equal protection clause posed a

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<sup>34</sup> *Cf.* *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 297 (1979) (distinguishing between a case or controversy and “abstract questions.”)

<sup>35</sup> *See id.*

<sup>36</sup> The modern doctrine has some early antecedents. *See, e.g., Fairchild v. Hughes*, 258 U.S. 126, 129 (1924) (general interest in law enforcement insufficient basis for lawsuit to void the 19<sup>th</sup> Amendment).

<sup>37</sup> 369 U.S. 186 (1962)

<sup>38</sup> *Id.* at 204.

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *Id.* at 206.

justiciable legal question.<sup>43</sup> By treating standing as a separate doctrinal issue, the Court began the modern movement toward formulating a distinct standing doctrine.

Five years later, the Court elaborated upon the *Baker* Court's statement that the gist of the standing inquiry addressed concreteness concerns in *Flast v. Cohen*.<sup>44</sup> It identified standing doctrine with avoidance of "ill-defined controversies over constitutional issues" and cases of a "hypothetical or abstract character."<sup>45</sup> 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 what *Baker* had done, explained that standing addressed the question of "who is a proper party to request adjudication of a particular issue" and "not whether the issue itself is justiciable."<sup>46</sup>

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 pre-determined issue are made, but to the very definition of the issue before the Court.<sup>47</sup> It also identified standing with vigorous pursuit of litigation.<sup>48</sup> 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."<sup>49</sup> Thus, the *Flast* Court created a concept of a proper case as one where "concrete adverseness" 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."<sup>50</sup> When the Court substituted an injury-in-fact test requiring past or likely future injury for the legal interest test in *Barlow v. Collins*<sup>51</sup> and

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<sup>43</sup> Id. at 209-236.

<sup>44</sup> 392 U.S. 83 (1968).

<sup>45</sup> Id. at 100 (citations omitted).

<sup>46</sup> Id. at 99-100.

<sup>47</sup> See id. at 100 (Court demands a "proper party" to avoid "ill-defined controversies").

<sup>48</sup> See id. at 106.

<sup>49</sup> See id. at 106.

<sup>50</sup> See generally, Gene R. Nichol, *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1920 (1986) (describing the legal interest test).

<sup>51</sup> 397 U.S. 159, 163-164 (1970)

*Association of Data Processors Service Organization v. Camp*<sup>52</sup> in 1970, it continued to treat “concrete adverseness” as central to the standing inquiry.<sup>53</sup> An injury-in-fact requirement became the means of ensuring the concrete adverseness that standing doctrine demands.<sup>54</sup>

“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.<sup>55</sup> 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.<sup>56</sup>

For many years, the Court generally treated standing as amenable to legislative control.<sup>57</sup> *Barlow*, however, began a slow shift toward constitutionalizing a core set of standing elements as required by Article

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<sup>52</sup>397 U.S. 150, 152 (1970) (“The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact.”)

<sup>53</sup> See *Barlow*, 397 U.S. at 164, 170 (majority and concurring opinion)

<sup>54</sup> See *id.* at 163-164, 170-173 (majority and concurring opinions). Cf. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (requiring actual or “threatened” injury).

<sup>55</sup> See Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 475 (1996) (discussing Burger Court’s creation of causation and redressability requirements). See, e.g., *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (indirect link between defendant’s action and plaintiff’s harm may make required showing of causation and redressability under article III more difficult); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973) (declining standing on ground of an insufficient link between plaintiff alleged injury, deprivation of child support, and the challenged action, non-enforcement of child support order.); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976) (demanding redressability and causation); *United States v. SCRAP*, 412 U.S. 669, 688 (1973) (plaintiff must allege that he was injured or will be injured by the challenged action).

<sup>56</sup> See, e.g., *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); *Simon*, 426 U.S. at 38, 41 (linking causation to concrete adverseness and then equating redressability with causation); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586-87 (1972) (“federal courts do not decide abstract questions posed by parties who lack a personal stake in the outcome of the controversy”) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 211 (1972) (because plaintiffs allege injury with particularity, no “abstract question” is present).

<sup>57</sup> See Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (existence of standing is largely with the control of Congress). See, e.g., *Barlow*, 397 U.S. at 164-165 (analyzing question of standing primarily as one of legislative intent);

III's language authorizing adjudication of cases or controversies.<sup>58</sup> This shift culminated more than twenty years later in the Court's first decision explicitly overruling a clear Congressional grant of standing, *Lujan v. Defenders of Wildlife*.<sup>59</sup>

Concrete adverseness assumed a leading role in this transformation. In *Barlow*, the Court suggested that Article III required concrete adverseness.<sup>60</sup> In *Valley Forge College v. Americans United*<sup>61</sup>, the Court made its growing concept of a concrete case a central element linking article III to the burgeoning standing requirements.<sup>62</sup> *Valley Forge* claims 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 identifies this policy of using the context facts about injury provide to understand consequences as an "implicit policy of Article III."<sup>63</sup> 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.<sup>64</sup>

While the Court has repeated the "concrete adverseness" phrase in numerous of cases,<sup>65</sup> it has never explained its meaning. The concept of

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<sup>58</sup> See *Barlow*, 397 U.S. at 164 (dicta referring to article III); Scalia, *supra* note 57, at 885 (describing standing in the mid-1980s as a combination of prudential limits and a constitutional core).

<sup>59</sup> 504 U.S. 555, 560-61 (1992) (denying standing under a statute granting any person a right to sue).

<sup>60</sup> *Barlow*, 397 U.S. at 164.

<sup>61</sup> 454 U.S. 464 (1981).

<sup>62</sup> See *id.* at 472; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1379 (1988) (the Burger Court added causation as an element of standing doctrine in the 1970s).

<sup>63</sup> *Valley Forge*, 454 U.S. at 472.

<sup>64</sup> See William A. Fletcher, 98 YALE L. J. 221, 222 (1988) (describing the litany that mentions standing doctrine's purpose of ensuring that a concrete case informs the Court of the consequences of its decision as "numbingly familiar").

<sup>65</sup> 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); *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 78 (1991); *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 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, 939-40 (1983); *City of Los Angeles v. Lyons*, 461 U.S. 103, 101 (1983); *Larson v. Valente*, 456 U.S. 228, 238-39 (1982); *Valley Forge*, 454 U.S. at 486; Orr (continued...)

"adverseness" seems to demand two parties to litigation that genuinely oppose each other. That term standing alone would indicate the need to avoid advisory opinions - opinions sought by one party who does not ask for a binding judgment and faces no opposition.<sup>66</sup> 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.

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.<sup>67</sup> Two parties may have a dispute rendering them adverse to each other even if the plaintiff suffers no injury. Indeed, several commentators, including Justice Scalia, have suggested that an ideological plaintiff might litigate more vigorously than one who has simply suffered an injury.<sup>68</sup> As long as two parties genuinely disagree and the plaintiff seeks a judgment, not just advice, we have adverse litigation

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<sup>65</sup>(...continued)

v. Orr, 440 U.S. 268, 273 (1979); *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1977); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 345 (1976); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 52-53 (1976); *United States v. Richardson*, 418 U.S. 166, 181 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

<sup>66</sup> See generally Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961) (suggesting that standing is a shorthand for ideas related to avoiding advisory opinions).

<sup>67</sup> See, e.g., Fletcher, *supra* note 64, at 247 (explaining that standing is not a good protection against advisory opinions); Pushaw, *supra* note 55, 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).

<sup>68</sup> See Scalia, *supra* note 57, at 891 (standing doctrine is "ill designed" to assure the concrete adverseness which sharpens presentation of issues, since the "very best adversaries" are national organization with a "keen interest in the abstract questions at issue in the case"); Mark Tushnet, *The Sociology of Article III: A Response to Professor Brillmayer*, 93 HARV. L. REV. 1698, 1704 (1980) (the Court recognizes that an organization will often be a more effective litigant than an individual); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1385 (1973) (there is no reason to believe that litigants with a personal interest will present issues more sharply or ably than the Sierra Club or the ACLU.); Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RES. J. 76, 82 (1973) (Sierra Club would make a better plaintiff than a park user for the Mineral King litigation); Louis J. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968). 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) (a plaintiff who is willing to pay for litigation probably feels a personal stake in the outcome).

quite different from a request for a non-binding advisory opinion.<sup>69</sup>

The standing test does not focus on the factors one should evaluate to avoid advisory opinions.<sup>70</sup> The injury-in-fact, causation, and redressability requirements do not require an adverse party, since they typically focus only upon the plaintiff.<sup>71</sup> 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.<sup>72</sup> In that sense standing doctrine is underinclusive as a means of avoiding advisory opinions.<sup>73</sup> 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 defendant's conduct, not a response to a unilateral request for advice.<sup>74</sup> Since the Court has a separate doctrine prohibiting advisory opinions, it does not need a standing doctrine to perform this function.<sup>75</sup>

Sham litigation might well include a plaintiff who can meet the requisites of standing, so constitutional standing requirements seem ill-suited to the task of avoiding sham litigation as well. Detecting the sham would require a comparison between the interests of the plaintiffs and the defendants to determine whether they coincide,<sup>76</sup> but the three-part

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<sup>69</sup> 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, 305-306 (2000) (prohibition of advisory opinions requires that judgment must have some effect).

<sup>70</sup> See Fletcher, *supra* note 64, at 247 (standing doctrine is not a particularly good protection against advisory opinions).

<sup>71</sup> See Ellen 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"). Cf. *Virginia v. Hicks*, 48 U.S.L.W. 4411, 4433 (2003) (basing standing to review a state court decision on the injury to the defendant stemming from the lower court ruling on behalf of a plaintiff).

<sup>72</sup> See *INS v. Chadha*, 462 U.S. 919, 935-36 (1983) (holding that Chadha meets causation and redressability requirements, even though the INS supports his position).

<sup>73</sup> See, e.g., Chemerinsky, *supra* note 69, at 289-91, 304-07 (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).

<sup>74</sup> See Robert J. Pushaw, *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 513-14 (1994) (early Supreme Court cases on advisory opinions only insist that resolution of a case must be "final . . . and public").

<sup>75</sup> See Pushaw, *supra* note 55, at 442-444 (questioning the conventional understanding of advisory opinions).

<sup>76</sup> See, e.g., *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (no jurisdiction without truly adverse parties); *INS v. Chadha*, 462 U.S. 919, 931 n. 6 (1983) (finding (continued...))

constitutional test for standing does not focus upon this comparison.<sup>77</sup> And sincere ideological plaintiffs experiencing no personal injury do not present sham litigation if they seek a judgment against an opponent.

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.<sup>78</sup> The phrase “concrete adverseness” does not have any readily apparent meaning.<sup>79</sup> Parties either

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<sup>76</sup>(...continued)

jurisdiction, even though the INS sided with Chadha, because of intervention of both houses of Congress in opposition).

<sup>77</sup> See Bullock, supra note 71, at 641 (“standing is overwhelmingly a plaintiff’s hurdle”).

<sup>78</sup> 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) (partially correcting the Court’s usage by translating concrete adverseness as “concrete adversity between the parties”).

<sup>79</sup>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 where 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 where 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’s 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 them generally cannot claim injury-in-fact. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 579 (1992). By contrast, litigants that have such plans can claim injury. See *id.* at 579. Yet, in either case the relationship between the plaintiff and defendant is basically 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.

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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 helps.<sup>80</sup> 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 concrete results. This reading also comports with important early antecedents of modern standing doctrine.<sup>81</sup>

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" bars litigation brought without standing must hinge on some judicial definition of cases (and controversies).<sup>82</sup> 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

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<sup>79</sup>(...continued)

Unless one imagines that the intensity of the adversarial relationship varies with the concreteness of the injury, it's hard to distinguish the relationship between the injured plaintiff and the government from the relationship between the non-injured plaintiff and the government.

<sup>80</sup> See, e.g., *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (quoting *Baker* on these points).

<sup>81</sup> See *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947) (identifying "concrete legal issues . . . not abstractions" as requisite for constitutional litigation and expressing concern about the lack of specific facts about which of plaintiff's activities the challenged Hatch Act prohibited); *Massachusetts v. Mellon*, 262 U.S. 447, 485-87 (1923) (rejecting taxpayer standing to challenge grant program under the Maternity Act because it raises abstract questions of political power under the Tenth Amendment); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 236, 241-242 (1937) (describing a legal dispute about Haworth's disability as satisfying requirement for a concrete dispute touching a legal relationship between parties); *Ashwander v. TVA*, 297 U.S. 288, 324 (1936) (Brandeis J. concurring) (calling for action of a concrete character, rather than determination of abstract questions); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (Court will not decide "abstract" questions of law that will not affect the case); *Liverpool Steamship Co. v. Commissioners of Immigration*, 113 U.S. 33, 38-39 (1885) (describing question of whether Congress constitutionally sanctioned collection of head monies as abstract when state law may not have authorized the collection); *Cherokee Nation v. Georgia*, 5 Pet. 1, 75 (1831) (refusing to render an abstract opinion about the constitutionality of state law).

<sup>82</sup> See *Arizonan for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (standing is an aspect of the "case-or-controversy" requirement of Article III). See generally Pushaw, *supra* note 74, 82 (arguing that cases mean something different from controversies).

standing, aim to make litigation more concrete has firm roots in constitutional scholarship.<sup>83</sup> This suggestion played a leading role in Alexander Bickel's writing about "passive virtues," techniques for avoiding or delaying constitutional decision-making in the Supreme Court.<sup>84</sup> Bickel has suggested that justiciability doctrines, doctrines allowing the Court to avoid deciding cases otherwise properly before the Court, help the Court make wise decisions.<sup>85</sup> Bickel suggests that concrete litigation makes wise decisions more likely and that the standing requirement fosters concrete litigation.<sup>86</sup> The Court has also explained that separation of powers requires standing.<sup>87</sup> It regards standing as a tool to make sure 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.<sup>88</sup> Even though the Court's increased reliance upon separation of powers seems to have led to somewhat less emphasis on concrete adverseness,

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<sup>83</sup> See, e.g., Fallon, *supra* note 68, at 14 (concrete injury frames litigation in a factual context suitable for judicial resolution); Monaghan, *supra* note 68, at 1372 ("constitutional questions" must "be presented in a manner sufficiently concrete for resolution of the problem.").

<sup>84</sup> See BICKEL, *supra* note 10, at 111-198 (chapter on the "passive virtues"). See also Pushaw, *supra* note 55, at 465 (Bickel's idea of passive virtues had a "lasting" influence on the Court); Mathew D. Alder, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 PENN. L. REV. 759, 760 (1997) (Bickel's "masterpiece", *The Least Dangerous Branch*, is "the most important work of constitutional scholarship in the last half-century"); Barry Friedman, *The Birth of an Academic Obsession: the History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L. J. 153, 201 (2002) (describing Bickel's framing of the "countermajoritarian difficulty" in *The Least Dangerous Branch* as "catching the attention of the ages").

<sup>85</sup> See BICKEL, *supra* note 10, at 115 (concepts of standing and case or controversy lead to "sounder and more enduring judgments"). See also Michael Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 246 (1994) (assuming that courts function best when presented with concrete controversies).

<sup>86</sup> See, e.g., BICKEL, *supra* note 10, at 115-117 (linking standing and case or controversy to concrete adjudication exemplifying the consequences of challenged legislative and executive actions). While Bickel's writing only addresses constitutional decision-making in the Supreme Court, the "concreteness requirement" now also applies to non-constitutional litigation and to cases in lower federal courts. See Fletcher, *supra* note 64, at 229. Bickel's (and the Court's) notion that a court would benefit from more concrete adjudicative settings applies to lower courts as well as the high court.

<sup>87</sup> See *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("The law of Art. III standing is built on a single basic idea - the idea of separation of powers"); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (standing confines courts to their "properly limited" role in democratic society).

<sup>88</sup> See *Gladstone Realtors v. Village of Bellevue*, 441 U.S. 91, 99 (1979) (standing confines Court to a properly limited role in democratic society); *Warth*, 422 U.S. at 498 (same); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998) (resting interpretation of Article III standing on separation of powers rather than text of article III).

concrete adverseness remains part of the doctrine.<sup>89</sup> Moreover, this separation of powers rationale aims to explain why the Court reads article III to require standing.<sup>90</sup> Abstract separation of power principles have not supplanted article III as the source of standing limitations.<sup>91</sup> As a result, the “concrete adverseness” rationale’s function 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.<sup>92</sup> A separation of powers approach requires a theory of what precisely the role of the judiciary is.<sup>93</sup> 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 branch does not explain injury-based standing any more than a simple statement that a court must remain with its proper role. Every judicial order in public law interferes with one of the other branches of government.<sup>94</sup> The Court only issues such orders when it concludes that another branch of government has violated the law.<sup>95</sup> If that conclusion is correct and appropriate, then the interference is usually proper.<sup>96</sup> The Court has separate doctrines, the political question doctrine,

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<sup>89</sup> See *Spencer v. Kemna*, 523 U.S. 1, 11 (1998) (disclaiming sole reliance on concrete adverseness as basis for standing).

<sup>90</sup> See *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 771 (2000) (standing requirements are an essential part of “Article III’s case-or-controversy requirement and a key factor in dividing the power of government between the courts and the two political branches.”)

<sup>91</sup> See *Steel Co.*, 523 U.S. at 102 n. 4 (reaffirming centrality of article III).

<sup>92</sup> *Cf.* *Nichol*, *supra* note 50, 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).

<sup>93</sup> See *Bandes*, *supra* note 65, at 230-31, 263 (recognizing role of separation of powers is only the beginning of an inquiry into the role of the federal judiciary). *Accord* *Scalia*, *supra* note 57, at 894 (asking whether the doctrine of standing is “functionally related to the distinctive role that we expect the courts to perform”).

<sup>94</sup> *Cf.* *Dorf*, *supra* note 85, at 245-246 (any restriction on judicial power limits interference with other branches of government).

<sup>95</sup> See *Pushaw*, *supra* note 55, at 469 (federal courts inevitably “interfere” with the majoritarian branches when these branches exceed constitutional bounds).

<sup>96</sup> See *Lewis v. Casey*, 518 U.S. 350, 349 (1996) (courts must remedy official interference with inmate’s presentation of claims to courts); *Pushaw*, *supra* note 55, at 484 (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) (the “take care”

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and various doctrines of equitable discretion to prevent issuance of improper orders, those that resolve political rather than legal questions or unduly intrude upon the political process.<sup>97</sup> The question of improper interference properly focuses upon the merits, the political question doctrine, and questions of equitable discretion, not upon injuries to parties.<sup>98</sup>

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,<sup>99</sup> 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

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<sup>96</sup>(...continued)

clause does not authorize the executive branch to violate the law); Fallon, *supra* note 78, at 14 (if Congress can exceed constitutional bounds without judicial check, then the written constitution would not perform a restraining function).

<sup>97</sup> See Pushaw, *supra* note 55, at 489 (suggesting the Court combine permissive standing with use of the political question ground and ripeness doctrine to meet "efficiency" concerns); Fallon, *supra* note 68, at 43-47 (suggesting that doctrines of equitable discretion provides the proper restraint on remedies). See, e.g., O'Shea v. Littleton, 414 U.S. 488, 499-504 (1973) (discussing doctrines of equitable relief).

<sup>98</sup> See Fallon, *supra* note 68, at 42 (injury requirement does not restrain judicial overextension in the remedial phase); 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, 554-555 (2002) (standing does not focus upon the "issues of the case", but upon the party and her injury); Tushnet, *supra* note 68, at 1700 (suggested that separation of powers principles are better considered under the political question doctrine than under standing doctrine). See, e.g., Allee v. Medrano, 416 U.S. 802, 814-821 (1973) (addressing several claims regarding equitable discretion). Justice 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 57, at 892. This does not establish, however, that the interference that judicial resolution of a legal issue would bring is an 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.* at 892 (suggesting that denial of standing in *Flast* would have eliminated judicial enforcement of the establishment clause altogether).

<sup>99</sup> See Neal Devins, *Asking the Right Questions: How the Courts Honored Separation of Powers by Reconsidering Miranda*, 149 U. PA. L. REV. 251, 256 (2000) (conservatives believe that separation of powers requires review only of issues "truly in controversy and therefore represented by vigorous advocacy").

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.

While this article focuses primarily upon constitutional standing, the Court applies prudential limits to standing as well.<sup>100</sup> The doctrine of third party standing allows the Court to avoid deciding cases where a litigant seeks to invoke the rights of others to justify a remedy.<sup>101</sup> Under the Administrative Procedure Act,<sup>102</sup> the Court only permits standing when the plaintiff’s injury falls within the “zone of interest” arguably protected by the statutory or constitutional provision under which relief is sought.<sup>103</sup> 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.<sup>104</sup> The Court has stated that these prudential limits, like the constitutional limits, allow the Court to avoid deciding “abstract questions of wide public significance.”<sup>105</sup>

Article III requires standing largely in order to assure sufficiently concrete adjudication. Overly abstract matters may fall outside the bounds of the case or controversy requirement.<sup>106</sup>

## B. OTHER JUSTICIABILITY DOCTRINES

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<sup>100</sup> See *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (describing third party standing as a “prudential” standing principle); *Gladstone, Realtors v. Village of Gladstone*, 441 U.S. 91, 99-100 (1979) (discussing prudential limits on standing); Fallon, *supra* note 68, at 18 (discussing limitations of generalized grievances and third party standing as prudential limits).

<sup>101</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 193-197 (1976) (allowing beer vendor to invoke the equal protection rights of young males in challenge to gender discrimination in alcoholic beverage law); *Nordlinger*, 505 U.S. at 11 (litigant who did not intend to travel cannot invoke constitutional right to travel). Cf. *Miller v. Albright*, 523 U.S. 407, 447-50 (1998) (O’Connor, J., concurring) (party may not assert third party’s rights unless an obstacle prevents that party from asserting his own rights).

<sup>102</sup> 5 U.S.C. §§ 551-559; 701-706.

<sup>103</sup> See, e.g., *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997).

<sup>104</sup> See *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Federal Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998) (Court has found injury-in-fact when a grievance is concrete, but widely shared); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Steven, J. concurring) (suggesting that the generalized grievance limitation remains prudential by stating that it does not matter how many people suffer an injury). Cf. *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 claims); *Defenders*, 504 U.S. at 573-74 (plurality opinion) (suggesting that the prohibition on generalized grievances is constitutional).

<sup>105</sup> See *Warth*, 422 U.S. at 500.

<sup>106</sup> See *Dorf*, *supra* note 85, at 247 (linking article III case or controversy requirement to the interest in “concrete decisionmaking”).

We have seen that the Court has suggested that Article III requires litigants to satisfy its standing requirements, because of a need 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.<sup>107</sup> A dismissal on ripeness grounds, unlike a dismissal on standing grounds, usually suggests that the Court will hear the case at a later date, once the facts are further developed.<sup>108</sup>

The Court evaluates two factors in deciding whether a case is ripe for judicial resolution.<sup>109</sup> First, the Court evaluates the hardship delay might visit upon the litigants.<sup>110</sup> Second, the Court evaluates the “fitness of the issues for judicial resolution.”<sup>111</sup>

The rationale for the ripeness doctrine places concreteness at center stage.<sup>112</sup> The Court has repeatedly explained that avoiding “premature adjudication” prevents courts from “entangling themselves in *abstract* disagreements.”<sup>113</sup> Ripeness doctrine also protects agencies from “judicial interference until an administrative decision” has “concrete” effects upon

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<sup>107</sup> See *Warth*, 422 U.S. at 499 n. 10 (“the standing question . . . bears a close affinity to questions of ripeness”); *Lujan v. National Wildlife Federation* (NWF), 497 U.S. 871, 891-893 (1989) (finding challenge to land withdrawal program premature based on grounds suggesting a lack of current injury). See, e.g., *Presault v. ICC*, 494 U.S. 1, 11-12 (1989) (suggesting that takings claim may be ripe after the property owner making a takings claim has taken advantage of relevant Tucker Act remedies).

<sup>108</sup> See *Pushaw*, *supra* note 55, at 493 (“ripeness merely postpones a decision”). See, e.g., *NWF*, 497 U.S. at 892-93 n. 3 (describing actions that will make rejected challenge ripe); *EPA v. National Crushed Stone Ass’n*, 449 U.S. 64, 72-73 n. 12 (1980) (finding challenge ripe that previously had not been, because EPA “has now taken a definitive position”).

<sup>109</sup> See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998).

<sup>110</sup> *Gardner*, 387 U.S. at 149.

<sup>111</sup> *Id.*

<sup>112</sup> See, e.g., *Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954) (describing resolution of scope of legislation prior to its having an “adverse effect” in the “context of a concrete case” as involving too “abstract an inquiry”).

<sup>113</sup> *Gardner*, 387 U.S. at 148-149 (emphasis added. See *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 735 (1998) (“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 (5<sup>th</sup> Cir. 1999) (describing the Supreme Court’s most recent ripeness case as “standing for the proposition that abstract disagreements over administrative policies’ will not make a controversy ripe”).

“the challenging parties.”<sup>114</sup> Thus, the ripeness doctrine also reflects the view that concrete injury makes cases concrete.

The ripeness jurisprudence, however, recognizes that concrete injury does not aid 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.”<sup>115</sup> Thus, the Court recognizes that facts, such as facts about injury, do not illuminate “pure” questions of statutory interpretation.<sup>116</sup> Similarly, the Court recognizes that facial constitutional challenges do not require facts making the litigation more concrete.<sup>117</sup> It considers such cases ripe even before the litigants experience the effects of the legislation at issue.<sup>118</sup> In both classes of cases, the Court seems to recognize something that its standing jurisprudence tends to deny, that injury is quite irrelevant to some kinds of merits analysis.

But the Court does consider factual development important to the ripeness of as-applied-challenges - both statutory and constitutional.<sup>119</sup> 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

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<sup>114</sup> Gardner, 387 U.S. at 148-49.

<sup>115</sup> See *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 479 (2001).

<sup>116</sup> See *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985) (“further factual development” will not clarify this case’s “purely legal” issue); *Pacific Gas & Elec. v. Energy Resources Comm’n*, 461 U.S. 190, 201 (1982) (finding preemption question fit for judicial resolution because it is “predominantly legal”); *EPA v. National Crushed Stone Ass’n*, 449 U.S. 64, 72-73 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). *Cf.* *Texas v. United States*, 523 U.S. 296, 301 (1998) (declining to adjudicate a request for adjudication regarding the scope of a statute’s application facially, because it has not been applied and the Court “lacks confidence” in its “powers of imagination” regarding how it might be applied).

<sup>117</sup> See, e.g., *Presault v. ICC*, 494 U.S. 1, 17-19 (1989) (adjudicating claim that Congress lacked authority under the Commerce Clause to enact the rails to trails program, after finding takings claim “premature”).

<sup>118</sup> See *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n. 10 (1997) (facial challenges ripe the moment an ordinance is passed). See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1013 (1983) (adjudicating takings claim regarding government disclosure of trade secrets, including claims about what government might disclose in the future); *Yee v. City of Escondido*, 503 U.S. 519, 527-532 (1992) (resolving a facial takings claim, while declining to adjudicate as applied challenges)

<sup>119</sup> See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (explaining that Court must know extent of permitted development to adjudicate a non-facial takings claim). *Cf.* Dorf, *supra* note 85, at 294 (arguing that the distinction between facial and applied challenges “may confuse more than it illuminates.”). Even if the distinction between facial and applies challenges is confusing, it is the typology that the Court uses. *Id.*

insists on some experience making the relevant scope of application clear.<sup>120</sup> In other words, it wants facts - sometimes including facts about injury - to frame the issue for resolution.<sup>121</sup> 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.<sup>122</sup>

## 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.<sup>123</sup> 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.<sup>124</sup> 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 non-moot cases.<sup>125</sup> Indeed, because the Court permits standing based on likely future injuries, a moot case, which arises after all relevant facts are fully known, usually

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<sup>120</sup> See, e.g., *Ruckelshaus*, 467 U.S. at 1019-20 (challenge to procedures offering compensation for taking of a trade secret are not ripe, because “Monsanto’s ability to obtain just compensation does not depend solely on the validity” of those procedures).

<sup>121</sup> See, e.g., *Williamson Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 190-191, 199-200 (1984) (demanding 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).

<sup>122</sup> See, e.g., *Renne v. Geary*, 501 U.S. 313, 323 (1991) (labeling an unripe First Amendment challenge to a prohibition on party endorsement of candidates abstract, when the statute does not precisely define what endorsement means).

<sup>123</sup> See *Friends of the Earth v. Laidlaw Environ. Servs.*, 528 U.S. 167, 180 (2000) (article III’s case or controversy requirement undergirds both mootness and ripeness); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22 (1997) (referring to mootness as standing set in a time frame). See also *Bandes*, *supra* note 65, at 228 (in considering mootness, the Court emphasizes adverse parties and concrete claims).

<sup>124</sup> See, e.g., *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (mootness occurs when effects of violation have been eradicated and the violation will not recur).

<sup>125</sup> See *Monaghan*, *supra* note 68, at 1384 (cases becoming moot on appeal present a “concrete record illuminated by the adversary process”); *Fallon*, *supra* note 68, at 28-29 (past injuries continue to frame litigation in a factual context illuminating and limiting judicial decisionmaking).

offers more concreteness on the merits than a live controversy.<sup>126</sup>

Logically any judicial order that stops a defendant from doing something that he would do absent the order appears concrete. The Court sometimes uses the concept of an abstract case to refer to the problem 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.<sup>127</sup> Such an order is abstract and remedies only hypothetical misconduct.<sup>128</sup> 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.<sup>129</sup>

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.<sup>130</sup> This exception would support the idea that an order remedying misconduct can be concrete, even though it does not remedy any specific injury before the Court.<sup>131</sup>

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.<sup>132</sup> But the Court's standing jurisprudence emphatically denies that

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<sup>126</sup> *Cf.* *Laidlaw*, 528 U.S. at 191-92 (mootness may entail abandonment of a case at an advanced state).

<sup>127</sup> *See, e.g.*, *Davis*, 440 U.S. at 632-633 (characterizing a decision about hiring practices that have been abandoned as an "advisory opinion about abstract propositions of law"). *Cf.* *Laidlaw*, 528 U.S. at 189 (case is only moot if defendant meets a heavy burden of persuading a court that violations will not recur).

<sup>128</sup> *See, e.g.*, *Davis*, 440 U.S. at 632-633.

<sup>129</sup> *See, e.g.*, *id.* at 631-632 (state has stopped using invalidated civil service exam). *Cf.* *Allee v. Medrano*, 416 U.S. 802, 810 (1973) (cessation of wrongful does not moot a case if "there is a possibility of recurrence").

<sup>130</sup> *See* *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602-03 (1982); *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (abortion rights can be adjudicated after women was no longer pregnant, because women can become pregnant more than once).

<sup>131</sup> *See* *Monaghan*, *supra* note 68, at 1384-1385 (mootness cases "confirm the demise of the personal interest requirement").

<sup>132</sup> I am not the first scholar to question the notion that Article III requires injury in fact. *See, e.g.*, *Monaghan*, *supra* note 68, at 1375 (injury in fact is not a "constitutional prerequisite"); *Bandes*, *supra* note 65, at 245-50 (discussing the tension between the mootness doctrine's flexibility and the concrete adverseness requirement found in the standing doctrine).

idea.<sup>133</sup>

This article focuses upon abstraction and concreteness in resolution of the merits, rather than in the content of remedial orders. But 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.<sup>134</sup>

### C. FORMALISM AND FUNCTIONALISM

Over time, the Court has tightened justiciability barriers designed to make litigation more functional by providing concrete contexts for judgment.<sup>135</sup> Yet, most commentators agree that the modern Court has become increasingly formalist in its approach to the merits of constitutional cases.<sup>136</sup>

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<sup>133</sup> Cf. Laidlaw, 528 U.S. at 190-191 (recognizing that expansion of standing doctrine could undermine exception to mootness doctrine for cases capable of repetition but evading review).

<sup>134</sup> A related problem involves choices about how defendants respond to 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 extending benefit to the excluded class or by denying benefit to all).

<sup>135</sup> See Pushaw, *supra* note 55, at 496 (suggesting that Court has converted ripeness doctrine from a discretionary doctrine to a constitutional barrier). See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (invalidating, for the first time, a Congressional grant of standing and requiring a detailed showing of injury).

<sup>136</sup> See, e.g., Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 2 (2001) (“the continuing allure of formalism dominates constitutional law.”); Jack Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999); 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”); 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 formalistic”); Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L. J. 1766, 1766 (1985) (the “new formalism” challenges the “functionalist approach”). Cf. Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1094 (2000) (characterizing the Court’s commerce and dormant commerce clause jurisprudence as casting “aside” the “categories and methods” of “formalism” and “realism”); Kathleen M. Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. V. Thornton*, 109 HARV. L. REV. 78, 94 (detecting, in 1995, a trend toward functional analysis in recent separation of powers cases in an article about dueling formalisms in the term limits case). See generally William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J. L. & PUB. POL’Y 21 (1998).

(continued...)

A formalist approach emphasizes formal legal rules articulated at a high level of abstraction to resolve cases.<sup>137</sup> 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,<sup>138</sup> formalist reasoning can sometimes create rules noticeably at odds with text.<sup>139</sup> The leading contemporary example of formalist reasoning departing from text comes from the Court's sovereign immunity jurisprudence.<sup>140</sup> The text of the 11th Amendment bars diversity suits by a citizen of one state against another state in federal court.<sup>141</sup> The

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<sup>136</sup>(...continued)

This does not mean that every decision of the Court falls into the formalist category. No judge and no court are 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) (the Burger Court follows an "originalist" and "formalist" methodology in cases testing the limits of Congressional power, while emphasizing functional "policy considerations" in upholding presidential actions); Harold J. Krent, *Separating the Strands of Separation of Powers*, 74 VA.L. REV. 1253, 1255 (1988) (the Court has not adopted a uniform approach to separation of powers). *Cf.* E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, The Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 125-126 (discussing tension between "abstract formulas" and consideration of "practical effects" in constitutional law).

<sup>137</sup> *See, e.g.*, KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 5-6 (1960) (discussing the "formal style" of judicial reasoning prevalent in the late nineteenth century); WILLIAM WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937* (1998) (discussing the formalist style and ideology of the "Lochner" period).

<sup>138</sup> *See, e.g.*, Elliott, *supra* note 136, at 132 (suggesting that the formalist *Chadha* opinion incorrectly asserts that the framers defined legislative, executive and judicial powers in the constitution).

<sup>139</sup> *See, e.g.*, *New York v. United States*, 505 U.S. 144, 156 (1992) (Tenth Amendment limits on Congressional power are not derived from the amendment's text).

<sup>140</sup> *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (striking down order that Florida negotiate with the Seminole Indian tribe under the Indian Gaming Act); *Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (invalidating federal abrogation of state immunity from private suit for patent infringement); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (invalidating federal abrogation of state immunity from private suit for false and misleading advertising); *Alden v. Maine*, 527 U.S. 706 (1999) (invalidating enforcement of the Fair Labor Standards Act by a private individual against his own state in state court); *Kimel v. Board of Regents*, 528 U.S. 62 (2000) (holding state immune from suit under Age Discrimination in Employment Act); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (forbidding private damage actions against the states under the Americans with Disabilities Act). *See generally Symposium: State Sovereign Immunity and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 817 (2000).

<sup>141</sup> U.S. Const. Amend. 11. *See Seminole Tribe*, 517 U.S. at 54 (text of the 11<sup>th</sup> Amendment "would appear" to restrict only federal court diversity jurisdiction). *Cf.* Hans (continued...)

text does not limit suits in state court or suits brought by a citizen against her own state.<sup>142</sup> Notwithstanding these textual limits, the Court has held that the Constitution bars suits in state courts, and it does so even if the plaintiff is a citizen of the defendant state.<sup>143</sup>

The formal legal rule from which the Court derives this result simply states that states retain their sovereignty.<sup>144</sup> The Court purports to derive this state sovereignty rule from the structure and history of the constitution, not from the text of the 11th Amendment.<sup>145</sup> And the rule of state sovereign immunity has been controversial among legal scholars.<sup>146</sup> Nevertheless, the rule of state sovereign immunity stems from formalist reasoning, which derives results from broad abstract principles.<sup>147</sup>

Functionalists tend to have a more pragmatic bent. They express skepticism about the capacity of “general propositions” to decide “concrete cases,” in the words of Justice Holmes.<sup>148</sup> They believe that resolution of cases involves some element of judgment in which an appreciation of the consequences of rulings should play a prominent role.<sup>149</sup>

In the separation of powers area, Justice Jackson’s concurrence in *Youngstown Sheet and Tube v. Sawyer*<sup>150</sup> provides a paradigmatic example

<sup>141</sup>(...continued)

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 (1988) (exploring the amendment and its interpretation prior to the recent development of still broader sovereign immunity).

<sup>142</sup> *See* U.S. Const. Amend. 11.

<sup>143</sup> *See* Alden, 527 U.S. at 712.

<sup>144</sup> *See* Alden, 527 U.S. at 713 (sovereign immunity is a fundamental attribute of state sovereignty predating the constitution); *Seminole Tribe*, 517 U.S. at 54 (each state is sovereign and immunity from suit is an inherent part of sovereignty).

<sup>145</sup> *See* Alden, 527 U.S. at 713 (declaring the term “11<sup>th</sup> Amendment” immunity a “misnomer” because the immunity comes from history, structure, and precedent, not the amendment’s text).

<sup>146</sup> *See, e.g., Symposium, supra* note 140.

<sup>147</sup> *See* Caminker, *supra* note 136, at 200-201. The sovereign immunity cases employ the same sort of formalism that Caminker sees in *Printz v. United States*, 521 U.S. 898 (1997). The sovereign immunity exhibits “doctrinal formalism” - a categorical rule that does not admit of any case-by-case balancing. *See* Caminker, *supra* note 136, at 200. They also employ “interpretive formalism”, in that “essential postulates” (i.e. state sovereignty implies sovereign immunity) drive the reasoning. *Id.* at 201.

<sup>148</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)

<sup>149</sup> *See* Elliott, *supra* note 136, at 125-126 (discussing of tradition of considering practical effects in resolving separation of powers issues); Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 462 (1899) (different rights rest on different policy grounds).

<sup>150</sup> 343 U.S. 579, 634-655 (1952).

of the functionalist approach<sup>151</sup>. Justice Black's opinion for the majority<sup>152</sup> exemplifies a formalist approach<sup>153</sup>.

In that case, the Court rejected President Truman's seizure of steel mills in support of the Korean war effort on separation of powers grounds.<sup>154</sup> Justice Black offered a formalist reason to reject the Presidential seizure. Since Congress did not authorize the seizure, the President could not carry it out.<sup>155</sup> The President's executive power did not justify the seizure, because he did not execute any law passed by Congress.<sup>156</sup> Hence, the seizure violated separation of powers.

Justice Jackson provided a more functional and contextual rationale for the same result.<sup>157</sup> He offered a rather fluid framework for analysis, under which Presidential power would be at its low ebb when Congress seemed to disapprove of his actions.<sup>158</sup> Because Congress rejected granting the power to seize plants in debates about labor legislation, Justice Jackson rejected the seizure.<sup>159</sup> 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.<sup>160</sup> 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. For formalists may not need or benefit from context.<sup>161</sup> Conversely, one might argue that the justiciability doctrines raise questions about formalist

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<sup>151</sup> See Swire, *supra* note ?, at 1767-78 (identifying Jackson's *Youngstown* concurrence with a major shift to functionalism after 1935).

<sup>152</sup> *Youngstown*, 343 U.S. at 582-89.

<sup>153</sup> See Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENTARY 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).

<sup>154</sup> *Youngstown*, 343 U.S. at 582-89.

<sup>155</sup> *Id.* at 585-89. See *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 586-587 (1985) (identifying formalism with "reliance upon formal categories"); Cass R. Sunstein, *The Supreme Court 1995 Term Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 21 (1996) (reasons are by their nature abstractions).

<sup>156</sup> *Youngstown*, 343 U.S. at 582-89.

<sup>157</sup> *Id.* at 634-55 (concurring opinion).

<sup>158</sup> *Id.* at 637.

<sup>159</sup> *Id.* at 639 n. 8.

<sup>160</sup> *Id.* at 635-37.

<sup>161</sup> *Cf.* Elliott, *supra* note 136, at 147 (arguing that Court's early decision in area are often mechanical and rigid, but that subsequent decisions adjust to "new situations" it confronts in the same area).

merits adjudication that ignores context.

#### D. MODELS OF ABSTRACTION AND CONCRETENESS

While scholars and courts seem virtually unanimous in their stated desire to avoid abstraction and embrace concreteness,<sup>162</sup> neither defines these concepts.<sup>163</sup> A model, however, will help clarify common understandings of concreteness.

Concreteness involves contextualized judgment. It often means that facts influence results, not just theories.<sup>164</sup> Facts tend to influence judgments because they evoke a somewhat visceral response. This need not mean that the decision-maker eschews thought.<sup>165</sup> But it does mean that shared intuitions about justice cause an emotional response to certain facts.

##### 1. THE PRIVATE LAW MODEL

Trials before juries probably offer the best example of concrete judgments. Juries deciding whether a defendant's injury constitutes a disability entitling him to compensation under a disability insurance policy involves judgment about a specific set of facts. People have experience with jobs.<sup>166</sup> 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.<sup>167</sup>

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<sup>162</sup> See, e.g., *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 297 (1979) (distinguishing between a case or controversy and "abstract questions."); BICKEL, *supra* note 10, at 111-198.

<sup>163</sup> Cf. *Babbitt*, 442 U.S. at 297 (difference between an abstract question and a case or controversy is not discernible by any precise test).

<sup>164</sup> See Sunstein, *supra* note 155, at 20-21 (identifying concrete judgments with minimal reasoning).

<sup>165</sup> See generally MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (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, 282-297 (1996) (same).

<sup>166</sup> See, e.g., *New York Life Ins. Co. v. Jones*, 17 So.2d 879, 882-83 (Ct. App. Alabama, 1943), *rev'd on other grounds*, 245 Ala. 247 (suggesting the jurors understand the duties of a receptionist, so that expert opinion of a doctor should not have been admitted). Cf. *Conley v. Alleghany County*, 200 A. 287, 293-94 (Pa. Super. 1938) (disallowing expert testimony, because understanding of labor market for people with obviously damaged organs is common knowledge).

<sup>167</sup> See, e.g., *Equitable Life Insurance Soc. of U.S. v. Davis*, 164 So. 86, 89 (Ala. 1935) (doctor may not testify about capacity of laborer with loss of one arm to do work, as this invades the province of the jury).

The case of *Aetna Life Insurance Company v. Haworth*,<sup>168</sup> an early forerunner of modern standing doctrine, shows that the Court accepts something like the model of concreteness I have identified.<sup>169</sup> 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).<sup>170</sup>

In private law litigation, resolution of the merits usually requires some assessment of both the plaintiff's and defendant's experience.<sup>171</sup> In tort and contract, for example, the plaintiff must show injury and that defendant breached a duty in order to recover more than nominal damages.<sup>172</sup> Thus, juries deciding these cases focus upon facts and experience, for the most part.<sup>173</sup>

## 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. Decisions heavily influenced by the litigants' experience might approximate jury trials in concreteness, whereas cases relying more upon logical syllogism appear abstract.<sup>174</sup>

The Court suggests that facts clarifying the consequences of public law decisions, framing the issues, and sharpening arguments make public law decisions concrete. This idea of facts serving three functions seems based on a private law model.<sup>175</sup> In a jury trial on a disability, for example,

<sup>168</sup> 300 U.S. 227 (1937)

<sup>169</sup> Cf. Fiss, *supra* note 33, at 37 (article III does not confine the court to a private law dispute resolution model).

<sup>170</sup> *Aetna*, 300 U.S. at 240-242.

<sup>171</sup> See generally Fiss, *supra* note 33, at 17 (a private law model posits a judge deciding which individual is right and which is wrong).

<sup>172</sup> See RESTATEMENT (SECOND) OF TORTS § 281 (1965) (requiring invasion of an interest, negligence, and causation to make out a negligence claim); RESTATEMENT (SECOND) OF CONTRACTS § 346 (1981). See generally Fiss, *supra* note 33, at 22 (private law model relies upon the concept of a "wrongdoer").

<sup>173</sup> See generally Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L. J. 1311, 1313 (tort adjudication focuses upon the "harm to plaintiff").

<sup>174</sup> See *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 586-587 (1985) (linking abstraction to formalism and reliance upon formal categories and contrasting abstraction with "practical attention to substance").

<sup>175</sup> Many scholars have noted the private law model's influence on public law. See, e.g., Fallon, *supra* note 78, at 20-23 (linking standing requirements to the private rights "face" of *Marbury v. Madison*); Monaghan, *supra* note 68, at 1365-66 (tracing a private rights model of public law to *Marbury v. Madison*); Fiss, *supra* note 33, at 17 (continued...)

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. If the facts perform only one or two of the three functions in a public law cases, then perhaps the case becomes more concrete than a case like *Clinton*, where facts about the litigants' experience came close to being wholly irrelevant, but remains less concrete than a typical jury trial in a private law case.<sup>176</sup>

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*<sup>177</sup> principle that separate is inherently unequal for its lack of neutrality.<sup>178</sup> He argued that Supreme Court decisions should rest upon abstract "neutral principles" that would apply to all cases and make sense regardless of context.<sup>179</sup> Many scholars, however, have praised *Brown* as an appropriate response to the facts of desegregation.<sup>180</sup> And they call for more judicial responsiveness to the experience of litigants in public law cases.<sup>181</sup>

While scholars almost all claim to favor "concrete" cases,<sup>182</sup> the influence of Wechsler's neutral principle 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.<sup>183</sup> Wechsler

<sup>175</sup>(...continued)

(sketching a private dispute resolution model); Bandes, *supra* note 65, at 229 (acceptance of the private rights model leads to a failure to address "collective rights and . . . harms").

<sup>176</sup> See Tushnet, *supra* note 68, at 1708 (defining abstract cases as those litigated in the absence of good information about the actual operation of a challenged legal rule in the real world).

<sup>177</sup> 347 U.S. 483 (1954)

<sup>178</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19, 31-35 (1959).

<sup>179</sup> See *id.* at 19, (reasons must "in their neutrality and generality transcend any immediate result involved.").

<sup>180</sup> 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).

<sup>181</sup> See, e.g., Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L.L.REV. 1 (1985).

<sup>182</sup> See generally Frederick Schauer, *The Generality of Rights*, 6 LEGAL THEORY 323, 324-328 (2000) (discussing strong support for the concept of concrete individual cases among legal realists, and their distrust of abstraction).

<sup>183</sup> Exposition of common law principles apart from jury trials may also involve elements of abstraction. See, e.g., 3 BLACKSTONE'S COMMENTARIES ON THE LAW OF ENGLAND 379 (judges must ascertain the true "axioms of law, which are general (continued...)

asks the Court to develop a general rule, which might be articulated at a high level of abstraction.<sup>184</sup> And he asks that Court to test that rule by imagining how it might apply in future hypothetical cases not before the Court.<sup>185</sup>

The simple model of a highly contextualized private law jury case leads the Court to imagine that public law should enjoy at least some of the concreteness this model suggests. The Court's public law model of concreteness, drawn from private law, envisions facts providing valuable context that defines issues, leads to good clear arguments, and makes plain the consequences of the decision the justices must make.

While the private rights model sketched above helps make sense of the project of requiring "injury-in-fact", rather than invasion of a legal interest, to become the basis of standing, I do not claim that this model exhausts possible understandings of concreteness and abstraction.<sup>186</sup> Indeed, I have already pointed out that the case law also reflects a concept of remedial concreteness, 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, we examine whether the application of standing doctrine has produced the sort of concreteness the Court seeks for public law through its standing jurisprudence.

## 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

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<sup>183</sup>(...continued)

propositions, flowing from abstracted reason").

<sup>184</sup> See HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 21 (1961) (insisting on grounds of "adequate generality").

<sup>185</sup> See *ID.* (principles in case must be "tested" by other applications that the principles imply). Cf. Mark 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).

<sup>186</sup> See, e.g., 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); Bickel, *supra* note 66, at 53 (suggesting that for an absolutist, a bare minimum of facts make a case concrete).

concrete and Sunstein denying it.<sup>187</sup> They both seem to take the correctness of their views for granted, with little supporting analysis.<sup>188</sup> Mark Tushnet states that “it is entirely unclear that standing rules add anything to the concreteness of the case.”<sup>189</sup> 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.<sup>190</sup>

This part offers an extensive review of the case law to see whether Bickel or Sunstein and Tushnet have the better argument. We shall see that Sunstein and Tushnet’s view of standing as not contributing to concreteness proves correct in most instances, but that Bickel’s contrary vision properly characterizes some significant cases.

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<sup>187</sup> See BICKEL, *supra* note 10, at 115 (standing requirement tends to ensure that cases get decided in a concrete context); Sunstein, *supra* note 96, at 1448 (“concreteness or abstraction of the dispute” does not depend upon injury to the plaintiff).

<sup>188</sup> 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 96, at 1448 (Court denied standing in *Sierra Club v. Morton* even though cases was not “hypothetical or remote.”). He does not consider other cases that might support or contradict his view. In fairness to Professor Sunstein, his remark on this point constitutes a small part of a much larger argument. See *id.* at 1432-1434 (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 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. TVA*, 297 U.S. 288 (1936), but did exist in *Tennessee Electric Power Co., v. TVA*, 306 U.S. 118 (1939). In both cases, petitioners sought to litigate constitutional questions regarding Congressional authority to create the Tennessee Valley Authority (TVA). See *Tennessee Electric*, 306 U.S. at 135; *Ashwander*, 297 U.S. at 317, 319. The *Ashwander* plaintiffs, stockholders in the Alabama Power Corporation, which had a contract with the TVA, experienced no injury, writes Bickel, while Tennessee Electric Power Co. experienced an injury as a competitor. See BICKEL, *supra* note 10, at 119-121. 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 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 (contract involved sale of transmission line and substations, sale of TVA’s electric power, and agreements about the service area). *Cf.* *Tennessee Electric*, 306 U.S. at 136 (sale of electricity gives 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 (issue defined in terms of the constitutionality of construction of the Wilson dam and the sale of energy from that dam alone). *Cf.* *Tennessee Electric*, 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).

<sup>189</sup> See Tushnet, *supra* note 68, at 1714.

<sup>190</sup> See *id.* at 1714-1716.

## 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*,<sup>191</sup> the Court rejected a challenge to a rule refusing to apply the consultation requirements of the Endangered Species Act of 1973<sup>192</sup> to projects overseas.<sup>193</sup> The Court held that plaintiffs who had only indicated a vague intention 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.<sup>194</sup>

Justice Steven's concurrence, approving of standing, but ruling against Defenders of Wildlife on the merits, clearly shows that injury would not have "illuminated" the merits in any way.<sup>195</sup> Justice Stevens explained that Congressional intent governs the question of the Endangered Species Act's extraterritoriality. Accordingly, Justice Steven's merits analysis never mentions the injuries he found sufficient for standing.<sup>196</sup> He rests his analysis upon case law's presumption against extraterritorial application of a statute,<sup>197</sup> the lack of explicit statutory language pointing overseas,<sup>198</sup> the position of implementing agencies,<sup>199</sup> the statute's structure,<sup>200</sup> and its general purpose<sup>201</sup>. Because the intent of Congress governed the question, 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

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<sup>191</sup> 504 U.S. 555 (1992). See William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENV'T'L L. & POL'Y FORUM 247, 252 (2001) (characterizing *Lujan* as the "base text" of modern standing law).

<sup>192</sup> 16 U.S.C. § 1531.

<sup>193</sup> See *Defenders*, 504 U.S. at 557-58, 578.

<sup>194</sup> See *id.* at 563-64, 579 (plurality and concurring opinions)

<sup>195</sup> See *id.* at 585-589.

<sup>196</sup> See *id.*

<sup>197</sup> *Id.* at 585-86.

<sup>198</sup> *Id.* at 586.

<sup>199</sup> *Id.* at 587.

<sup>200</sup> *Id.* at 588.

<sup>201</sup> *Id.* at 588-89.

some quirk in Justice Steven's analysis. A majority of the Court employed a similar approach with equally little reference to injury in *EEOC v. Arabian American Oil Co.*<sup>202</sup> In that case, an alleged victim of racial discrimination by an ARAMCO subsidiary in Saudia Arabia, a person with obvious standing, asked the Court to apply Title VII of the Civil Rights Act abroad.<sup>203</sup> The Court's analysis in subsequent extraterritoriality cases, some of which employ a less strong presumption against territoriality, make equally little reference to injuries.<sup>204</sup>

The lack of linkage between the merits and standing in *Lujan* does not stand alone. Rather, this pattern prevails in almost all cases litigating the question of whether agency action conforms to a governing statute.<sup>205</sup> Indeed, in the overwhelming majority of statutory administrative law cases that come before the Court where 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 where 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 discretion are arbitrary and capricious or not supported by substantial evidence.<sup>206</sup>

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<sup>202</sup>499 U.S. 244 (1990)

<sup>203</sup> See *id.* at 246-247.

<sup>204</sup> On extraterritoriality generally, see Comment, *Is That Your Final Answer?* "The Patchwork Jurisprudence Surrounding the Presumption Against Extraterritoriality," 70 U. CINN. L. REV. 715 (2002).

<sup>205</sup> See, e.g., *Lujan v. National Wildlife Federation*, 497 U.S. 871, 875-879 (1989) (describing claim that land withdrawal review program violates the Federal Land Policy Management Act and the National Environmental Policy Act); *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 176 (2000) (describing merits claim that polluter exceeded permit limits, which does not require proof of harm to anyone); *Bryant v. Yellen*, 447 U.S. 352 (1979) (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 farmers bring suit); *Sierra Club v. Morton*, 405 U.S. 727, 730 n. 2 (1972) (describing legal claims about planned ski resort in the Mineral King Value that almost surely would have been resolved with no reference to injuries). Cf. *Andrus v. Allard*, 444 U.S. 51, 55-64 (1979) (injury to plaintiff not considered, but the specifics of their actions 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 *Akins v. Federal Election Comm'n*, 524 U.S. 11, 21 (1998) (injury conferring standing stems from inability to obtain information that would help plaintiffs evaluate candidates for public office) with *Akins v. Federal Election Comm'n*, 101 F.3d 731, 740-44 (D.C. Cir. 1996) (en banc) (merits analysis makes no reference to injury, focusing on interpretation of meaning of the term political committee in statute in light of first amendment concerns with disclosure statutes).

<sup>206</sup> 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 *id.* at 616. Contrary to law claims assert that the agency actions

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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.<sup>207</sup> Parties play a role in creating this record through their comments and submissions. These comments can document the parties' potential injuries, but they often focus more generally on the effects of an 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.<sup>208</sup> But sometimes facts about the petitioner's projected future injury frame issues for resolution.<sup>209</sup>

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<sup>206</sup>(...continued)

conflict with the statute. 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 agency's reasons for its decision were arbitrary and capricious. Resolution of a contrary to law claim should, in theory, foreclose taking the prohibited action. 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.

These categories, however, tend to blend. *See* Arent, 70 F.3d at 616 (discussing overlap between unreasonable statutory interpretation and arbitrary and capricious decisions). *See, e.g.,* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 731 (1998) (complaint alleged that Forest Service's failure to properly identify lands economically unsuitable for timber harvesting was contrary to both the authorizing statute and "arbitrary and capricious").

<sup>207</sup> *See* Burlington Truck Lines v. United States, 371 U.S. 156, 167-169 (1962) (review of agency action based on record before the agency, not "post-hoc" rationalizations); Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 736-37 (1998) (expressing view that review of site specific plans would offer more concrete context for review than a plan for an entire national forest).

<sup>208</sup> *See, e.g.,* United States v. Fior Ditalia, 122 S. Ct. 2117, 2124-2125 (2002) (resolving complaint about aggregation method's tendency to overestimate a restaurants FICA obligation for tip income, when restaurant did not claim injury from overestimation in its case); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378-385 (1989) (dispute about necessity to prepare supplemental environmental impact statement hinges upon importance of new information in a scientific study); Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Company, 463 U.S. 29, 46-57 (1983) (insurance company challenge adjudicated in terms of agency rationale for rescinding safety standard not impact on insurance company revenues); Fidelity Federal Savings and Loan Ass'n v. 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 must pay off mortgage all at once); Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775, 802-809 (1978) (FCC decision to grandfather in existing cross ownership to prevent disruption of service upheld in challenge brought by primarily by broadcasters, not the consumers who might experience disruption).

<sup>209</sup> *See, e.g.,* Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) (decision that EPA's issuance of discharge permit to an Arkansas polluter was not arbitrary and capricious; issue framed in terms of relevance of further polluting an already degraded river). I was able to  
(continued...)

While agency adjudication and enforcement of rules does not usually raise standing issues, the injuries in these cases do frequently make merits adjudication concrete.<sup>210</sup> But even in this context, policy issues arise that make the direct experience of participants in agency adjudication irrelevant to merits analysis.<sup>211</sup>

## 2. STRUCTURAL CONSTITUTIONAL LAW CASES

The line item veto cases exemplify a category of cases addressing the structure of government. This category includes separation of powers cases and federalism cases.<sup>212</sup> The separation of powers cases address questions regarding the limits of the powers of various branches of the federal government.<sup>213</sup> Federalism cases often address questions regarding the limits of federal power imposed to preserve a sphere of state sovereignty.<sup>214</sup> In these cases, individual injury almost never significantly influences the merits.<sup>215</sup>

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<sup>209</sup>(...continued)

find only one arbitrary capricious decision in which the Supreme Court decided an issue of standing. Hence, my analysis infers the nature of injury from the party's identity and the nature of the challenged rule.

<sup>210</sup> *See, e.g.*, *Baltimore & Ohio Railroad v. Aberdeen & Rockfish Railroad Co.*, 393 U.S. 87 (1968) (information about cost structure of companies frames issues and influences outcome of adjudication of challenge to rate-making); *Adamo Wrecking Company v. United States*, 434 U.S. 275 (1978) (criminal charges against a company frame issue as to whether Congress intended to apply criminal sanctions to violation of work practice standards).

<sup>211</sup> *See, e.g.*, *National Labor Relations Board (NLRB) v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 812-818 (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 oppose the union).

<sup>212</sup> *See* MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS*, 37-38 (1982); Levinson, *supra* note 173, at 1367. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that Congress cannot compel states to dispose of radioactive wastes); *Clinton v. City of New York*, 524 U.S. 417 (1998) (adjudicating constitutionality of the line item veto).

<sup>213</sup> *See, e.g.* *Clinton*, 524 U.S. 417 (adjudicating validity of executive power to use a line item veto); *INS v. Chadha*, 462 U.S. 919 (1983) (adjudicating validity of exercise of a one house veto); *Mistretta v. United States*, 488 U.S. 361 (1989) (adjudicating validity of judicial rulemaking regarding sentencing).

<sup>214</sup> *See* *New York*, 505 U.S. at 156 (claiming that the states maintain a measure of sovereignty in spite of broad Congressional powers); *United States v. Lopez*, 514 U.S. 549 (1995) (constitutional grant of authority to regulate interstate commerce does not allow for federal restrictions on gun possession near schools); *United States v. Morrison*, 529 U.S. 598, 607-19 (2000) (interstate commerce authority does not authorize creation of a federal remedy for gender-based violence).

<sup>215</sup> *See, e.g.*, *New York*, 505 U.S. at 174-175 (holding that offering state a choice  
(continued...))

## 3. FACIAL INDIVIDUAL RIGHTS CASES

Facial challenges to statutes based upon individual rights claims also rarely contain express links between injury and result.<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup> The Court tends to disfavor facial challenges.<sup>219</sup> 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,<sup>220</sup> although the Court has invalidated statutes facially in many cases where the litigants have not made that showing<sup>221</sup>.

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<sup>215</sup>(...continued)

between taking title to low level radioactive waste and providing for disposal commandeers state government); *Clinton*, 524 U.S. 417 (barely mentioning injuries of litigants before the Court); *Mistretta*, 488 U.S. 361 (case hinges on history and text of constitution, not the likely experience of criminals under sentencing guidelines).

<sup>216</sup> *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Ass'n*, 112 S. Ct. 1465, 1477-78 (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, 459-471 & n. 5 (1980) (particular type of picketing giving rise to suit not important in analysis of whether the whole ordinance unconstitutionally discriminates between different types of speech).

<sup>217</sup> *See Yee v. Escondido*, 503 U.S. 519, 535 (1992).

<sup>218</sup> *See Richard H. Fallon, Commentary: As Applied Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321 (2000). *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 379-380 (1992) (teenagers accused of burning a cross on a black family's yard mounts a facial challenge to the ordinance under which they were charged); *Tahoe-Sierra*, 122 S. Ct. at 1477-1476 (landowner making a takings claim seeks a categorical rule that any moratorium on building constitutes a facial taking); *Virginia v. Black*, 123 S. Ct. 1536, 1550 (2003) (ban on cross burning with intent to intimidate is facially valid).

<sup>219</sup> *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n. 10 (1997) (facial challenges face an "uphill battle," since it is difficult to demonstrate that mere enactment of legislation "deprived the owner of all economically viable use of the property."). Facial challenges, however, are more common than commonly recognized. *See Dorf, supra* note 85; Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 421-456 (1998) (Court's openness to facial challenges varies with the legal doctrine involved in the challenge).

<sup>220</sup> *Salerno*, 481 U.S. at 745; *Reno v. Flores*, 570 U.S. 292, 301 (1993); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991). *Cf. City of Chicago v. Morales*, 527 U.S. 41, 56 n. 22 (1999) (characterizing the *Salerno* formulation as dictum).

<sup>221</sup> *See, e.g., Ada v. Guam Soc'y of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992) (holding an anti-abortion statute facially invalid); *Morales*, 527 U.S. at 56-65 (holding an anti-loitering statute facially invalid); *Florida Prepaid Postsecondary Education* (continued...)

Judicial opinions addressing facial challenges rarely focus upon the influence of the challenged statute upon the plaintiff.<sup>222</sup> Rather, they tend toward abstract general reasoning.<sup>223</sup> When they do consider concrete situations, they often consider the situations of people other than the plaintiffs.<sup>224</sup>

For example, in *County of Riverside v. McLaughlin*,<sup>225</sup> the Court upheld the standing of arrested plaintiffs to litigate the question of whether county post-arrest probable cause determinations were prompt enough to satisfy Fourth Amendment requirements as a class action.<sup>226</sup> One would think that the question of whether a probable cause determination was sufficiently prompt to satisfy a constitutional requirement about 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.<sup>227</sup> The Court does not even state how long the named plaintiffs remained in jail awaiting a probable cause determination.

In the end, the Court issued a ruling based on policy considerations. The majority establishes a presumption that detention for longer than 48

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<sup>221</sup>(...continued)

*Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (holding the Patent Remedy Act invalid on sovereign immunity grounds). *See also* *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 11 (1988) (facial challenge may be permitted because of lack of any valid application, *or* because statute reaches the plaintiff and its breadth inhibits third parties’ speech).

<sup>222</sup> *See, e.g., Morales*, 527 U.S. at 61-65 (striking down ordinance with no reference to defendants’ experience except in footnote 34). *Cf. Zablocki v. Redhail*, 434 U.S. 374, 387-391 (1978) (plaintiff’s injury considered along with hypothetical injury others may experience from statute prohibiting marriage without payment of prior child support, but heart of analysis focuses upon state’s justification for the burdens its statute has placed on the right to marry).

<sup>223</sup> *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 7-12 (1977) (decision to grant aliens educational benefits rests upon analysis of level of scrutiny for alienage discrimination under equal protection clause and policy considerations defining scope of a political community).

<sup>224</sup> *See, e.g., id.* at 6 n. 7, 11 n. 15 (considering total cost of providing educational benefits for all aliens, not just for the plaintiff challenging the statute).

<sup>225</sup> 500 U.S. 44 (1990)

<sup>226</sup> *See id.* at 50-52.

<sup>227</sup> *See id.* at 48-49 (dispute exists about whether County policy requires probable cause determination within 7 days or 10 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.* at 47-48.

hours without a probable cause determination is invalid.<sup>228</sup> It establishes this period as presumptive, rather than mandatory, in order to implement a policy of “flexibility” to accommodate varying state administrative needs.<sup>229</sup> Justice Scalia, relying more heavily upon historical understanding of the Fourth Amendment, advocated a more stringent rule.<sup>230</sup> None of the Justices relied upon the concrete facts regarding the injuries to named plaintiffs. As a consequence, it is not clear that the case offers relief (or a denial of relief) to the named plaintiffs. The case, in many respects, uses a vague hypothetical to announce a general rule, even though injured plaintiffs brought the case.<sup>231</sup>

This tendency toward abstraction in facial challenges exists even when the precise scope of injuries and the factual context they provide are quite clear.<sup>232</sup> For example, in *R.A.V. v. City of St. Paul*<sup>233</sup>, the Court adjudicated several teenagers’ claim that their arrest for burning a cross on a black family’s yard violated their free speech rights.<sup>234</sup> The merits discussion, however, paid no attention at all to their conduct or their precise injury. Rather, the Court focused on the question of whether the ordinance under which they were charged, which outlawed fighting words based on race, religion, or gender, constituted content discrimination.<sup>235</sup> For the cross burners wisely framed their case as a facial overbreadth challenge under the First Amendment, rather than as a challenge to the statute’s application to their awful conduct.<sup>236</sup>

At times, however, injury makes even rulings invalidating entire statutes more concrete. For example, in *Zablocki v. Redhail*,<sup>237</sup> the Court invalidated a statute requiring parents with child support obligations to meet that obligation in order to obtain a marriage license.<sup>238</sup> Because the applicant who brought the case was indigent and could not meet his child

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<sup>228</sup> *See id.* at 56-57.

<sup>229</sup> *Id.* at 53 (citing need to encourage state flexibility and experimentation).

<sup>230</sup> *See id.* at 60-70 (justifying a rule of probable cause determination within 24 hours absent extraordinary circumstances based on history).

<sup>231</sup> This is not an isolated example. *See, e.g.,* *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987) (court decides issue of whether citizen suits lie for “wholly past violation” in case where district court found that the defendant remained in violation at the time of trial).

<sup>232</sup> *Cf. Fallon, supra* note 68, at 14 (injury limits the scope of a judicial decision).

<sup>233</sup> 505 U.S. 377 (1992).

<sup>234</sup> *Id.* at 379-380.

<sup>235</sup> *See id.* at 380-391.

<sup>236</sup> *Cf. id.* at 380, 396 (admitting that the conduct involved was punishable under other laws and reprehensible).

<sup>237</sup> 434 U.S. 374 (1978).

<sup>238</sup> *Id.* at 375, 390-391.

support obligation, the Court analyzed the statute as a substantial infringement upon the right to marry not well supported by the state's interest in collecting child support.<sup>239</sup> Thus, an injury to a plaintiff can make clear that a statute that might on its face appear only to burden a right, can, in fact, wholly negate the right at issue. 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 SOMETIMES LINK INJURY TO THE MERITS

Individual injuries sometimes 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.<sup>240</sup> Second, the Court sometimes uses the facts regarding the litigant's injury to illuminate the consequences of the challenged government action.<sup>241</sup> This in turn informs the discussion of whether the Court should hold the government conduct unconstitutional.

A good example of cases where this occurs involves allegations of police misconduct violating individual constitutional rights.<sup>242</sup> The Court has sometimes denied standing to litigants who, in its view, failed to adequately allege personal injury at the hands of the police.<sup>243</sup> But judicial

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<sup>239</sup> *Id.* at 389 (statute broadly infringes right to marry, but fails to get child support from those who have no money).

<sup>240</sup> *See, e.g.,* *Bigelow v. Virginia*, 421 U.S. 809, 821-822 (1975) (examining the particular contents of an advertisement for abortion services to determine if the editor who published it enjoys 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); *Meese v. Keene*, 481 U.S. 465, 479 n. 14 (1987); *Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n. 14, 289 (1978) (plurality opinion) (injury of inability to compete for all 100 places for medical school leads to framing case in terms of "a line drawn on the basis of race."); *Andrus v. Allard*, 444 U.S. 51, 64-68 (1979) (takings issue framed in terms of loss of opportunity to sell artifacts of protected birds).

<sup>241</sup> *See, e.g.,* *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 & n. 4 (1987) (using the Arkansas Times' situation as perhaps the only payor of a tax to show that tax unconstitutionally singles out a small group within the press). *Cf. Meese*, 481 U.S. at 488-490 (Blackmun, J., dissenting) (objecting to court's failure to use facts presented to prove injury to evaluate effects of Foreign Agents Registration Act upon free speech).

<sup>242</sup> *See, e.g.,* *Rizzo v. Goode*, 423 U.S. 362, 365-366 (1976) (discussing allegations of police misconduct); *Allee v. Medrano*, 416 U.S. 802, 804-09 (1974) (same).

<sup>243</sup> *See, e.g.,* *Rizzo*, 423 U.S. at 371-73 (expressing doubt that injuries experienced by the plaintiffs provided sufficient evidence of future harm); *City of Los Angeles v.*

(continued...)

decisions on the merits in such cases do rely upon documentation of plaintiffs' injuries, at least in part, to establish a constitutional violation.<sup>244</sup>

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.<sup>245</sup> In these cases, however, we might just as accurately state that the legal claim defines the injury that creates standing.<sup>246</sup> This 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 framing 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, since constitutional standing is obvious.<sup>247</sup> And this injury-in-fact creating constitutional standing figures not at all in the merits analysis.<sup>248</sup>

Surprisingly often, facts about injury have no influence upon the

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<sup>243</sup>(...continued)

Lyons, 461 U.S. 95 (1983) (same).

<sup>244</sup> See, e.g. Allee, 416 U.S. at 804-808 (discussing union members experience with policy of harassment).

<sup>245</sup> See *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (injury may exist solely by virtue of invasion of statutorily created rights). See, e.g., *Holland v. Illinois*, 493 U.S. 474, 476-478 (1990) (alleged invasion of white litigant's right to a fair cross section of the community creates standing to challenge constitutionality of peremptory challenges to strike prospective black jurors); *Powers v. Ohio*, 499 U.S. 400, 410-417 (1991) (convicted white defendant's standing to challenge striking of black jurors rests on the right a proceeding that appears fair); *McCleskey v. Kemp*, 481 U.S. 277, 291 n. 8 (1987) (standing to challenge disparate sentencing based on the victim's race is based on claim that state violates equal protection); *New York State Club Association v. City of New York*, 487 U.S. 1, 8-10 (1988) (private club's standing to challenge municipal prohibition based on its "associational rights").

<sup>246</sup> See, e.g., *Gratz v. Bollinger*, slip op. at 13 (2003) (in an equal protection case, denial of equal treatment constitutes injury, so that a showing of denial of a benefit is not required)

<sup>247</sup> See *Edmonson v. Leesville Concrete Company*, 500 U.S. 614, 629 (1991) (party asserting rights of third parties must suffer a concrete injury of her own). See, e.g., *Miller v. Albright*, 523 U.S. 420, 432-33 (1998) (plurality opinion) (Court evaluates 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).

<sup>248</sup> Cf. *Miller*, 523 U.S. at 451 (O'Connor, J., concurring) (denial of third party standing would change the substantive standard governing the merits, because injury to the plaintiff only triggers rational basis scrutiny).

merits at all in as-applied individual rights cases.<sup>249</sup> For example, in *Renne v. Geary*,<sup>250</sup> the Supreme Court rejected a challenge to California's restriction of endorsements in non-partisan elections on standing and ripeness grounds.<sup>251</sup> The majority explained how awaiting a challenge by different litigants might add context to the case, showing "the nature of the endorsement, how it would be publicized, [and] . . . the precise language" used.<sup>252</sup> It did not, however, explain how any of these details would influence the merits of the First Amendment challenge.<sup>253</sup> Justice White's dissent, in fact, proposed a resolution of this "as applied" first amendment issue that rested upon assessment of the state's interest and public forum analysis, not the facts that the majority felt it needed to make the case justiciable.<sup>254</sup> A subsequent lower court case also demonstrates the irrelevance of the context the *Renne* majority found so important, by employing an analysis similar to Justice White's.<sup>255</sup> And the Supreme Court itself resolved a similar issue - whether the state may prevent candidates for elected judgeships from announcing their views on political and legal questions - without reference to any specific censored statements

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<sup>249</sup> See, e.g., *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972) (majority finds no injury to a political party challenging an oath requirement, but dissent would find a constitutional violation because ordinance on its face discriminated against all minor political parties); *Laird v. Tatum*, 408 U.S. 1, 13-24 (1972) (majority and dissenting opinions) (majority finds no concrete injury from alleged army surveillance, but dissent would resolve case on the basis of the lack of direct legal authority for surveillance); *Babbitt v. United Farm Workers*, 442 U.S. 289, 312-314 (1979) (finding Arizona's union election procedures constitutional, because compulsory collective bargaining is not a constitutional right); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166, 171-79 (1972) (injury involves denial of service to guest of a private club, but merits adjudication focuses upon state action question); *Buckley v. Valeo*, 424 U.S. 1 (1976) (pre-enforcement challenge to campaign financing law with almost no reference to the litigants' actual situation).

<sup>250</sup> 501 U.S. 312 (1991).

<sup>251</sup> See *id.* at 316-324.

<sup>252</sup> See *id.* at 322.

<sup>253</sup> *Accord id.* at 341 (Marshall J., dissenting). Marshall also points out that "the form of the 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.*

<sup>254</sup> See *id.* at 328, 332-334 (White J. dissenting). *Cf. id.* at 343-349 (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 328-330. 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 avoidance of the appearance of bias" sufficiently justified the restriction. See *id.* at 333.

<sup>255</sup> See *California Democratic Party v. Lungren*, 919 F. Supp. 1397, 1400-1405 (N.D. Cal. 1996) (striking down the restriction, because it serves no compelling state interest).

in *Republican Party of Minnesota v. White*.<sup>256</sup>

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 they show that litigants may make cases more concrete by bringing in facts about how challenged practices injure people other than the litigant.<sup>257</sup> For example, defendants seeking to challenge search and seizures predicated upon violations of others' expectations of privacy have used the facts pertaining to those searches, the facts leading to injury to a third party's privacy rights, to make litigation more concrete.<sup>258</sup>

For example, Jack Payner challenged the validity of a search that uncovered a document that helped prove that he falsified his income tax

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<sup>256</sup> 536 U.S. 765 (2002) (Minnesota rule prohibiting judicial candidates from announcing their views on disputed legal and political issues violates First Amendment). The *White* dissenters claimed that the Court's "entire analysis has a hypothetical quality" stemming from the Court's inability to rely upon specific statements from the candidate to make the litigation more concrete. *Id.* at \_\_\_\_ (Stevens, J. dissenting). In fact, however, the Court relies 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 \_\_\_\_\_. But the injury incurred in 1998 could not create concrete context for litigation of the sort sought in *Geary*, because the plaintiff declined to specify what statements he wished to make in the 1998 campaign. *Id.* at \_\_\_\_\_. The Court, however, created some concrete context by referring to the subjects the plaintiff addressed during a prior campaign for judicial office in 1996. The plaintiff probably did not base his complaint on the events of 1996, because The Minnesota Lawyers Responsibility Professional Responsibility Board dismissed an ethics complaint against him under the challenged rule, which might create an argument regarding mootness. Arguably the real injury in 1998 produced no factual context and the non-injury in 1996 did create useful context. *Cf. id.* at \_\_\_\_ (notwithstanding dismissal of ethics complaint in 1996, candidate withdrew from election out of fear of additional complaints). In many other cases, however, nothing about the plaintiff's concrete experience influences the merits. *See infra* n. 249

<sup>257</sup> *See Campbell v. Louisiana*, 523 U.S. 392, 400 (1998) (white defendant would be an effective advocate for excluded black grand jurors).

<sup>258</sup> *See, e.g., United States v. Padilla*, 580 U.S. 77, 80-81 (1993) (conspirator has no standing to seek exclusion of evidence seized in violation of co-conspirator's expectation of privacy); *United States v. Salvucci*, 448 U.S. 83 (1980) (repudiating automatic standing for criminal defendants to challenge seizure of evidence relied upon by the prosecutor); *Rawlings v. Kentucky*, 448 U.S. 98, 104-106 (1979) (defendant has 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. Payner*, 447 U.S. 727, 731-32 (1980) (refusing a defendant standing to contest unconstitutional seizure of documents from somebody else). This rule, while clearly announced in *Salvucci*, has antecedents in earlier cases. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 133-140 (1978) (Court may not exclude evidence under the Fourth Amendment's exclusionary rule unless it was seized in violation of the defendant's own constitutional rights).

return in *United States v. Payner*.<sup>259</sup> The record, presumably developed by Payner's lawyers, made this allegation quite concrete. It showed that IRS agents had stolen the briefcase of a banker to obtain a key document, without obtaining a warrant.<sup>260</sup> Indeed, a district court judge found that the government counsels its agents to deliberately violate the Fourth Amendment rights of innocents in order to obtain the goods on a suspect.<sup>261</sup> The Supreme Court used this record and characterization to frame the issue in the case as whether a "federal court should use its supervisory powers to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights."<sup>262</sup> It begins its analysis with a concrete allusion to the specific facts, stating that "No court should condone . . . this briefcase caper."<sup>263</sup> But the Court concluded that the importance of "ascertaining the truth in a criminal case" counseled against allowing litigants to assert other's Fourth Amendment rights, even in this context.<sup>264</sup> *Payner* illustrates that lawyers can develop facts about other people's situations to make litigation more concrete.<sup>265</sup> This implies that even without an injured client, litigation can become concrete through the development of context.<sup>266</sup> 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.<sup>267</sup> So, *Payner* does support the more general lesson that non-injured parties, if represented by good lawyers, can develop factual information making a case concrete.<sup>268</sup>

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<sup>259</sup> See 447 U.S. at 728-729.

<sup>260</sup> See *id.* at 729-730.

<sup>261</sup> See *id.* at 730.

<sup>262</sup> See *id.* at 733. All of the courts involved agreed that Payner had no protectable privacy interest in the documents taken from the banker's briefcase. *Id.* at 732.

<sup>263</sup> *Id.* at 733 [internal quotations omitted].

<sup>264</sup> *Id.* at 734-35.

<sup>265</sup> Examples of this can be multiplied. See, e.g., *California Democratic Party v. Lungren*, 919 F. Supp. 1397, 1399, 1403 (N.D. Cal. 1996) (discussing evidence from County Supervisor election in a case arising from injury incurred in a school superintendent election).

<sup>266</sup> See, e.g., *Orr v. Orr*, 440 U.S. 268, 281-82 (1979) (decision about whether alimony statute violates equal protection made more concrete through application of information about nature of alimony proceeding available through case law).

<sup>267</sup> See Tushnet, *supra* note 68, at 1708-1709, 1713 (suggesting that ideological plaintiffs with a sufficient interest in the subject matter often will be capable of generating an adequate record for decision).

<sup>268</sup> See FRCP 26(b),(c); 30(a)(1); 31(a)(1); 34(c); 35(a) (authorizing discovery against non-parties). See, e.g., *Grutter v. Bollinger*, slip op. at 15-21 (2003) (affirming the importance of context to equal protection analysis, and then going on to examine a record (continued...))

In other types of individual rights litigation as well, injuries to people other than the plaintiffs can make litigation concrete.<sup>269</sup> In general, as applied constitutional litigation involves some cases where individual injury does make litigation more concrete, but others where it does not.<sup>270</sup>

### 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 in the briefs not explicitly mentioned in the opinion or elucidating consequences that motivated the decision. We must consider 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 judges of precisely that, and argue that increasing candor would solve the problem.<sup>271</sup> 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* because they were concerned about declining medical care in New York hospitals that lost federal funding through President Clinton's veto. This might suggest that a veto of, say, line items for highway construction might pass muster. But

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<sup>268</sup>(...continued)

built by parties and amici that went far beyond the particulars of race relations and student performance at the University of Michigan).

<sup>269</sup> See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (allowing state to assert injury to excluded jurors). Cf. *Miller v. Albright*, 523 U.S. 420, 433-34 (1998) (plurality opinion) (experience of a hypothetical female central to Court's evaluation of an equal protection claim alleging discrimination against males).

<sup>270</sup> Cf. Fiss, *supra* note 33, at 18 (in public law, the focus of judicial inquiry is upon a "social condition," not discrete events). See also *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72-94 (1977) (injury discussed in merits analysis is different than the injury forming the basis for standing).

<sup>271</sup> See, e.g., Elliott, *supra* note 136, at 145 (suggesting that the Court's formalist opinion in *Chadha* drives policy judgments "underground" and arguing for open and above board conclusions about the legislative veto's effects).

the Court has no reasoning limiting its holding to 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.

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, it failed in this case. If the judgment is sound, it is for reasons having little to do with the injuries to New York hospitals.

### 1. IMPLICIT FRAMING

The problem of implicit framing has been addressed in the analysis regarding explicit linkages above. For the analysis considers any framing of issues that in fact corresponds to the scope of an injury that helped justify standing as an example of explicit linkage. That analysis did not confine itself to cases where the Court explicitly said, “We use the injury to frame the question before us.”

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.<sup>272</sup> Ultimately, the Court determines how to define the issue it addresses in its opinion.<sup>273</sup> Lawyers seek to frame issues in a manner helpful to their case, and to convince the Court to adopt that framework.<sup>274</sup> The possibility of facial challenges to statutes shows that litigants need not confine their challenges to those applications that only injure them.<sup>275</sup> Even injured

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<sup>272</sup> See *Yee v. City of Escondido*, 503 U.S. 519, 535-536 (1992) (lawyers may frame the issue upon which they wish to seek certiorari, but the Court may rephrase the question); *Troxel v. Granville*, 530 U.S. 57 (2000) (some justices framing the challenge facially and some framing it as an as applied case). Professor Isserles argues that a court’s choice about the scope of appropriate invalidation is “predetermined at the outset.” See Isserles, *supra* note 219, 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. In any case, so many cases involve disputes between justices about how an issue should be framed (as in *Troxel, supra*) that a claim of predetermination seems at best exaggerated, and Isserles himself qualifies it. See *id.* at 452-53.

<sup>273</sup> See, e.g., Peter L. Strauss, 1983 DUKE L. J. 789, 791 (suggesting that the Court could have, and should have, decided *Chadha* on narrower grounds).

<sup>274</sup> See, e.g., *id.* at 792 (suggesting that none of the lawyers found narrow framing of the issues in *Chadha* in their clients’ interest); Levinson, *supra* note 173, at 1314-1315 (discussing how two lawyers arguing a takings claim would frame the issue differently).

<sup>275</sup> Cf. Tushnet, *supra* note 68, at 1712 (Hohfeldian plaintiffs can induce courts to make abstract decisions binding future courts and litigants).

litigants can make ideological choices about what issues to raise. And judges can employ discretion to decide how to frame issues as well.<sup>276</sup>

Lawyers' propensity to frame issues to advantage their clients does not imply that the wise lawyer will always seek a ruling confined to the context that the client's injury provides. A quite broad ruling will encompass the client's injury as well as a narrow one.<sup>277</sup> And sometimes a wide framing of an issue can help the client.<sup>278</sup> In *Clinton*, a good argument existed that all line items were invalid. It would be very hard to construct an argument narrowly targeting at veto of funding for New York hospitals. Furthermore, ideological clients who have experienced injury may prefer broad frames to get at the problem that is really bugging them. And repeat players may seek rulings not only addressing their injuries, but all conceivable problems that might arise in the future. Injury's influence on framing does not always confine.

## 2. CONSEQUENCES

It is impossible to know whether injuries grounding standing influence the merits when the Court does not mention them in its merits analysis. The *Clinton* case would suggest, however, that this 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's hard to imagine that the case would have gone the other way if no worthy beneficiary of pork barrel spending came 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 farmers' cooperative's tax breaks, but simply found the line item veto inconsistent with the clauses governing legislation in the constitution.

Just as lawyers and judges control framing they also control introduction and use of facts as well. Lawyers with injured clients may place facts regarding these injuries in the record and use those facts to try

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<sup>276</sup> See, e.g., *Yee*, 503 U.S. at 535-536 (acknowledging that the Court has "on occasion rephrased the question presented" or asked the parties to address an issue not raised, and going on to construe the issue before them more narrowly than the petitioner had). Strauss, *supra* note 273, at 791 (suggesting that the Court could have, and should have, decided *Chadha* on narrower grounds); Levinson, *supra* note 173, 1332-1375 (discussing how judicial views about the appropriate framing of a transaction influence constitutional decisions).

<sup>277</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987) (black defendant claims that Georgia capital punishment statute violates equal protection, because death penalty applied more often to black defendants and murders of blacks than to white defendants and murders of whites)

<sup>278</sup> See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 379-380 (1992) (teenagers who burned a cross on a black family's lawn facially attack the hate speech ordinance under which they are charged).

and 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. 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 experience.<sup>279</sup> They can, and often do, discuss the ramifications for other people or even society as a whole. And judges can decide whether the client's context, a broader context, or no context aids wise decision-making.<sup>280</sup> So an injured client offers no guarantee that facts will illuminate the consequences of judicial decisions or influence the arguments of lawyers. In fact, injured clients cannot guarantee concrete merits litigation.

This raises an interesting normative questions. Part III will address the 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.

#### D. THE STRUCTURE OF LINKAGE

The evidence we have 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 explanations for this pattern do much to 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 most merits analysis and assesses the broader implications of this failure of standing requirements to improve the concreteness of litigation. It analyzes the nature of public law and its structure to help explain the paradox of standing having so little influence on the merits.<sup>281</sup>

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<sup>279</sup> See generally *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (court's judgment may benefit others collaterally).

<sup>280</sup> See *Tushnet*, *supra* note 68, at 1723 (jurisdictional doctrine will not prevent Court from formulating a broad abstract rule if it wants to). See, e.g., *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 590-591 (1985) (considering context of experiences frustrating realization of statutory purposes of the Federal Insecticide, Fungicide, and Rodenticide Act in adjudicating challenge to arbitration provisions under Article III of the Constitution).

<sup>281</sup> See generally *Fiss*, *supra* note 33, at 2 (arguing that judges deciding  
(continued...)

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 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. We must carefully examine the nature of public law to see if the tendency to ignore injuries really comes solely from formalist reasoning style.

Typically public law cases become much more abstract than jury trials. *Marbury v. Madison*<sup>282</sup> describes judicial review as an exercise in resolving a conflict of law claim, laying the constitution alongside an Act of Congress to see whether the statute runs afoul of the constitution.<sup>283</sup> *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*.<sup>284</sup> But some degree of abstraction is inherent in determining whether two laws conflict, especially if one or both are phrased in broad terms.<sup>285</sup> And it is inherent in any legal problem requiring construction of 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.<sup>286</sup>

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 v. Madison* Court adjudicated the question of whether Secretary of State Madison breached a legal duty to make

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<sup>281</sup>(...continued)

constitutional individual rights cases give meaning to public values)

<sup>282</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>283</sup> See *id.* at 177-178 (describing deciding which of two conflicting laws govern a case as the "essence of judicial duty").

<sup>284</sup> See Jefferson to Justice William Johnson, June 12, 1823, 1 S. CAR. HIS. & GEN.MAG. 1, 9-10 (1900) (referring to Marshall's "obiter dissertation" in *Marbury*).

<sup>285</sup> Cf. Pushaw, *supra* note 55, at 500 (suggesting that a "lack of judicially discoverable and manageable standards" exists in many constitutional clauses).

<sup>286</sup> See Schauer, *supra* note 186, at 658 ("reason giving is the kin of abstraction" and checks "maximum contextualization" and "case by case determinations").

Marbury a Justice of the Peace.<sup>287</sup> The Court did not discuss any details about how much the loss of this commission meant to Marbury, as it might of had the loss of a commission constituted some kind of tort giving rise to damages dependent upon the extent of injury.<sup>288</sup> Instead, the Court devoted most of its attention to the question of whether it had authority to adjudicate Marbury's claim<sup>289</sup> and also concluded that Madison had breached a duty to Marbury<sup>290</sup>. The context that details about Marbury's suffering might have provided became irrelevant.

Something like the *Marbury* model of constitutional litigation applies to a large class of administrative law claims as well. Many litigants claim that an agency action, often the promulgation of a rule, conflicts with a governing statute.<sup>291</sup> Such a claim requires a Court to set the statute alongside the agency decision to see whether the two conflict. So, claims that an agency action are contrary to law tend toward *Marbury* type abstraction.

The predominance of conflict of law questions in public law often makes injuries to litigants irrelevant to the resolution of the merits.<sup>292</sup> In conflict of laws cases, textual analysis matters. The intention 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 decisions for the litigants.

Conflict of law claims form the backbone of public law. They encompass the broadest constitutional and statutory rulings.<sup>293</sup> Claims that

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<sup>287</sup> See *Marbury*, 5 U.S. at 153-162.

<sup>288</sup> Cf. *id.* at 164 (loss of office of trust, honor, or profit involves injury, not just loss).

<sup>289</sup> See *id.* at 163-180.

<sup>290</sup> *Id.* at 162 (withholding of Marbury's commission is "not warranted by law, but violative of vested right").

<sup>291</sup> See, e.g., *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 462-471, 476-184 (2001) (resolving claim that EPA's rule establishing new National Ambient Air Quality Standards conflicted with the Clean Air Act); *TVA v. Hill*, 437 U.S. 153, 172 (1977) (resolving claim that construction of Tellico Dam would violate the endangered species act).

<sup>292</sup> 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 a narrow sense common in the legal profession, as referring only to the question of which jurisdiction's law applies in an interstate case.

<sup>293</sup> See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto in numerous statutes as violating the constitutional requirements of bicameralism and presentment); *Buckley v. Valeo*, 424 U.S. 1 (1976) (greatly limiting campaign finance limitations as in conflict with free speech guarantee in the First Amendment); *American Trucking*, 531 U.S. at 464-71 (EPA may not consider cost in promulgating national

(continued...)

an agency action or Congressional statute conflict with a trumping document 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.<sup>294</sup> And they necessarily have consequences for non-litigants, not just the litigants before the Court.<sup>295</sup> As a result, they draw the Court's attention away from the litigants before them into questions of interpretation and of the broader implications of the ruling.<sup>296</sup>

Typically cases become more abstract as they move up the appellate ladder. Again, we law professors may be uniquely poorly qualified to see this, since 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.<sup>297</sup> The petition becomes an exercise in characterizing the issue and the holdings of other circuits in such a way that a circuit conflict appears.<sup>298</sup> Alternatively, a certiorari petition can emphasize the importance of the issue, not to the litigant, but to the nation as a whole.<sup>299</sup> And the Supreme

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<sup>293</sup>(...continued)

ambient air quality standards under the Clean Air Act).

<sup>294</sup> *Cf.* Republican Party of Minnesota v. White, 536 U.S. 765, \_\_\_ (2002) (American adjudication cannot be completely separated from the enterprise of representative government because judges make common law and interpret constitutions).

<sup>295</sup> *See* Pushaw, *supra* note 55, at 479 (the *Marbury* Court recognized that its decisions had ramifications going far beyond *Marbury*'s injury); *Lujan v. National Wildlife Federation* (NWF), 497 U.S. 871, 891 (1989) (some statutes permit broad regulations and authorize judicial review before "concrete effects" are felt); *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating death penalty statutes in a number of states). *See also* NWF, 497 U.S. at 913 (Blackmun J. dissenting) (if the plaintiff prevails in a challenge to a rule of broad applicability the court will invalidate the rule, not simply its application to a "particular individual").

<sup>296</sup> *See* *Thomas v. Union Carbide*, 473 U.S. 568, 593 (1985) (vague statute draw meaning from statute's purpose, factual background, and statutory context)

<sup>297</sup> *See* *Yee v. Escondido*, 503 U.S. 519, 536 (1992) (discussing how certiorari practice forces litigants to choose the most important issues from the many presented below).

<sup>298</sup> *See* Sup. Ct. R. 10 (1999) (listing conflicting decisions as grounds for certiorari).

<sup>299</sup> *See* Sunstein, *supra* note 155, at 16 (practice of granting certiorari for cases of national importance assures that the decision will "affect other cases"); Fallon, *supra* note 78, at 23 (court chooses issues which need its attention in light of public interest in clarity and uniformity of the law). *See also* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1714-

(continued...)

Court issues pronouncements at such a high level of abstraction<sup>300</sup> that its decisions often fail to even resolve the case before the Court, instead causing a remand where lower courts can figure out whether a general principle enunciated by the Court should influence the outcome of the case.<sup>301</sup>

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.<sup>302</sup> This 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 explain the patterns of concreteness and abstraction described in part II. The structure of legal problems, rather than the existence of injury, determines whether injury to plaintiffs makes the litigation more concrete. And elucidating this structure helps 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.<sup>303</sup> Mathew Adler argues that constitutional law is about the validity of legal

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<sup>299</sup>(...continued)

1715 (2000) (describing tension between certiorari practice and the private rights model of adjudication).

<sup>300</sup> See Fallon, *supra* note 78, at (Court routinely issues “broad pronouncements, not rulings tailored to the case before it.”).

<sup>301</sup> See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44, 59 (1990) (remanding after announcing a general presumption regarding the length of appropriate pre-arraignment detention); *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001) (remanding case because it has not resolved question of whether a takings has occurred or not); *Phillips v. Washington Legal Foundation*, 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). Cf. *Brown v. Legal Foundation of Washington*, 538 U.S. \_\_\_ (2003) (resolving issue left open in *Phillips*).

<sup>302</sup> See Scalia, *supra* note 57, at 896 (claiming that judges are “instructed to be governed by a body of knowledge that values abstract principles above concrete results.”).

<sup>303</sup> Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998) [hereinafter, Adler, *Structure*]; Matthew D. Adler, *Personal Rights and Rule-Dependence: Can the Two Co-Exist*, 6 LEGAL THEORY 337 (2000) [hereinafter, Adler, *Coexistence*]; Fallon, *supra* note 218; Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Litigation: A Response to Professor Fallon*, 113 HARV. L. REV. 1371 (2000) [Adler, *Response*].

rules, not about the rights of individuals to take certain actions.<sup>304</sup> He takes as his point of departure an individual rights case, *Texas v. Johnson*,<sup>305</sup> which invalidated a prohibition upon flag burning.<sup>306</sup> He asks whether we should understand this case as protecting the act of flag burning or as prohibiting the law against desecrating the flag.<sup>307</sup> He argues that since flag burning leading to a conflagration could still be outlawed as arson, we should understand this individual rights case as about the validity of legal rules - specifically, the flag desecration statute.<sup>308</sup> *Texas v. Johnson* does not, argues Adler, insulate the act of flag burning from legal consequences. 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. This insight leads Adler to the startling conclusion that “there is no such thing as an as applied constitutional challenge.”<sup>309</sup>

Richard H. Fallon challenged this statement, arguing that as-applied challenges remain the norm.<sup>310</sup> He also questioned the notion that all constitutional challenges should be understood as rights against rules.<sup>311</sup>

For my purposes, the points of consensus that emerged 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.<sup>312</sup> Second, they agree that some constitutional challenges invalidate only some applications of a rule, instead of all of them.<sup>313</sup> This latter agreement

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<sup>304</sup> Adler, *Structure*, *supra* note 303, at 3.

<sup>305</sup> 491 U.S. 397 (1989).

<sup>306</sup> See Adler, *Structure*, *supra* note 303, at 3-7.

<sup>307</sup> See *id.* at 3.

<sup>308</sup> See *id.* at 3-5 (claiming that Johnson could be prosecuted for arson or other general offenses connected with flag burning, but not for violating the flag desecration statute).

<sup>309</sup> See *id.* at 157.

<sup>310</sup> See Fallon, *supra* note 218, at 1368 (as-applied challenges remain the . . . primary mode of constitutional attack).

<sup>311</sup> See *id.* at 1364-68.

<sup>312</sup> See *id.* at 1325 (accepting Adler’s “important insight” that *many* . . . constitutional rights are rights against rules.”); Adler, *Response*, *supra* note 303, at 1374-75 (Fallon is “absolutely correct” that some types of rights challenges do not “entail the existence of a particular type of rule”). See also Christopher L. Eisgruber & Lawrence G. Sager, *Religious Liberty and the Moral Structure of Constitutional Rights*, 6 LEGAL THEORY 253, 257 (2000) (appreciation of the extent to which Adler’s view is correct can provide “important insight into the moral structure of constitutional rights.”).

<sup>313</sup> See Fallon, *supra* note 218, 1334-1335 (articulating an understanding of as-applied challenges as invalidating “subrules” while leaving other subrules in tact); Adler, (continued...)

lies concealed behind varying definitions of “as-applied” challenges.<sup>314</sup> Third, they agree that the results of Supreme Court litigation typically bind, at least indirectly through the doctrine of precedent, parties not before the Court.<sup>315</sup>

The insights gleaned from this debate form the beginnings of 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 personal injury before it will adjudicate a case and it often says that constitutional rights are individual rights.<sup>316</sup> 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.<sup>317</sup> This descriptive claim

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<sup>313</sup>(...continued)

*Response, supra* note 303, at 1387 (distinguishing between complete and partial repeal of a rule).

<sup>314</sup> See, e.g., Adler, *Response, supra* note 303, at 1387 n. 56 (stating that “as-applied” challenges vindicating personal rights of claimants do not exist, but “as applied challenges” partially invalidating rules do exist).

<sup>315</sup> See Fallon, *supra* note 218, at 1362 (an invalid rule cannot be enforced against any party); Adler, *Response, supra* note 303, at 1412 (a Supreme Court order invalidating rules can oblige officials not to enforce against anyone). See generally Geoffrey Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1 (1978).

<sup>316</sup> See Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 153 (the law of standing reflects the view that judicial capital should be expended to vindicate individual rights); Nichol, *supra* note ?, at 1920 (describing protection of private rights as the “trigger of judicial power”); Fallon, *supra* note 78, at 22 (principle that court should only adjudicate constitutional questions to protect the rights of individuals finds “abundant expression” in post-Marbury judicial opinions); 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”).

<sup>317</sup> 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,” see Adler, *Structures, supra* note 52, at 2, which suggests a focus upon merits adjudication. Second, 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 132-145. 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. 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.

raises the normative issue this article explores - why should injury matter so much to justiciability, when it plays no role in many merits decisions.<sup>318</sup>

Furthermore, the concept needs extension beyond the individual rights cases that Adler and Fallon focus on. Public law includes not just individual rights claims, but structural claims about the distribution of power and non-constitutional claims about the validity of agency actions under governing statutes. Professor Fallon argues that constitutional law rarely conforms to simple characterizations of the whole, but to varying structures based on the legal doctrines at issue.<sup>319</sup> The following analysis applies this insight to extend understanding of public law beyond the individual rights cases by discuss how structures vary across areas of public law.

## 2. STRUCTURAL CONSTITUTIONAL LAW

Structural cases often involve facial claims about entire statutory provisions, if not entire statutes. The statutory provisions under attack tend to have broad and uncertain substantive impacts, since they only specify procedures not outcomes.<sup>320</sup> Their impacts upon individuals tend 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 rather typical of structural constitutional cases. 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 separation of powers and federalism aim to protect institutions. To be sure, this protection of institutions from each other aims to advance the welfare and liberty of the individuals who created the

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<sup>318</sup> *Cf. id.* at 153 (noting that Adler's 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 312, at 254 (expressing skepticism about the theory's value in constructing free exercise jurisprudence).

<sup>319</sup> *See* Fallon, *supra* note 218, at 1327 (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) ("constitutional rights are heterogeneous, and properly so")

<sup>320</sup> *See, e.g.,* INS v. Chadha, 462 U.S. 919 (1983) (invalidating legislative vetoes); Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating line item veto); Mistretta v. United States, 488 U.S. 361 (1989) (validating judicial rulemaking in the area of criminal law).

government.<sup>321</sup> But any particular choice of institutional arrangement will effect an individual indirectly and unpredictably, making it hard to separate the effects of institutional arrangements from those of substantive political decisions that might occur irrespective of institutional structure.<sup>322</sup>

### 3. INDIVIDUAL RIGHTS

Individual rights claims, by contrast, involve claims that the actions of government officials transgress constitutional limits enacted to protect individuals from government. Since individual rights often aim to protect individuals directly, rather than institutions, the Court sometimes considers the impact upon individuals relevant to decisions in this area.<sup>323</sup>

Yet, as Professor Adler points out, even in this area, legal rules are often (but not always) at stake. Legal rules impact many people.<sup>324</sup> Hence, the Court often turns away from consideration of the impacts upon the individual before it, especially if the lawyers or the judges choose to frame the litigation broadly, for example, as a facial challenge. In this area, however, the experience of litigants often bears some relationship to the assessment of 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 on the degree of economic harm the plaintiff experiences, and procedural due process, which requires assessment of the

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<sup>321</sup> 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. . .”).

<sup>322</sup> See PERRY, *supra* note 212, at 53 (“it is most unlikely that the Court” could specify how resolution of a separation of powers challenge would affect individual freedom); Dorf, *supra* note 85, at 246 (while structural provisions secure liberty in the long run, they may not do so in any every case); *Thomas v. Union Carbide*, 473 U.S. 568, 579-580 (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). See generally Nichol, *supra* note 50, at 1938 (application of standing to federalism and separation of powers cases has “seriously eroded” the claim that “constitutional review” only protects “private rights”).

<sup>323</sup> See Eisgruber & Sager, *supra* note 312, at 258 (some constitutional claims may focus primarily upon the claimant’s immediate circumstances).

<sup>324</sup> See Schauer, *supra* note 186, at 655 (suggesting that an opinion supported by fairly general reasoning offers an advisory opinion respecting cases not yet before the court); Tushnet, *supra* note 68, at 1711 (“absent parties often benefit when a litigant” convinces “a court to adopt a new legal rule”).

weightiness of the plaintiff's interest and the risk of error in a particular proceeding.<sup>325</sup> In such cases, injury often makes cases more concrete. While such cases can establish a plaintiff's 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 impacts upon subsequent cases.

Other legal tests, however, focus upon defendant's conduct or other factors and make 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 which uses injury as a framing device, to a test that often accepts neutral general rules, even if they impinge on free exercise incidentally.<sup>326</sup> This formalist doctrinal change means that the general intent of the rule's framers will matter much more than individual injury in resolving merits.<sup>327</sup> This move converts a personal right to engage in a practice to a right against rules aimed at discouraging religious practice.<sup>328</sup> And it tends to convert as applied challenges to something more like a facial challenge.<sup>329</sup> Resolution of such a facial claim can easily invalidate an entire statute.<sup>330</sup>

#### 4. ADMINISTRATIVE LAW

The most significant administrative law cases involve claims that an agency action violated a governing statute. Such claims require a comparison of the agency's action to Congressional intent. Injury typically

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<sup>325</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 341-347 (1976) (establishing the degree of deprivation of a right, liberty or property interest, the risk of error in a proceeding, and the cost of providing additional procedures as factors to be considered in a procedural due process challenge); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (deprivation of all economically viable use of a property constitutes a taking); *Penn Central Transportation Corp. v. New York City*, 438 U.S. 104, 124 (1978) (making the economic impact on the plaintiff a relevant factor in an ad hoc factual inquiry governing takings claims).

<sup>326</sup> See *Employment Division v. Smith*, 494 U.S. 872, 876-890 (1990) (generally allowing neutral rules to infringe free exercise); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (holding that state must exempt Yoder from a statute's application to protect his free exercise of religion).

<sup>327</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Haleah*, 508 U.S. 520, 533 (1993) (a post-*Smith* challenge to the statute, rather than its application); Isserles, *supra* note 219, at 435 n. 340.

<sup>328</sup> See Adler, *Coexistence*, *supra* note 303, at 342.

<sup>329</sup> See *Haleah*, 508 U.S. at 534-535 (Court examines text of ordinance and the context of its passage to determine whether it has a discriminatory purpose).

<sup>330</sup> See *Haleah*, 508 U.S. at 533 (lack of facial neutrality toward religion is grounds for invalidation).

plays no role at all in resolving the merits of such disputes. Narrower claims that an agency exercised its discretion arbitrarily or without substantial evidentiary support usually do not implicate injury either. These sorts of claims typically involve assessment of the quality of agency reasoning with injury becoming wholly irrelevant or peripheral. 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.

## 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.<sup>331</sup> Redistricting, according to the Court, can injure individuals by stigmatizing them on account of race or depriving their votes of impact.<sup>332</sup> The Court generally allows voters to challenge the constitutionality of their districts, but denies standing to voters whose challenge seems rooted in complaints about neighboring districts.<sup>333</sup> Yet, redistricting affects groups and usually does not aim at any individual voter.<sup>334</sup> Because the lines influence the structure of

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<sup>331</sup> See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 607-608 (2002) (describing how the Warren Court framed “framed federal constitutional oversight of the political process in the . . . language of individual rights.”).

<sup>332</sup> See John Hart Ely, *Commentary: Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 577-78, 586, 594 (1997) (reduction of influence white people experience in becoming part of a new district where blacks have enough votes to elect a black representative constitutes injury). In this area, some scholars have found the concept of injury itself extremely abstract. See Pildes & Niemi, *supra* note 316, at 506-516 (arguing that the Court's rejection of oddly shaped electoral districts shaped to enhance minority voting strength inflicts an “expressive harm”).

<sup>333</sup> See *Bush v. Vera*, 517 U.S. 952, 957-958 (1996) (allowing resident of allegedly gerrymandered district to challenge its constitutionality); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (generally only voters of challenged district have standing); *United States v. Hays*, 515 U.S. 737, 739 (1995) (denying standing to voter outside of gerrymandered district); *Sinkfield v. Kelley*, 531 U.S. 606 (2001) (denying standing to voter whose challenge primarily aimed at unconstitutionality of neighboring district).

<sup>334</sup> See Issacharoff, *supra* note, 331, at 606 (describing how a conception of equal  
(continued...)

government, (who gets to elect whom), linking individual harms to the redistricting decision seems difficult.<sup>335</sup>

The individual experience of injury that the Court envisions becomes completely irrelevant to analysis of the merits in this area.<sup>336</sup> When the Court reaches the merits it focuses upon questions about legislative motive, geography, political boundaries, demography, and transportation corridors.<sup>337</sup> Surely a requirement of individual injury does nothing to improve the concreteness of these abstract cases.<sup>338</sup>

### 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.<sup>339</sup> 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.

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 fairness. For example, in *Burnham v. Superior Court*,<sup>340</sup> Justice Scalia rejected judicial judgment about fairness as a touchstone for due process limits upon personal jurisdiction in a case accepting transient jurisdiction - jurisdiction

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<sup>334</sup>(...continued)

protection in terms limited to individual rights produced a failure to outlaw "categorical denial of registration" to all black voters in Alabama in *Giles v. Harris*, 189 U.S. 475 (1903)).

<sup>335</sup> See Issacharoff, *supra* note 331, at 608-609 ("an individual rights approach" fails to capture the "constitutional insult").

<sup>336</sup> See, e.g., *Bush*, 517 U.S. at 959-983.

<sup>337</sup> See, e.g., *id.*; Pildes & Niemi, *supra* note 316, at 527-586 (discussing methodology for addressing geographic "compactness" concerns).

<sup>338</sup> See Issacharoff, *supra* note 331, 596 (linking early reapportionment cases to "a somewhat abstract right to" full and effective participation). Issacharoff goes on to describe a major component of merits analysis in this area as "indeterminate to the point of incoherence." *Id.* at 635.

<sup>339</sup> See, e.g., Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENTARY 215, 225 (2002) (calling Black's majority opinion in *Youngstown* "a masterpiece of textual and formal analysis").

<sup>340</sup> 495 U.S. 604 (1990).

through the service of process upon somebody just temporarily with the forum state.<sup>341</sup> Scalia disapproved of the notion that judges' concrete response to the facts of the case before them should influence their judgments regarding due process.<sup>342</sup> Instead, he called for reliance upon formal rules derived from history.<sup>343</sup>

A more functional view of the role of judicial review might suggest a greater need to take injury into account.<sup>344</sup> But perhaps not.

A functional view involves taking context into account. But that does not establish that injury to litigants before the Court provides important or even relevant context, even for a functionalist.<sup>345</sup> 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.”<sup>346</sup>

Consider Justice Jackson's functionalist approach in *Youngstown*. Justice Jackson's analysis depends upon context, but not a personal injury context.<sup>347</sup> Rather, the relevant context involves the context of Congressional policy expressions about the matter at hand.<sup>348</sup> The injuries the steel makers might incur through Presidential seizure played no role in his opinion.<sup>349</sup>

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<sup>341</sup> Id. at 623-27 (plurality opinion).

<sup>342</sup> Id.

<sup>343</sup> Id. at 621-22.

<sup>344</sup> See Fiss, *supra* note 33, at 12 (suggesting that response to concrete facts might produce a true account of constitutional values).

<sup>345</sup> Cf. Elliott, *supra* note 136, at 150-156 (suggesting that the systemic effects of the legislative veto provide the correct context for considering its constitutionality from a functionalist perspective); Brown, *supra* note ?, at 126 (distinguishing consequences “involving separation of powers” from those “related to individual rights”).

<sup>346</sup> See BICKEL, *supra* note 10, at 55. Bickel links this argument to an endorsement of the idea of neutral principles and the embrace of Kant's categorical imperative. See ID. Bickel understands that his arguments about justiciability as 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 explain how the context of cases limits judicial review if the Court “rise[s] above the case.”

<sup>347</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring)

<sup>348</sup> See *id.* See also *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 593 (1985) (discussing role of statutory context, rather than individual context). Cf. Monaghan, *supra* note 68, at 1372-73 (constitutional questions can turn on “legislative facts,” such as “facts bearing on matters of economic or social organization”).

<sup>349</sup> See *Youngstown*, 343 U.S. at 584-85 (passing over takings claim to address issue of whether President had authority to issue the seizure order); J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENTARY

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 law<sup>350</sup> raises some questions about the value of having litigants' injuries influence the outcome of cases. A hard case often refers to a case where instincts about justice collide with the requirements of formal rules.<sup>351</sup> This can occur, for example, when a case presents an unusual fact pattern.<sup>352</sup> Because the designers of the rules may have created it with typical cases in mind, application of a perfectly good rule to an abnormal fact pattern can create unjust results.<sup>353</sup> A hard case can produce bad law, because the Court will often modify the law to bring about a just result under an unusual fact pattern making straightforward application of the rule unjust.<sup>354</sup> In so doing, the court may

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<sup>349</sup>(...continued)

37, 44 (2002) (the *Youngstown* Court “blew past” the takings issue the steel mill owners presented 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 189-194 (describing the enactment of the statute before the Court as federal adoption of a politically negotiated compromise between states).

<sup>350</sup> See, e.g., *N. Sec. Co. v. United States*, 193 U.S. 197, 400-01 (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 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”) (citing *East India Company 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, 966, n.15 (1998) (explaining the origins of the adage).

<sup>351</sup> See Phillip J. Closius, *Rejecting the Fruits of Action: The Regeneration of the Waste Land’s Legal System*, 71 NOTRE DAME L. REV. 127, 127 (1995) (stating that “sympathetic fact patterns” are a “judicial nightmare” because of the tension between societal values and the need to follow legal precedent).

<sup>352</sup> See, e.g., Andrew R. Klein, *A Legislative Alternative to “No Cause” Liability in Blood Products Litigation*, 12 YALE J. REG. 107, 108 (1995) (describing cases where courts have relaxed traditional rules of causation to permit hemophiliacs who contracted HIV from transfusions to collect damages from pharmaceutical companies).

<sup>353</sup> See Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1642 (1998) (stating that what is unjust may not be the law, but the law’s application to a particular case, for example the imposition a prison sentence upon an elderly drug addict).

<sup>354</sup> See Bhagwat, *supra* note, 350, at 968 (stating that “bad law” is the “distortion” of clear rule to reach a “just” result); 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

(continued...)

make the law function poorly with respect to more typical fact patterns, thereby disserving the law's purposes in most cases.<sup>355</sup> This suggests that allowing injuries to plaintiffs 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 upon 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*,<sup>356</sup> which struck down a legislative veto deporting Chadha, might hinge, not upon an assessment of the relevant constitutional text, general concerns about Congressional bills disagreeing with fact specific findings of executive branch officials, or the effects of legislative vetoes upon democratic accountability and constitutional structure, but upon the judge's feelings about the seriousness of deportation.<sup>357</sup> And *Clinton* 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 approach would

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<sup>354</sup>(...continued)

mistreatment of employees by their employers, are tempted to bend the law to afford victims compensation).

<sup>355</sup> See Schauer, *supra* note 186, at 655-56 (discussing problem of "result-oriented" decision in one case causing too much harm in subsequent cases controlled by that cases reasoning).

<sup>356</sup> 462 U.S. 919 (1983).

<sup>357</sup> Chadha's counsel argued that a favorable ruling would make him "a citizen by the 4<sup>th</sup> of July." See 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 reply upon his wife's status as a citizen as the basis for seeking citizenship. This would involve a long uncertain bureaucratic process placing him in limbo. *Id.* Justice White suggested this may have influenced the Court's decision. See *Chadha*, 462 U.S. at 974 (White, J., dissenting) (suggesting Court had struck down all legislative vetoes based on an "atypical" case).

raise some questions about legitimacy.<sup>358</sup> 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*.<sup>359</sup> 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.<sup>360</sup> Thus, the *Brown* Court held that separate educational facilities are inherently unequal.<sup>361</sup>

Surely, equal protection law gained something from taking litigants' experiences of inequality into account.<sup>362</sup> 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.<sup>363</sup> He may have had then recent civil rights litigation in mind, even though he

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<sup>358</sup> 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).

<sup>359</sup> 347 U.S. 483, 493-94 (1954) (drawing on history of graduate student education and findings of the lower courts regarding segregation's effects). See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (denial of black student's application to law school violates separate but equal doctrine when state provides no law school for blacks); *Norris v. Alabama*, 294 U.S. 587 (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 (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 (1914) (statute subjecting citizens who are not descendants of people with voting rights prior to 1866 to a literacy test violates 15<sup>th</sup> Amendment, since it tends to deny suffrage to blacks). Cf. *Nixon v. Herndon*, 273 U.S. 536 (1926) (declaring a prohibition of negro voting facially invalid). Of course, the *Brown* Court did not rely solely upon the experience of case law. See *Brown*, 347 U.S. at 494-95 n. 11 (citing social science studies).

<sup>360</sup> See *Brown*, 347 U.S. at 494-95 n. 11 (citation to social science seeking to bridge gap between a particular lower court finding and the general result).

<sup>361</sup> *Id.* at 495.

<sup>362</sup> See, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (reversing conviction of black defendants denied counsel after a full trial); *Brown v. Mississippi*, 297 U.S. 278 (1936) (reversing conviction of "ignorant negroes" based on confession extracted through torture); *Chambers v. Florida*, 309 U.S. 227 (1940) (reversing conviction of black defendants based on a coerced conviction after examination of a detailed record).

<sup>363</sup> See *infra* note 188.

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 requirements for injury to make litigation concrete and its incapacity to do so under many judicial doctrines raises doubts about the constitutional foundation of standing doctrine.<sup>364</sup> 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.<sup>365</sup> The claim that standing fosters better "presentation of issues," which Scalia has disavowed, 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 in the past. Indeed, direct references to "concrete adverseness" nowadays often appear in dissenting or concurring opinions.<sup>366</sup>

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<sup>364</sup> Scholars have expressed doubts about standing on non-functional grounds as well. *See, e.g.*, Pushaw, *supra* note 74, 82, at 480-82 (arguing that a case historically required no individualized injury).

<sup>365</sup> *See* Scalia, *supra* note 57, at 891. *Accord* Monaghan, *supra* note 68, at 1385 (there is no necessary connection between a personal interest and sharp presentation of issues).

<sup>366</sup> *See, e.g.*, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 121 (1998) (Breyer, J., concurring) (standing is meant to ensure "concrete adverseness"); Lewis v. Casey, 518 U.S. 343, 399-400 (1996) (Souter J., concurring) (citing need for a "concrete factual context" as requiring a less demanding standing requirement than the majority imposes); Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (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). *Cf.* Federal Election Commission v. Akins, 524 U.S. 11, 20 (1998) (standing requirements helps court to avoid "abstract, intellectual problems," in favor of "concrete living contests between adversaries") (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 759-60 (linking separation of powers to need for suits on "identifiable government (continued...)

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 limitations 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 concrete adverseness seeks to provide.<sup>367</sup> 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.<sup>368</sup> 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.

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.<sup>369</sup> This concept has influenced the Court's decisions to raise the standing bar, even though the Court has not endorsed the concept it explicitly.<sup>370</sup> Scalia himself recognizes that this

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<sup>366</sup>(...continued)

violations of law" as opposed to "particular" agency "programs"). Second, 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); *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 78 (1991) (unanimous opinion); *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 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). See also *Akins*, 524 U.S. at 20 (referring to concrete adverseness indirectly by contrasting abstract disputes with living contests between adversaries in case decided since *Wyoming v. Oklahoma*). 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 the idea of remedial concreteness. See *Spencer v. Kemna*, 523 U.S. 1, 11 (1998) (per Scalia, J.). Cf. *Spencer*, 523 U.S. at 23 n. 2. (Ginsburg, J., concurring) (affirming the centrality of concrete adverseness). See also *Clinton v. City of New York*, 524 U.S. 417, 462-63 (1998) (Scalia, J., dissenting and concurring in part) (claiming that the view of standing as only supporting concrete adverseness has been superseded).

<sup>367</sup> See *Spencer*, 523 U.S. at 11 (concrete adverseness is not the only function that standing performs).

<sup>368</sup> See Scalia, *supra* note 57, at 894-99.

<sup>369</sup> See *id.* at 894.

<sup>370</sup> See, e.g., *Defenders*, 504 U.S. at 561-62 (Scalia J.) (standing is more difficult (continued...))

concept would require imposition of new requirements going beyond those embraced in the injury-based standing doctrine.<sup>371</sup> Indeed, this conception makes injury-in-fact beside the point, since the central inquiry should compare a litigant's interest to the majority's to figure out whether a litigant was in the minority.<sup>372</sup>

The anti-majoritarian 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. But the idea that interfering with executive branch violations of law at the behest of beneficiaries of legislative enactments is improper seems odd to say the least.<sup>373</sup> 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 cut-offs in order to secure executive branch compliance with the constitutional duty to faithfully execute the law.<sup>374</sup> This seems at odds with traditional notions of separation of powers, since it emphasizes Congressional enforcement, rather than enactment of law, and denies a judicial role in enforcement (at least in many cases).

Not only does Scalia's counter-majoritarian 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.<sup>375</sup> He argues that the judiciary's tendency to value "abstract principle" above "concrete result" suits protection of individuals, but not protection

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<sup>370</sup>(...continued)

to establish when the plaintiff is the not the object of the regulation).

<sup>371</sup> See *id.* at 895 (not all injury would justify standing under this conception).

<sup>372</sup> *Cf.* *id.* at 895 (claiming that his conception explains the injury requirement).

<sup>373</sup> 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 underenforcement of law is a majoritarian harm. *Id.* at 849. 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 lots of people benefit from corporate production). But then he 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 isn't 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.

<sup>374</sup> *Cf.* Bandes, *supra* note 65, at 262 (Court's emphasis on avoiding improper interference involves a choice not to fulfill Court's role in making sure that other branches of government do not exceed their powers).

<sup>375</sup> *Id.* at 896.

of a majority interests.<sup>376</sup> He does not explain why merits adjudication in individual rights cases would be (or should be) based on abstract principle, or why adjudication on behalf of majority interests would require emphasis upon concrete results. The analysis presented in this paper 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.<sup>377</sup> 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.<sup>378</sup> But that position has not commanded a majority of the Court.<sup>379</sup> While thorough discussion of this theory would require another article, a brief indication of why this may not prove satisfactory seems worthwhile. The Article II theory begins with the premise that the Executive’s power to “take care the law is faithfully executed” limits other parties’ capacity to sue.<sup>380</sup> 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 the executive branch of the federal government in the early days of the

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<sup>376</sup> *Id.*

<sup>377</sup> Scalia puts forward environmental law as an example of law serving a majority interest. *See id.* at 895-97.

<sup>378</sup> *See, e.g., Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 778 n. 8 (2000) (Scalia, J.) (mentioning the possibility of article II limitations upon standing); *Federal Election Comm’n v. Akins*, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting) (if “the citizenry at large could sue to compel Executive compliance with the law” then the courts, rather than the executive, would have the primary responsibility to “take Care that the Laws be faithfully executed.”) (citing U.S. Const., Art. II, § 3); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Congressional creation of citizen standing to vindicate public interest would transfer the President’s duty to take care that the law be faithfully executed). *See also Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 197, 209 (2000) (concurring and dissenting opinions) (flagging but declining to address article II theory of standing).

<sup>379</sup> *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 n. 4 (1998) (Scalia, J.) (standing jurisprudence derives from Article III, not Article II).

<sup>380</sup> *See generally* Stephen G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L. J.* 541 (1994); Stephen G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *HARV. L. REV.* 1153 (1992); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L. J.* 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994).

Republic.<sup>381</sup> Such an interpretation would disregard the historic role of state, territorial, and tribal governments in executing laws, not to mention private parties.<sup>382</sup>

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.<sup>383</sup>

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.<sup>384</sup>

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.<sup>385</sup>

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<sup>381</sup> See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957(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 framer's expectation that federal government could rely upon state executive officers to enforce federal law).

<sup>382</sup> See *Vermont*, 529 U.S. at 774-77 (recognizing the historic pedigree of private qui tam actions to enforce federal law); *Hodel v. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (recognizing and approving the cooperative federalism arrangement pervading environmental law); *Nance v. EPA*, 645 F.2d 701, 712-15 (9<sup>th</sup> Cir. 1981) (upholding delegation of federal authority to Indian Tribe).

<sup>383</sup> Cf. *Buzbee*, *supra* note 191, at 283 (pointing out the incongruity of Scalia's suggesting an article II basis for standing without even arguing that citizens can never enforce statutory law).

<sup>384</sup> See Sunstein, *supra* note 96, at 1471 (the "Take Care" clause does not authorize the executive branch to violate the law); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 647 (1999) (ruling that an executive branch official has violated the law at the behest of a citizen does no violence to article II). See also *Buzbee*, *supra* note 191, at 274-277 (discussing how citizen suits can only enforce detailed political judgments embodied in regulations and statutes).

<sup>385</sup> 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 *Fletcher*, *supra* note 64, at 223 (proposing abandonment of the view that Article III requires injury-in-fact); Sunstein, *supra* note 96, 1461-62 (Article III does not limit authority to adjudicate Congressionally created causes of action); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L. J. 1141, 1169 (1993) (the Constitution does not require the private rights model embraced in *Defenders of Wildlife*); Richard J.

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Of course, standing doctrine has never been applied consistently, as many critics have frequently noted.<sup>386</sup> This raises the possibility that standing requirements might vary its demands with doctrinal needs for concreteness.<sup>387</sup> Current practice does not vary standing demands in such a systematic fashion. For example, many observers claim that the Court has been especially demanding in the environmental area, even though individual injury has little to do with the merits of many environmental claims reaching the Supreme Court.<sup>388</sup>

The suggestion that standing might vary with needs 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.<sup>389</sup> Even without an injured litigant, the Court could dismiss a case where the law has not been applied to clarify the scope of the challenger's claim. And mootness could still function to bar abstract orders, where ideological plaintiffs seek orders that remedy hypothetical misconduct that seems unlikely to occur.

The expansion of certiorari jurisdiction since Bickel wrote lessens the need for justiciability doctrine to avoid or postpone decision at the

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<sup>385</sup>(...continued)

Pierce, Jr. *Lujan v. Defenders of Wildlife as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L. J. 1170, 1178 (1993); Buzbee, *supra* note 191, at 283. This article shows that a functional approach supports this same conclusion.

<sup>386</sup> See, e.g. Bandes, *supra* note 65, at 266 (stating the injuries similar to those found insufficient in *City of Los Angeles v. Lyons*, *Laird v. Tatum*, and *Sierra Club v. Morton* have justified standing in other cases); Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L. J. 185, 212 (1980) (complaining about judicial manipulation of redressability requirement); Nichol, *supra* note 50; Fletcher, *supra* note 64, (discussing in detail the concept of injury and its relationship to the merits).

<sup>387</sup> See Bandes, *supra* note 65, at 269 (arguing that adversity and matters of concreteness are matters of degree and that the "requisite quantity" of these attributes should vary according to the case's nature).

<sup>388</sup> See Katherine B. Steuer & Robin L. Juni, Note, *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. Defenders of Wildlife*, 15 HARV. ENVTL. L. REV. 187, 188 (1991) (the Supreme Court's *Lujan* decision renders the injury-in-fact requirement of standing more difficult to meet in environmental citizen suits).

<sup>389</sup> See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 531 (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 where an analysis of the relevant substantive law suggests that they would not. See *infra* notes 250-256 and accompanying text.

Supreme Court level.<sup>390</sup> But justiciability continues to remain an important tool for limiting or postponing decisions in the lower federal courts.<sup>391</sup> 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 claims. 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.<sup>392</sup> Standing doctrine will likely persist, precisely because of the Court's formalist tendencies. Standing doctrine sets out 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 types of judicial proceedings.<sup>393</sup> 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.<sup>394</sup> Still, at this point, *stare decisis* supports standing. Under these circumstances, recognition that experience has revealed the doctrine's futility may have a more modest result than killing the doctrine outright or confining it to some as applied individual rights challenges.<sup>395</sup> Perhaps this recognition should lead to more liberal treatment of injury, which might include less use of heightened

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<sup>390</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Stevens, J., concurring) (Court should have denied certiorari in case seeking adjudication of whether constitution limits visitation rights of grandparents). I am grateful to Harry Wellington for this suggestion.

<sup>391</sup> I am grateful to Richard Fallon for emphasizing this.

<sup>392</sup> See Scharpf, *supra* note 389, at 534 (Bickel's justification for the passive virtues "is, at bottom, a functional one.").

<sup>393</sup> See Pushaw, *supra* note 74, 82, at 480-482, 526-27 (arguing that cases do not involve controversies between adverse parties); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (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 a "legislative dispute" can constitute a "controversy").

<sup>394</sup> See Nichol, *supra* note 385, at 1151-52 (discussing historical evidence); 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."); Pushaw, *supra* note 55, at 477-485 (arguing that a neo-federalist approach would allow standing without injury-in-fact, if Congress or the constitution authorized suit). See also Evan Camminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341 (1989) (examining the long history of one cause of action not requiring injury).

<sup>395</sup> See generally Schauer, *supra* note 186, at 655 (explaining that reliance on general reasoning affecting multiple hypothetical cases makes the requirement of a "concrete case" seem "peculiar.")

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.<sup>396</sup> 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 standing doctrine ever did.<sup>397</sup>

#### 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,<sup>398</sup> well, rather indirect.<sup>399</sup> A litigant with standing almost always will come along sooner or later to seek adjudication of an issue.<sup>400</sup> The Court's decisions in *Bush v. Gore*,<sup>401</sup> *United States v.*

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<sup>396</sup> See *Warth v. Seldin*, 422 U.S. 490, 528 (1975) (Brennan J., dissenting) (arguing that Court denied standing through application of a heightened pleading standard); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590-93 (Blackmun, J., dissenting) (suggesting that the Court did not properly apply summary judgment principles in denying standing). Cf. *Winter*, *supra* note 62, at 1373 (standing law has increasingly restricted claims against the government); *Nichol*, *supra* note 385, at 1167 (describing how the Court bolstered standing requirements over two decades).

<sup>397</sup> See *Nike, Inc. v. Kasky*, 71 U.S.L.W. 4602, 4605 (2003) (Stevens, J., concurring) (need for 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 pleading are cutting federal courts off from human experience).

<sup>398</sup> See *Katyal*, *supra* note ?, at 1713 (Bickel's passive virtues focused upon avoiding decisions through denials of certiorari and doctrines of standing, ripeness, and political questions)

<sup>399</sup> Standing doctrine may have emerged as a reaction against Lochnerism, since rejected on the merits. See *Flast v. Cohen*, 392 U.S. 83, 107 (1968) (Douglas J. dissenting) (suggesting that allowing standing in the *Frothingham* case in 1923 "accentuated an ominous trend to judicial supremacy"); *Winter*, *supra* note 62, at 1455-1457 (suggesting that standing doctrine allowed liberals to avoid Lochner-era vices).

<sup>400</sup> See *Scharpf*, *supra* note 389, at 536 (standing and other justiciability restraints, apart from the political question doctrine, avoid a case, not the constitutional issue involved).

<sup>401</sup> 531 U.S. 98 (2000) (per curiam) (holding that Florida should not recount ballots in the 2000 Presidential election). See Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L. J. 1407, 1407-1408 (2001) (*Bush v. Gore* has shaken many academics' confidence in judicial review, because of its highly partisan nature).

*Lopez*,<sup>402</sup> and *United States v. Morrison*<sup>403</sup> may demonstrate that standing cannot effectively constrain an activist judiciary.<sup>404</sup> The ideal of judicial practices designed to improve the concreteness of public law, even if some of it can never be terribly concrete because of its fundamental structure, does have merit.<sup>405</sup> 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.<sup>406</sup>

## 1. CONFINING DECISION TO BRIEFED ISSUES

The Court often emphasizes that standing and other judicial doctrines assure adverse presentations helping to define and illuminate the issues before them. 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.<sup>407</sup>

The Court's doctrine demands that the Court confine itself to

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<sup>402</sup> 514 U.S. 549 (1995) (holding for the first time since the New Deal, that Congress has exceeded its authority under the Commerce Clause).

<sup>403</sup> 529 U.S. 598 (2000) (holding that Congress lacked the authority under the Commerce Clause and the Fourteenth Amendment to enact the Violence Against Women Act). See William W. Buzbee and Robert A. Shapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 110-111 (2001) (characterizing *Morrison* as the first case in more than 50 years to reject a Congressional finding that regulated activities substantially affect interstate commerce); Catharine A. Mackinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 135 (2000) (*Morrison* is only the second case since reconstruction to invalidate a federal anti-discrimination statute).

<sup>404</sup> Since litigants in all of these cases had standing, the Court was able to aggressively interpret constitutional constraints on legislative power.

<sup>405</sup> See Tushnet, *supra* note 68, at 1707 (suggesting several procedural devices to serve standing's goal of aiding understanding of a decision's consequences).

<sup>406</sup> See Katyal, *supra* note ?, at 1712-1715 (linking constructive use of silences and giving of advice in merits opinions to Bickel's passive virtues); Sunstein, *supra* note 155, at 51 (linking minimalist reasoning on the merits to Bickel's passive virtues). See, e.g., Elliott, *supra* note 136, 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).

<sup>407</sup> See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 121 (1998) (Breyer, J., concurring) (criticizing parts of the majority opinion not informed by parties' briefing as not benefitting "from the 'concrete adverseness' the standing doctrine is meant to ensure.") Cf. Fiss, *supra* note 33, at 13 ("The judge is entitled to exercise power only after he has participated in a dialogue about the meaning of public values.")

briefed issues.<sup>408</sup> But the Court often ignores this doctrine.<sup>409</sup> Indeed, justiciability doctrines undermine the practice of only resolving issues briefed by the parties.<sup>410</sup> For they require that the Court consider jurisdictional defects whether or not the parties raise them.<sup>411</sup> The Court should adopt a simple solution to that problem. When it sees a potential jurisdictional defect not adequately briefed by the parties, it should order briefing.<sup>412</sup> 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 briefs.<sup>413</sup> This carries with some of the same risks of unwise decision-making that come from deciding unbriefed issues. And the Court can address this by requesting supplement 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

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<sup>408</sup> See, e.g., *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 n. 8 (1997) (issue of whether a litigant making a takings claim has exhausted available state procedures not considered, because not briefed).

<sup>409</sup> See, e.g., *Devins*, *supra* note 99, at 261-262 (explaining that the Court in *Erie Railroad Co. v. Tompkins* overruled *Swift v. Tyson* even though no party sought that ruling); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 915 n. 16 (1989) (Blackmun J., dissenting) (chiding the majority for addressing ripeness when it was not briefed or argued).

<sup>410</sup> See, e.g., *Los Angeles v. Davis*, 440 U.S. 625, 636-37 (1979) (Powell, J., dissenting) (chiding majority for mootness dismissal when defendant below did not argue this point); *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 214, 231-32 (1990) (finding a lack of standing when no 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. *Id.* at 234-35. Dallas' attorney believed that some of the Petitioners lost licenses to run adult entertainment businesses under the provisions they sought to challenge. *Id.* at 236. 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 250 (Stevens J., concurring) (saying he would remand for an evidentiary hearing, rather than order dismissal on standing grounds).

<sup>411</sup> See *Devins*, *supra* note 99, at 258 (if the plaintiff lacks standing, the judiciary must dismiss the case, whether or not the defendant raises a standing defect); *Lewis v. Casey*, 518 U.S. 341, 393 (1996) (Souter J., concurring) (chiding majority for its treatment of standing in a case where neither party raised it);. See also *Reno v. Catholic Social Services*, 509 U.S. 43, 57 n. 18 (1993) (Court may raise non-jurisdictional ripeness defect on its own motion).

<sup>412</sup> See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997) (Court called for briefing on standing when it granted petition for certiorari). *Cf. Reno*, 509 U.S. at 57 n. 18, 67-68 (majority resolves ripeness claim only briefly touched upon in the briefs).

<sup>413</sup> See S. Ct. Rule 14(1)(a) ("a question presented is deemed to comprise every subsidiary question fairly included therein").

the Court believes serves the purposes of the law.<sup>414</sup>

Current doctrine, however, allows the Court to use rationales offered by no party, as long the Court confines itself to issues the parties raise.<sup>415</sup> Because the line between an issue and a rationale can be very blurry,<sup>416</sup> 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.<sup>417</sup> An injured plaintiff under current doctrines licenses the Court to decide the case on any grounds it finds sensible (although the Court's usually chooses to confine itself to questions presented by litigants).<sup>418</sup> And it can choose

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<sup>414</sup> See, e.g., Devins, *supra* note 99, at 262 (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).

<sup>415</sup> See *id.* at 282 (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);

<sup>416</sup> For example, in *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788 (1984), 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 Fund “because it disagreed with their view points”, since that issue “was neither decided nor fully briefed before this Court.” 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 issue, rather than a separate issue. See also *Suitum v. Tahoe Regional 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); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1484-1485 (2002) (identifying theories that were separate issues not before them and three theories as “fairly encompassed” within the facial takings claim before the Court).

<sup>417</sup> See Sunstein, *supra* note 155 (discussing judicial “minimalism”).

<sup>418</sup> See Pushaw, *supra* note 74, 82, 489-493 (cases confer upon judges the right to “expound” the law). See, e.g., *Yee v. 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. & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885) (citing 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 this rule); *Brockett v. Spokane Arcades*, 472 U.S. 491, 501 (1985) (citing this rule); *Broderick v. Oklahoma*, 413 U.S. 601, 609-615 (1973) (declining to find facial overbreadth when alleged overbreadth appears insubstantial).

broad grounds for decision-making if it wants to.<sup>419</sup>

Narrow decisions tend toward concreteness. They rely less on general abstractions about law and a little more upon specific reasons for particular outcomes in a case.

Narrow decisions would have another benefit; they might lessen the number of concurring decisions.<sup>420</sup> These days, multiple long Supreme Court opinions giving a wide variety of grounds for decisions of varying scope seem fairly common.<sup>421</sup> Such opinions can leave the law in a state of confusion.<sup>422</sup> If judges directed substantial energy toward finding narrow grounds for agreement, one might see shorter clearer opinions (and fewer of them) in some cases.<sup>423</sup>

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.<sup>424</sup> Dormant commerce clause jurisprudence regarding interstate taxation offers perhaps the best example of this problem.<sup>425</sup>

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<sup>419</sup> See Fallon, *supra* note 78, at 24 (Court routinely issues broad pronouncements and occasionally renders alternative holdings to achieve “doctrinal clarification on multiple fronts.”); Sunstein, *supra* note 155, at 15 (claiming that no consensus exists on the appropriateness of minimalism).

<sup>420</sup> Cf. Sunstein, *supra* note 155, at 17, 20 (suggesting that concrete narrow decisions can bring together a multi-member court).

<sup>421</sup> See, e.g., *Burnham v. Superior Court*, 495 U.S. 604 (1990) (question of transient jurisdiction generating three opinions); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (no majority opinion).

<sup>422</sup> See *Seminole Tribe of Florida 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); *Grutter v. Bollinger*, slip op. at 12-13 (2003) (describing lower court confusion in the wake of multiple opinions in *Bakke* and acknowledging difficulty of applying the test for interpreting such opinions).

<sup>423</sup> See, e.g., *Yee*, 503 U.S. at 539 (Blackmun J., concurring, and Stevens J., concurring) (both concurrences generated by unnecessary remarks in the majority opinion regarding an issue the Court had concluded was not within the scope of the question presented); *Lewis v. Casey*, 518 U.S. 343, 394 (1996) (Souter, J., concurring) (Court’s decision to address a standing issue prevented issuance of a unanimous opinion on the question forming the basis for certiorari).

<sup>424</sup> See *Grutter v. Bollinger*, slip op. at 9 (Thomas, J., dissenting) (arguing that making diversity a compelling state interest in one context, but not in another, is unprincipled). Cf. Sunstein, *supra* note 155, at 16 (discussing Justice Scalia’s view that broad rules serves rule of law values).

<sup>425</sup> See *Camps Newfound/Athena, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 610-11 (1997) (Thomas, J. dissenting) (calling dormant commerce clause jurisprudence unworkable and citing numerous statements by justices referring to this jurisprudence as a “quagmire” or otherwise remarking on its incoherence); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 217 (discussing the ubiquity of dormant  
(continued...)

Furthermore, narrow decisions can raise transaction costs.<sup>426</sup> 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.<sup>427</sup>

Hence, the decision about whether to prefer narrow grounds of decision will necessarily involve many considerations.<sup>428</sup> 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 issues.<sup>429</sup> The narrowly framed issue can lose, to use a poorly chosen term, concrete adverseness. But the Court can solve that problem by adopting a practice of asking for supplemental briefing on narrowly defined questions when litigants frame a dispute too broadly.<sup>430</sup>

The Court's practice of disfavoring facial challenges serves the function that the Court wrongly assigns to the standing doctrine, avoidance

<sup>425</sup>(...continued)

commerce clause rulings); Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 *TAXLAW* 37, 44 (1987) (chiding the Court for line drawing "discernible, if at all, only to itself"); D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, 234 (1985) (describing this jurisprudence as arbitrary and conclusory); LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 439 (1988) (describing jurisprudence as "ad hoc" and not based on "consistent application of coherent principles"). I am not suggesting that dormant commerce clause cases rely upon injury to produce concreteness. *Cf.* *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343-44, 353-54 (1976) (injuries focus on economic burdens, but resolution of merits focus on lack of consumer benefits associated with those burdens). Indeed, this area combines narrow rulings with abstraction. *See, e.g.*, *Harrison*, 520 U.S. at 568-69, 575-76, 595 (limitation 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).

<sup>426</sup> *See* Sunstein, *supra* note 155, at 17 (linking narrow decisions to high costs for litigants and judges in subsequent cases).

<sup>427</sup> *Cf.* Elliott, *supra* note 136, at 162 (suggesting possibility that the broad opinion in *Chadha* might be a "wise exercise of judicial statesmanship")

<sup>428</sup> *See* Sunstein, *supra* note 155 (discussing some relevant considerations).

<sup>429</sup> *See, e.g.*, Strauss, *supra* note 273, at 791-92 (pointing out that the disputants in *Chadha* may not have defined the issue narrowly).

<sup>430</sup> *See, e.g.*, *Regents of California v. Bakke*, 438 U.S. 265, 281 (1978) (plurality opinion) (Court requested supplemental briefing on statutory civil rights claim in hopes of obviating need to resolve a constitutional equal protection issue); *Yee v. Escondido*, 503 U.S. 519, 535 (1992) (Court has "on occasion" asked litigants "to address an important question of law not raised in the petition for certiorari"). A more modest, and probably insufficient cure, would rely upon narrow questions at oral argument. *Cf.* *R.A.V. v. St. Paul*, 505 U.S. 377, 381-382 n.3, 397-398 (1992) (majority relied upon theory raised only in oral argument and a reply brief, and concurrence considered the theory not to have been briefed).

of improper interference with democratic decisions.<sup>431</sup> 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.<sup>432</sup>

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 *Morrison* and *Lopez*, subscribes to the rule that a regulatory program remains constitutional even if a particular commercial application of that program might violate the commerce clause if viewed in isolation.<sup>433</sup> This rule also limits improper interference, by eschewing interference with programs addressing problems that substantially affect interstate commerce through the aggregation of seemingly local activities.<sup>434</sup> One may question whether the Court has interfered improperly with democratic decision-making in this area 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.<sup>435</sup> 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 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 insisting upon

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<sup>431</sup> See *Erzoni v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (caution is needed when considering facial challenges, because invalidation can unnecessarily interfere with state regulatory programs).

<sup>432</sup> See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L. J. 853 (1991); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Dorf, *supra* note 85, at 261-279 (arguing the overbreadth doctrine protects against chilling of protected conduct); *Virginia v. Hicks*, 71 U.S.L.W. 4441, 4442 (2003) (same). See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (striking down anti-loitering ordinance as impermissibly vague on its face).

<sup>433</sup> See *United States v. Lopez*, 514 U.S. 549, 558 (1995) (when "a . . . regulatory statute bears a substantial relationship to interstate commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.") (citation omitted); *United States v. Morrison*, 529 U.S. 598, 609 (2000) (reaffirming the *Lopez* framework); *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 531 U.S. 159, 173 (2001) (affirming that the Court would have to consider regulated activity in the aggregate to adjudicate constitutionality of Clean Water Act jurisdiction).

<sup>434</sup> See *Lopez*, 514 U.S. at 558; John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998) (discussing the aggregation issue in light of *Lopez*).

<sup>435</sup> See *Lopez*, 514 U.S. at 603-608 (Souter J., dissenting); *Morrison*, 529 U.S. at 628-655 (Souter, J., dissenting).

proof on injury even as the Court's jurisprudence diminishes injury's relevance<sup>436</sup> provides some tools for clarifying the debate regarding facial versus 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 commentators have suggested that a continuum exists between a pure as-applied challenge and a facial challenge that strikes down a rule in its entirety.<sup>437</sup> This article's analysis helps clarify the nature of the continuum.

The as-applied end of the continuum involves challenges where the intensity of injury or defendant misconduct influences the merits, as in takings cases and procedural due process cases.<sup>438</sup> In such cases, even when a plaintiff challenges a formal legal rule, the result of the case is likely to have uncertain precedential significance upon the challenged rule itself, since intensity and the nature of injury can vary from case to case. In these cases, the injury performs the function of making the consequences of an application of legal rules clear. The Court's focus on individual consequences, however, obscures the case's significance for the rule as a whole.<sup>439</sup>

In the middle of the continuum, the Court explicitly invalidates part of a rule, but not all of it.<sup>440</sup> The Court may use a categorization of the injury to frame the issue it does resolve or the relief it offers instead of exploring the injury's intensity.<sup>441</sup> But since both the Courts and lawyers can frame issues broadly or widely, the injury does not determine the

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<sup>436</sup> See, e.g., Isserles, *supra* note 219, at 435 n. 340, 448-51 (discussing examples of doctrinal shifts away from consideration of effects upon individuals in the free exercise area). See generally Eisgruber & Sager, *supra* note 312 (discussing conceptions of free exercise based on formal equality and conceptions based on "privileges").

<sup>437</sup> See, e.g., Dorf, *supra* note 85, at 294 (distinction between facial and as-applied challenges may confuse more than it illuminates).

<sup>438</sup> See *State Farm Mutual Automobile Insurance 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. Doehr*, 501 U.S. 1, 4, 14-16 (1991) (relying upon 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).

<sup>439</sup> 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 reasoning of a state trial court judge to frame an as applied challenge, thereby leaving the opinion unclear as to the overall validity of Washington's statute).

<sup>440</sup> See, e.g., *United States v. Raines*, 362 U.S. 17 (1960) (holding that Congress may proscribe state interference with voting rights under statute that proscribed state or private interference with voting rights).

<sup>441</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399, 402-406, 407-408, 420 (1989) (framing the issue in terms of Johnson's conduct, categorized as expressive).

breadth of these holdings or the remedies.<sup>442</sup> 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,<sup>443</sup> the holding of a lower courts,<sup>444</sup> or its own view of the subrule it wants to adjudicate to frame the case<sup>445</sup>. Because of this fluidity many cases can be characterized as either challenges to rules or as challenges to application of rules.<sup>446</sup>

Finally, many statutory challenges to administrative regulations, most structural constitutional law challenges, and a significant number of individual rights cases involve facial challenges, where the principal issue is whether a rule violates some constitutional or statutory norm.<sup>447</sup> As, legal tests become more formal, facial challenges should become more common, because formal tests do not depend upon intensity of injury at all,

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<sup>442</sup> See, e.g., Johnson, 491 U.S. at 399, 403 n. 3 (framing issue in terms of expressive conduct generally, not just demonstrations at the Republican National Convention). See generally Frederick Schauer, *supra* note 186 (explaining that reasons always go beyond the facts they relate to); Frederick Schauer, *The Generality of Rights*, 6 J. LEGAL THEORY 323 (2000).

<sup>443</sup> See Raines, 362 U.S. at 25 (limiting challenge to statutory subrule framed by defendant's identity as state officials); *Dusenberry v. United States*, 534 U.S. 161, 168-169 (2002) (challenge to constitutional adequacy of notice framed in terms of defendant's conduct in delivering a certified letter under a statute that authorized use of the mail generally); Isserles, *supra* note 219, at 433 (describing challenge to statute construed to conform to a particular context as an as applied challenge).

<sup>444</sup> See Isserles, *supra* note 219, at 429-430 (suggesting that challenges to statutes narrowed through judicial construction may be considered as facial challenges).

<sup>445</sup> See *Virginia v. Black*, 123 S. Ct. 1536, 1556-1557 (2003) (Stevens J., concurring) (accusing plurality of adjudicating an as applied challenge based on a construction implicit in a trial court's jury instruction, and incorrectly labeling it a facial challenge).

<sup>446</sup> See Adler, *supra* note 303, at 36, 37, 156-157 (characterizing most cases as involving rights against rules); Isserles, *supra* note 303, at 423-451 (characterizing many cases as involving as applied challenges); Fallon, *supra* note 218, at 1368 (arguing that as-applied challenges remain the norm). It is possible that further inquiry might lead to a less agnostic position, but if so this would probably require more elaboration of definitions of as-applied and facial challenges than I can offer in this article. I confine myself to describing the basic illumination the concreteness paradox provides without extensive further analysis.

<sup>447</sup> See Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 8 (1981) (facial invalidity involves the "relationship" between the rule and the applicable constitutional law); Isserles, *supra* note 219, at 405 (equating facial challenges to regulations under a statute with facial challenges to the constitutionality of a statute); Dorf, *supra* note 85, at 260 (Court views drawing of discriminatory lines as a constitutional violation, irrespective of their effects). See, e.g., *Troxel*, 530 U.S. at 75-79 (Souter, J., concurring) (resolving facial challenge to statute allowing any person visitation rights when visitation serves the child's best interests); *Boos v. Barry*, 485 U.S. 312, 334 (prohibition on signs critical of a foreign government is an invalid content-based restriction of speech); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (prohibition of all picketing of schools except peaceful labor picketing was an invalid content-based restriction).

but upon the formal properties of legal rules and resolution of conflict of law claims.<sup>448</sup>

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,<sup>449</sup> seems to reflect a view that constitutional litigation hinges upon the intensity of injuries, when many cases involve some analysis of conflict of law claims.<sup>450</sup> But in *Salerno* itself, the Court engaged in an abstract analysis that properly focused upon general reasoning about whether the constitution permitted pre-trial detentions based upon risks to the community's safety, rather than risk of pre-trial flight.<sup>451</sup> The broader perspective this article offers, by extending the rights against rules thesis beyond the area of individual rights, confirms that *Salerno* properly affirms the legitimacy of adjudication of facial conflict of laws claims.<sup>452</sup> 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.<sup>453</sup>

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 laws affects, 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

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<sup>448</sup> See Isserles, *supra* note 219, at 363-64 (a facial "valid rule challenge" challenges a "defect inhering in the statute itself").

<sup>449</sup> See *United States v. Salerno*, 481 U.S. 739, 745 (1987).

<sup>450</sup> See Isserles, *supra* note 219, at 383 (*Salerno*'s test seems to require a Herculean effort to demonstrate that each and every hypothetical application of a statute is invalid). Professor Isserles, however, concludes that *Salerno*'s test should be read as not requiring the hypothetical inquiry it seems on its face to call for. *Id.* at 386-88.

<sup>451</sup> *Salerno*, 481 U.S. at 747-749. See *Washington v. Glucksberg*, 521 U.S. 702, 739-40 (1997) (Stevens J., concurring) (we have never applied the test *Salerno* suggests, not even in *Salerno*).

<sup>452</sup> Isserles, *supra* note 219, at 387 (a facial challenge demonstrates that the terms of a statute contains a "constitutional infirmity" when measured against "relevant constitutional doctrine")

<sup>453</sup> See Isserles, *supra* note 219, (judgment about whether to strike down a statute on its face or to adjudicate more narrowly must rest upon assessment of "practical effects").

These days, the Court seems quite confident, perhaps overly confident, about its ability to discern the meaning of the constitution with respect to vexing issues of federalism and separation of powers.<sup>454</sup> Although the Court recognizes functional considerations that invite considerations of context, it sometimes makes judgments without good information about relevant context.

For example, take the sovereign immunity cases. Making the states immune from private damage suits, as the Court's sovereign immunity jurisprudence does, raises functional issues under the Supremacy Clause.<sup>455</sup> Since that clause requires that federal law remain supreme, even the modern Court agrees that states must comply with federal law.<sup>456</sup> This raises the issue of whether disallowing private suits will liberate the states from compliance. The Court answers 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.<sup>457</sup> Yet, the Court considered no data about the validity of the assumption that states will generally comply with federal law absent private enforcement.<sup>458</sup> It obviously did not have an adequate basis for its conclusion that states' willingness to comply and federal enforcement (which might be sporadic

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<sup>454</sup> See, e.g., Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is"*, 59 WASH. & LEE L. REV. 839, 844 (2002) (discussing declining deference to Congressional interpretation of 14<sup>th</sup> Amendment); Buzbee & Shapiro, *supra* note ? (discussing the Court's lack of deference toward legislative findings).

<sup>455</sup> See *Alden v. Maine*, 527 U.S. 706, 731-73 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 153-158 (1996) (Souter, J., dissenting).

<sup>456</sup> See U.S. Const. Art. VI; *Alden*, 527 U.S. at 754-55, 757. Cf. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 278 (1997) (need to "promote the supremacy of federal law must be accommodated to the constitutional immunity of the states") (citation omitted).

<sup>457</sup> See *Seminole Tribe*, 517 U.S. at 71 n. 14; *Alden*, 527 U.S. at 755. In addition, suits for injunctive relief may lie against state officials acting in their official capacities. See *Alden*, 527 U.S. at 756-57 (some suits against state officials permitted). See, e.g., *Verizon Maryland, Inc. v. Public Services Comm'n of Maryland*, 122 S. Ct. 1753, 1756 (2002) (holding that telecommunications company may sue state officials in their official capacities under federal law). Cf. *Idaho*, 521 U.S. at 281-88 (1997) (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 (1997). Congress may abrogate state immunity when acting under the 14<sup>th</sup> Amendment. See *Seminole Tribe*, 517 U.S. at 59; *Alden*, 527 U.S. at 756. Cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (construing Congressional enforcement power under the 14<sup>th</sup> amendment narrowly); *Florida Prepaid Postsecondary v. College Savings Bank*, 527 U.S. 627, 630 (1999) (patent infringement statute not enacted to enforce due process guarantees of the 14<sup>th</sup> amendment). And states may consent to suit. See *Alden*, 527 U.S. at 755.

<sup>458</sup> Cf. *Seminole Tribes*, 517 U.S. at 157 n. 52 (Souter, J., dissenting) (expressing skepticism about the efficacy of remaining remedies).

because of resource constraints) produces substantial state compliance.<sup>459</sup> Hence, its conclusion that sovereign immunity does not conflict with the Supremacy Clause appears suspect.<sup>460</sup> The Court will likely make better judgments about the congruence of broad sovereign immunity with 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 its lack) 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 litigants.<sup>461</sup> Individual injury may be quite irrelevant or even distorting.<sup>462</sup> 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 broad recent prior experience).<sup>463</sup> And the Court, trapped as it is in a routine of considering lawyers' arguments, may get very distorted views of these sorts of questions.<sup>464</sup> Similarly judges should avoid

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<sup>459</sup> See Alden, 527 U.S. at 757 (“established rules provide ample means to correct ongoing violations of the law”).

<sup>460</sup> See Alden, 527 U.S. 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 remedies remaining after the Court disallowed damage suits against states for violation of intellectual property law).

<sup>461</sup> See, e.g., Buckley v. Valeo, 424 U.S. 1, 20 n. 21, 21 n. 23, 29 n. 31 (1976) (drawing on various sources of statistical information that go beyond the litigants' experience).

<sup>462</sup> See, e.g., id. at 34 n. 40 (discussing experience of small political parties before the Court in obtaining contributions, but conceding that their past experience may not capture the future effects of the new campaign finance law); Virginia v. American Booksellers Association, Inc., 484 U.S. 383, 395 (1988) (declining to rely on lower court construction of statute prohibiting sale of books “harmful to minors”, because the bookstore owners who testified below were unfamiliar with the statutory definition of this term). Cf. Nyquist v. Mauclet, 432 U.S. 1, 6 n. 7, 11 n. 15 (1977) (Court focuses on total cost of providing a benefit to all aliens, not to consequences for the particular alien challenging denial of benefits).

<sup>463</sup> See Abner J. Mikva, *Why Judges Should not be Advisegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1826-1832 (1998) (explaining why judges lack the capacity to give useful advice to legislative bodies). See, e.g., Friends of the Earth v. Laidlaw Environ. Servs., 528 U.S. 167, 185 (2000) (deferring to Congressional judgment that penalties deter future violations); Tigner v. Texas, 310 U.S. 141, 148 (1940) (Frankfurter, J.) (deferring to legislative judgment about what remedies adequately deter unlawful conduct).

<sup>464</sup> See Mikva, *supra* note 463, at 1829 (contrasting 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.

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 justices need humility about their capacity to make good judgments.<sup>465</sup> Such humility should make justices more eager to add context when they can or to defer to coordinate branches of government. And it should lead to some caution.

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 having injured litigants before them in public law cases. Injured plaintiffs help define the merits of some controversies, but public law properly depends upon some blend of formal legal analysis and pragmatic policy judgments that go far beyond the context any litigant's experience provides.

This has a number of implications. First, it eliminates, at least in many cases, the principal rationale linking the current doctrine of standing to the constitution. Second, it calls attention to the neglected habits of mind and practices that might help attain the virtues that concreteness requirements have sought to create through justiciability limits. Third, it sheds light on the nature of public law litigation.

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<sup>464</sup>(...continued)

L. REV. 1833, 1858 (1998) (explaining how reliance on lawyers led to misunderstanding of legislative history in a landmark case); Scharpf, *supra* note 389, at 524-527 (discussing approvingly a German practice of systematically incorporating a wide information base into constitutional litigation).

<sup>465</sup> See Fiss, *supra* note 33, at 45 (self-righteousness limits a judge's capacity to perform adequately).