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What Standing Is Good For

Eugene Kontorovich

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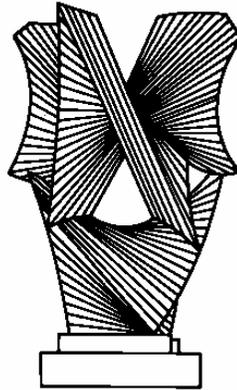
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WHAT STANDING IS GOOD FOR

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WHAT STANDING IS GOOD FOR

*Eugene Kontorovich**

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INTRODUCTION

This Article explains two related functions served by the standing in public law. Standing has been subject to voluminous¹ and sustained criticism over the past forty years.² Indeed, articles on standing routinely

¹ Louis Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971) (describing literature as “enormous”).

² See LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 390 (3rd ed. 2000), [hereinafter, TRIBE, CONSTITUTIONAL LAW (“[T]he law of standing has for some time been the one of most criticized aspects of constitutional law.”)]; ERVIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60 (3rd ed. 2006) (observing that standing is apparently “incoherent,” and “frequently attacked” in an “extensive” corpus of scholarship). See also, Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004) [hereinafter, Staudt, *Modeling*] (noting “countless” analyses of standing). See, e.g., See MARTIN H. REDISH, THE FEDERAL COURTS AND THE POLITICAL ORDER 88-103 (1991); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); William Fletcher, *The Structure of Standing*, 98 YALE L. J. 221 (1998); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WISC. L. REV. 37; Abraham Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 9 (1982) (describing standing as “incoherent or inappropriate, or both”); Jaffe; articles cited in notes 3-6.

begin with a recitation of subject's vast "comment, criticism, and doctrinal confusion."³ Scholars almost unanimously⁴ regard the doctrine as pointless and incoherent at best,⁵ a veil for ideological manipulations at worst.⁶ Prof. Tushnet summarized the more charitable view: standing law "serves no useful purpose."⁷ In the view that has "acquired the status of folk wisdom," standing decisions are simply "concealed judgments on the merits" made without the benefit of a full factual record.⁸ Not surprisingly, many leading scholars call for significantly liberalizing or even abolishing it.⁹ Academic disillusionment with standing has accompanied, or encouraged, dwindling enthusiasm on the Court, which has somewhat loosened standing restrictions over the last several decades.¹⁰

Unlike almost all previous scholarship, this Article applies economic

³ See, e.g., Staudt, *Modeling* at 613-14.

⁴ See *id.* For some rare exceptions, see Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) [hereinafter Scalia, *Separation of Powers*]; Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 307-09 (1979) (arguing that standing promotes individual autonomy) [hereinafter Brilmayer, "Case or Controversy"]; articles cited in n.33.

⁵ See Fletcher ("[S]tanding law . . . has long been criticized as incoherent.").

⁶ Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N. CAROL. L. REV. 1741, 1786 (1999):

Modern standing law is closer to a part of the political system than to a part of the legal system. It is characterized by numerous malleable doctrines and numerous inconsistent precedents. Judges regularly manipulate the doctrines and rely on selective citation of precedents to further their own political preferences.

⁷ Mark V. Tushnet, *The "Case Or Controversy" Controversy: The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1705 (1980).

⁸ See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies – And Their Connections to Substantive Rights*, 92 U. VA. L. REV. 632, 635 (2006).

⁹ See, e.g., RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 216-17 (1993) (arguing against standing limitations for constitutional challenge to government action); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992) [hereinafter, Sunstein, *Citizen Suits*] ("the very notion of an 'injury-in-fact' is not merely a misinterpretation of . . . Article III but also a large-scale conceptual mistake" equivalent to early twentieth-century substantive due process); Fletcher, *supra*, at 223 (urging courts to "abandon" standing requirements); David R. Dow, *Standing and Rights*, 36 EMORY L. J. 1195 (1987); Gene Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650 (1985); Mark Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

¹⁰ See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 195 (1996); Jensen, et. al., at 209 (noting that "there is virtual unanimity" that the Supreme Court liberalized standing doctrine in the 1960s and 1970s). See Pierce, at 1788-89 (arguing that *Akins* represent a major liberalization of standing doctrine); Cass Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 645 (1999) (same).

analysis to the standing doctrine to show that it can prevent inefficient dispositions of constitutional entitlements. In a distinct but related point, standing protects peoples' ability to individually determine the best use of their rights. Thus contrary to conventional wisdom, standing has significant, autonomous, and public-regarding functions. The analysis presented here also helps explain many of the mysteries of standing: Why should inchoate injuries be less justiciable than tangible ones? Isn't it paradoxical that justiciability exists when a few people are harmed, but not when a great many are harmed? Why should standing be a greater barrier when plaintiffs allege violations of the structural constitution rather than individual rights provisions, given that the restrictions of the former ultimately exist to protect individuals?

The next few paragraphs will briefly sketch the functions of standing elaborated in this Article. Then the limits, scope and structure of the Article will be discussed.

In the ordinary course of events, constitutional rights can be waived or bargained away by their individual bearers, in keeping with a broader legal culture that values litigant autonomy and favors the alienability of causes of action. The alienability of rights is crucial to their being put to their highest-value use. For example, a newspaper editor has a First Amendment right to be free of censorship. She is approached by Pentagon officials and told that the publication of a certain story will hurt national security. The editor can seek an injunction against prior restraint – or she can waive this right by voluntarily spiking the story. She can do this for the publicly-minded reasons like national security, or entirely selfish ones like good relations with potential Pentagon sources. Normally, decisions about the optimal use of rights are made separately and discretely by disparate individuals, and alienating their entitlement is one of the potential uses.

Sometimes circumstances make individual rights effectively inalienable – not as a result of any explicit policy choice, but simply because of the transaction cost structure of the situation. This happens when a single governmental action infringes on the rights of many people with conflicting preferences about how and whether to use their rights. In this situation, when one person seeks injunctive relief, his exercise of his rights effectively determines the exercise of the individual rights of everyone in the affected class. Massive social welfare losses can result in such circumstances. It is impossible to negotiate an efficient solution with a single rights-holder because *anyone* in a large and open class can be that single person. Thus every individual rights-holder, in the absence of standing restrictions, would have veto power over a government action that affects the rights of many, making strategic holdout likely. Standing allows courts to bypass the problems of high transaction costs and strategic behavior by attempting to

replicate the outcome that would be reached in a low-transaction cost environment – the outcome in the sense of whether the government action proceeds or not.

This Article shows that standing has important purposes not revealed by current understandings of the doctrine. But recognizing the economic and rights-protecting functions of standing is crucial for an assessment of proposals to liberalize the doctrine. Such suggestions must take into account the potentially large social welfare costs and individual-rights interference that would exist in the absence of standing restrictions. Moreover, the economic approach to standing helps define clearly the situations in which standing problems arise. This may promote a more coherent application of the doctrine, as well as providing a basis for functional criticism of its misapplication.

This only amounts to an explanation, rather than endorsement of standing doctrine. While standing solves real social problems, it is not a costless solution. The costs include the delay or preclusion of judicial review of illegal government activity and the foregone production of precedent. Whether these costs exceed the benefits are questions separate and subsequent to understanding the problems to which standing responds.

While this Article shows that standing may serve useful purposes, the doctrine's legitimate functions do not rule out illegitimate ones. Like any other doctrine requiring judgment and discretion, standing can be incorrectly applied or purposefully abused. This Article does not claim to explain the Supreme Court's standing jurisprudence, which is largely but not entirely consistent with the functional account presented here. At the same time, the fact that standing serves the functions described here does not mean it does not have any other potentially beneficial functions.¹¹

This Article confines its analysis to the central component of the Art. III standing doctrine – the requirement of a justiciable injury, also known as an “injury-in-fact.” The role of standing described here is performed solely through the injury component (which is also the most controversial). Furthermore, it focuses on standing to assert constitutional rather than statutory rights, which both courts and scholars suggest involve somewhat different considerations. While much of the analysis applies equally to

¹¹ For example, Maxwell Stearns has made an important contribution to the literature by showing that standing prevents the manipulation of intransitive preferences on the Court by strategic litigants. See Maxwell Stearns, *Standing Back From the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 n. 58 (1995) [hereinafter Stearns, *Standing Back*]; Maxwell Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PENN. L. REV. 309, 309 (1995) [hereinafter Stearns, *Historical Evidence*].

congressionally-created rights, there are important normative differences which will be explored briefly.¹²

A major criticism of standing doctrine is that there is no intelligible role for the doctrine beyond determining whether substantive law gives the plaintiff a cause of action.¹³ In this view, treating the doctrine as jurisdictional obscures the real issue, which is simply about the scope of rights protected by the substantive law. When a plaintiff does not have a legally protected right at stake, standing gets the right result through the wrong reasoning. When substantive law does give the plaintiff a legally protected right and it is violated, refusing to recognize standing because the right is broadly held or inchoate is simply a refusal to give effect to the governing law. In this view, if the substantive law gives the plaintiff the right to sue, that is the end of the matter.

This Article agrees with the critics that standing should not be used as a proxy for the existence of a legally protected right. It parts company from them in identifying a separate, autonomous and socially valuable function for the doctrine. This function can only be seen precisely in those cases where the individual plaintiff has a judicially-protected entitlement. Thus throughout the Article, it will be assumed that all plaintiffs and potential plaintiffs have a cause of action. Holding constant the cause of action issue is necessary to isolating the independent function of the standing doctrine.

It will be further assumed that all plaintiffs have meritorious claims -- that the challenged government conduct violates their rights. This further removes any confusion between standing and merits questions by taking plaintiffs' claims as true. Because standing determinations are made at the pleading stage, courts must construe the substantive claims as favorably to the plaintiff as possible. Again, standing's independent role can only be seen when one holds constant other elements of the case.

Any particular standing regime can fall on a spectrum from restrictive, where potentially no one can challenge certain wrongs, to permissive, where almost anyone can sue. For ease of exposition, this Article will use terms like *narrow* or *restrictive* standing to refer to the former conception, and *liberal* or *broad* standing to refer to the latter version. The most liberal approach to standing rules can also be described as simply a lack of standing barriers. Thus when this Article speaks simply of *standing*, it refers the robust, restrictive vision of the doctrine.

The Article proceeds as follows. Part I briefly sketches the standing doctrine and particularly the injury requirement. It discusses efforts to

¹² See Part V.D.

¹³ See Stearns, *Standing Back* at n.58 (observing that the cause-of-action theory is dominant among scholars). See, e.g., sources cited at note 32, *infra*.

understand the purpose of standing restrictions, and the major criticisms of the existing rationales. The two major functions of standing are presented in Parts II and III respectively. Part II sets out the transaction-cost function of standing and it shows how it is entirely different from the dominant accounts of the doctrine.

The economic approach may neglect the broader social purposes of rights by focusing solely on their transactional value. Moreover, some would contend that speaking of rights in welfarist terms is nonsensical, as rights cannot be reduced to instrumental arithmetic. These objections are taken up from Part II.E through Part III. Part III also presents the second, non-economic function that standing plays – protecting individual autonomy over the exercise of their rights, an autonomy that is threatened when rights overlap.

Part IV considers whether the function of standing can be better served through other means. It concludes that while various expedients would solve some of the problems to which standing responds, none would solve all of them, and the solutions would themselves have significant drawbacks. All of this may explain why courts in fact use the standing doctrine. Part V ties up some loose ends, such as why these functions of standing will never be implicated in Equal Protection challenges, and the applicability of the analysis to standing under congressionally-created rights.

I. THE DOCTRINE AND THE CRITICS

A. *Constitutional basis.*

Article III of the Constitution enumerates the three types of “Cases” and six types of “Controversies” that fall within the jurisdiction of the federal courts.¹⁴ Not only must suits fall within one of the nine categories to be heard by Art. III courts, they must also be presented in the proper package – a case or controversy.¹⁵ On one level, this seems natural. Courts resolve *cases*, not philosophical disputes, beauty contests, or broad questions of foreign policy.¹⁶ The “case” is to the courts what the “bill” is to Congress – the basic unit of operation. However, specifying the outer bounds of a “case or controversy” proves exceedingly difficult.

¹⁴ U.S. CONST., ART. III. § 2.

¹⁵ The extent to which standing and related rules truly stem from the express or implicit command of Article III has been a subject of some debate. *Compare* Sunstein, *Citizen Suits*, 91 MICH. L. REV. at 169 (arguing standing is a 20th century invention with value-laden goals), *with* Caleb Nelson & Anne Woolhandler, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (defending historical basis of standing).

¹⁶ *See* Letter of John Jay to Alexander Hamilton, reprinted in RICHARD H. FALLON, JR., DANIEL MELTZER, AND DAVID L. SHAPIRO, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 79-81 (5th ed. 2004).

The various Article III justiciability doctrines – standing, ripeness, mootness, political question, advisory opinions – all try to define the contours of the case-or-controversy limitation. Standing, the “most important of these doctrines,”¹⁷ focuses on whether a plaintiff is the right person to bring a given issue before the court. This is what makes standing jurisdictional – the inquiry is not about the existence of a wrong, but whether the court can respond at the request of *this* plaintiff.

The Court has framed the standing inquiry as having three components: whether the plaintiff alleges a “injury in fact,” whether that alleged injury can “fairly be traced to the challenged action,” and finally, whether a favorable ruling would probably end the injury.¹⁸ (Beyond this constitutional “core” of standing, there are also “prudential” standing rules invented by the courts themselves; Congress can presumably override these “self-imposed restraints.”¹⁹ This Article analyzes only the Art. III limitations on standing.)

B. Defining an Injury.

The standing inquiry focuses on whether the plaintiff has a justiciable injury, or an “injury-in-fact.” The Court itself has admitted that the concept is “not susceptible of precise definition.”²⁰ and most commentators amplify that view.²¹ Still, some basic concerns can be teased out. One concern is the avoidance of “abstract” injuries. Standing demands that courts respond only to “distinct and palpable” harms. This limitation most often has bite in ideological litigation by public interest groups, or when the alleged conduct causes inchoate harms, such as stigma. Related to abstractness is a concern about “general” rather than “particular” injuries. When government action harms many a great many people in the same way, none will have standing to assert the “undifferentiated” injury. In such cases, the Court will say that redress for the constitutional violation can only be had through the political branches – a position man see as an abdication of judicial review.

None of these attempts to define standing have been convincing, even to

¹⁷ *Allen v. Wright*, 468 U.S. 737 (1984).

¹⁸ *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

¹⁹ *See Allen v. Wright*. The main prudential rule prevents litigants from asserting the rights of others (*jus tertii*). *See, e.g., McGowan v. Maryland*, 366 U.S. 420 (1961).

²⁰ *Allen v. Wright*.

²¹ A quarter-century ago, it was already “customary in writing on standing to war the reader” of its amorphous character. Karen Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 AM. POL. SCI. REV. 723 n.1 (1979), citing Paul Freund, Hearings Before the Senate Subcommittee on Constitutional Rights, 89th Cong., 2d. Sess. (1966), pt. 2, pg. 498 (describing standing as “among the most amorphous” doctrines “in the entire domain of public law”).

the Court.²² The abstractness argument is used to rebuff groups with a programmatic or ideological interest in the constitutional violation. It is true that their sense of injury is a “psychological consequences . . . produced by observation of conduct with which one disagrees.”²³ But if the conduct also violates the plaintiff’s constitutional rights – the merits question – it is hard to see why psychological injury is insufficient. Certainly psychological harms are treated as concrete and justiciable in many ordinary tort contexts, such as negligent infliction of emotional distress and defamation. Indeed, if everyone’s rights are violated, and only some are offended (due to differing ideological views), this seems no different from an “egg-shell skull” situation, where a particular precondition of the plaintiff (such as a concern for the environment) makes him more prone to suffer severe harm from an otherwise de minimus injury.

Denying standing because the injury is too “general” or “undifferentiated” begs the question. Usually when a single course of governmental conduct violates the rights of many people, all can sue.²⁴ This is true even if each person’s injury is identical, as is the case with most large-scale instances of racial discrimination. Yet the Court has gone so far as to suggest that when a constitutional violation violates the rights of all citizens, none have standing.²⁵

C. Purposes and criticisms.

Two related purposes are commonly adduced for the standing doctrine. Standing is often said to track the purposes of the rule against advisory opinions – to ensure a concrete, adversary presentation of the issues.²⁶ The “abstract” injury shunned by standing doctrine may lead to an “abstract” presentation of the issues involved, while courts do best at incremental, fact-specific determinations. And a plaintiff without a true Article III “injury-in-fact” may not have enough on the line to invest the right amount of resources in the case and fully inform the court of the consequences of an adverse ruling.

²² Valley Forge, 454 U.S. at 475.

²³ Valley Forge at 485.

²⁴ See JAMES P. PFANDER, *PRINCIPLES OF FEDERAL JURISDICTION* 34 (2006), (observing that wrongful conduct often inflicts cognizable injuries on large classes of people); DAVID P. CURRIE, *FEDERAL JURISDICTION IN A NUTSHELL* 26 (4th ed. 1999) (“It hardly seems an appropriate reason for denying relief. . . that the Government has harmed many citizens rather than only a few.”)

²⁵ See Reservists Committee at 227.

²⁶ See generally, Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006) (arguing that Art. III case or controversy requirement demands genuine adversity between parties).

Few find these justifications convincing. In particular, scholars argue that the concept of “injury-in-fact” does not capture the degree of concreteness or adversity in litigation.²⁷ The injury requirement mostly bars ideological or “public interest” plaintiffs. However, these are often represented by well-financed, skilled and committed organizations. Ideological plaintiffs may in fact care much more than anyone else about the question.²⁸ Nor does it appear that the attorneys for such plaintiffs fail to raise relevant considerations sharply enough.²⁹ Which is just another way of saying ideological injuries are real rather than abstract, and indeed, any injuries that prompt the plaintiff to invest in litigation are real (especially given that the relief sought is often purely injunctive).³⁰ As Judge Fletcher famously wrote, to say that a plaintiff who feels injured does not have a cognizable injury is to call him a liar. Surely courts should not address an issue *sua sponte*, but the initiation of an action by a private party who is sincerely aggrieved should be enough to remove the non-adversity/advisory opinion concerns.

More recently, the Court has begun to argue that standing supports the separation of powers, in particular between the judiciary and the executive. The latter is charged with ensuring the laws are “faithfully executed” by the government. Given limited resources, this necessarily entails some degree of discretion. If *anyone* can challenge the legality of government action, it may curtail or interfere with the President’s “Take Care” power.³¹ This argument is much stronger in the context of congressionally-conferred standing, which might be a legislative end-run around executive management and enforcement of statutes. The Court also says standing

²⁷ See Fletcher at 247048; Amar, *supra* note __, at 719 n. 154 (arguing that “any legitimate interest in guaranteeing adverse presentation of issues can easily be handled” without the standing doctrine).

²⁸ See Richard A. Epstein, *Standing and Spending – The Role of Legal and Equitable Principles*, 4 CHAPMAN L. REV. 1, 46-47 (2001) (“[I]deological plaintiffs . . . will address the issues of principle raised in litigation precisely because they care as much about the structure of American government independent of the impact of their own pocketbooks.”); Landes & Posner at __.

²⁹ See Epstein at 46; Loius L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PENN. L. REV. 1033, 1037-38 (1968):

[Investing money in a lawsuit from which one is to acquire no further monetary profit argues . . . a quite exceptional kind of interest . . . From this I would conclude that, insofar as the argument for a traditional plaintiff runs in terms of the need for effective advocacy, the argument is not persuasive.

³⁰ See Kenneth E. Scott, *Standing in the Supreme Court -- A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973) (“If plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation.”).

³¹ See Scalia.

protects the separation of powers in a broader sense, by preventing judges from sitting as a Council or Revision. But this is simply a restatement of the advisory opinion concern.

Given the doctrinal incoherence, it is not surprising the entire Art. III standing inquiry has been assailed by commentators. The purpose of this Article is not to rebut any of the criticism of standing, but rather to explain its function and show some negative consequences of its abandonment. Thus only the main thrusts of the criticism will be sketched here. The criticisms of standing will be shown as orthogonal to at least one of the doctrine's important functions.

The classic and persistent criticism is that the only proper "standing" inquiry is whether the plaintiff has a cause of action.³² If some source of law allows him to sue in response to certain conduct, he has all the "injury" required. In this view, standing is at best a misnamed inquiry into whether the relevant law gives the plaintiff an entitlement against the kind of harm he alleges. At worst, standing is a way of delegitimizing or raising barriers to certain kinds of injuries disfavored by the courts.

Moreover, the jurisdictional status of standing, combined with the unpredictability of the doctrine, makes it susceptible to political manipulation. Since it is a question of subject-matter jurisdiction, justices can raise doubts about standing *sue sponte*. And due to the amorphous and shifting nature of "injury-in-fact," courts can use it as a cover for rejecting cases on grounds of politics, ideology, or personal convenience.

D. Economic analyses.

Only a few scholars have examined standing from an economic perspective.³³ One of these, a brief and unnoticed paper by Jensen, et. al.,

³² See Fallon, *Remedies*, 92 U. VA. L. REV. at 664-65 (arguing that Court's treatment of injury-in-fact cases are actually about the "substantive merits of the plaintiffs' underlying claims"); Sunstein, *Citizen Suits*, 91 MICH. L. REV. at 166 n.15; Amar at 719 n.154 ("A properly framed case in which a plaintiff has 'standing' is simply one in which she has a cause of action."); Currie, *Misunderstanding*; Fletcher, *Structure*; Sunstein, *Privatization*; Fletcher at 223 n.18 cites numerous additional commentators to this affect.

³³ See Michael C. Jensen, William H. Meckling, & Clifford G. Holderness, *Analysis of Alternate Standing Doctrines*, 6 INT'L REV. LAW & ECON. 205 (1986); Clifford G. Holderness, *Standing*, NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 505 (1998); Stearns, *Standing Back*, *supra* note _ (showing that given a likelihood of intransitive preferences among justices, standing limits litigants' ability to manipulate outcomes through strategic litigation); Stearns, *Historical Evidence*, *supra* (elaborating the social choice theory of standing); Khanna, *supra* note __, *Functional Understanding* (arguing that standing acts as screen for socially undesirable litigation); Scott, *supra* note __, at 669-678. See Vikramaditya S. Khanna, *Towards a Functional Analysis of Standing* 3, work-in-progress (2002), [hereinafter *Functional Analysis*] available at

anticipates some of the analysis of this Article by observing that broad standing makes entitlements inalienable and thus generates inefficiencies.³⁴ The Jensen paper did not deal with standing to assert constitutional or public rights. Rather, it focused on the classic law and economics context of private nuisance litigation, and acknowledged that extending the analysis to public law involves additional complications.³⁵

This Article expands significantly on the earlier discussion, and applies it to new areas. Unlike the Jensen paper, this Article identifies significant additional transaction costs arising from strategic behavior, and examines the role of different remedial regimes. Furthermore, it broadens the analysis to include different conceptions of rights. Jensen, et. al. compare only two alternate regimes: strict and liberal standing. This Article considers several additional alternative regimes (such as switching to liability rules) that might perform better than either polar solution.

II. STANDING AND EFFICIENCY

This Part shows how broad standing to challenge certain types of government action could result in inefficient outcomes because of high

<http://ssrn.com/abstract=304390> (discussing paucity of “functional analysis” of standing law).

A very brief discussion of prudential standing rules can also be found in William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEG. STUD. 683, 718-19 (1994) (discussing economic rationales for barring *jus tertii* suits, and noting that allowing third parties to have standing makes it difficult to “allocate property rights in legal claims”). The present Article does not deal with the prudential limitation of *jus tertii*. However, it shows that under certain circumstances particularly likely to arise in constitutional litigation, it becomes difficult to allocate property rights in legal claims even when standing is given only to the primary victims. In other words, all hard standing cases are in a sense *jus tertii* cases.

Political scientists have also devoted little attention to the doctrine. For some rare exceptions, see Staudt, *Modeling, supra* (presenting statistical analysis demonstrating that when underlying law is unclear, judges use standing doctrine to advance persona policy preferences); C.K. Rowland & Bridget Jeffrey Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175 (1991); Gregory J. Rathjen & Harold J. Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 AM. J. POL. SCI. 360 (1979).

³⁴ Jensen et. al. at 10-11. Only six citations can be found on Westlaw and JSTOR; most of these are only in passing.

³⁵ See *id.* at 206-07 (discussing implications of different standing rules in context of private nuisance suits). Jensen et. al. only mention suits against the government in a single paragraph, and do not differentiate between constitutional and statutory claims. *Id.* at 212. They correctly note that their central point carries over from private law to public, but did not build on this. See also, Scott, *supra* at 646 (arguing that economic analysis of standing must distinguish suits against government officials from litigation between private parties because the “important considerations . . . overlap to a degree but are far from identical”).

transaction costs and the possibility of strategic behavior.³⁶ Standing doctrine can be understood as a way of avoiding the potentially large social costs that would result from a liberal standing regime, though this solution is itself not costless.

Standing doctrine has long been unable to formulate coherent rules for principled identification of cases where it should apply. Understanding the *problem* standing responds to allows one to distinguish situations that pose genuine standing problems from those that do not. A basic definition will be presented in section B, and then further refinements to narrow the scope of the standing inquiry will be discussed. This Part will also show how the definition of standing developed here differs from the dominant account.

A. Structure of constitutional transactions

1. Differing valuations.

In the constitutional system, most entitlements are broadly, even universally, held. The entitlements are generally negative, giving the holder a right to be free of certain kinds of government action. However, different individuals attach different values to them, either in all circumstances or in some circumstances. There can even be differences in the *sign* of the values across entitlement holders. The value of an entitlement to a person is always the difference between:

W , the welfare derived from the government action that the right entitles one to be free of and C , the cost of challenging it in court (assume to be a negative number).

A person will be better off waiving their right when $W > C$, where C is never positive. To start with the conventional case, if the government action results in a welfare loss for the entitlement holders such that $W = -\$100$, he will exercise his right at any C to up to $-\$100$. This person would bargain away the entitlement for any amount greater than $\$90$ (the net benefit of enforcement). A second case deserves attention. The same government action may have positive welfare effects for a second entitlement holder, such that $W = \$100$. She will exercise her right to block it at the cost of $\$10$ only if paid at least $\$110$ to do so.

The first person will be better off exercising his right at certain levels of C , while the second person will never be better off exercising her right, regardless of C . The first person would demand payment to waive their right; the second person, on the other hand, would demand payment to exercise it. In the example above, if bargaining were possible, the second

³⁶ “Inefficiency” is used here in the Caldor-Hicks sense to refer to the blocking of an action whose social benefits exceed its costs.

person would pay the first anywhere between \$90 and \$100 to waive his entitlement, which is efficient. All of this is a result of the welfare effect of the government action on the first person being negative and for the second person being positive. This Article shall refer to these two cases as *negative value* and *positive value entitlement holders*, referring to their respective valuation of the government action that they have a legal right to be free of.

The notion of positive value entitlement holders may at first seem counterintuitive, so a few additional words should be said in this regard. It is important to distinguish legal injury from harm. The former refers to the violation of protected entitlements, the latter to value or cost of the violation. The same legal injury can cause harm or benefit depending on the person's subjective disposition. The difference between assault and affection lies largely in how the recipient feels about them. In tort law, the difference between injury and harm is subsumed by the substantive law: a consensual touch is not a permissible assault, but simply no violation at all. The situation is less clear in constitutional law. With a police search, advance consent makes it "reasonable," and thus not a violation of the underlying entitlement. But not all situations are like this. Ex ante consent is only practical on an individual level. Broad violations of the kind that give rise to standing questions are not, perhaps can not, be consented to in advance. So at least on a technical level the injury has occurred, and the question turns to redressability, remedy, and harm -- which may vary greatly among the affected group.

As Prof. Scott has written, in a view typical of standing critics, "Once the reality of non-monetary injuries is accepted, it follows that an individual who attaches more weight to some personal value than do most does suffer a differential injury from its transgression."³⁷ But it also follows that individuals can attach different values to such injuries, and these may be positive or negative. This has important implications. If members of the injured class all have non-positive values, and the principal relief sought is injunctive (as will generally be the case in this kind of constitutional litigation), then a plaintiff with a greater negative value may be a fine representative of all others. If values can be either positive or negative, the ideological plaintiff's interests may be opposed to those in the class of entitlement-holders the disposition of whose entitlements he is in effect determining.

2. Highest-value use.

From a social perspective, the highest value use of the entitlement – exercise or waiver – depends on the proportion of positive and negative

³⁷ See Scott at 691-92.

value entitlement holders, and the actual values they assign. If the aggregate positive value exceeds the aggregate negative value, the socially optimal use of the entitlement is waiver. Usually none of these matters rise to the surface because in most government action, each individual can choose between exercise and waiver in a way that does not affect or limit the choices of others. However, when a single government action infringes on many entitlements at once, and injunctive remedies are available, only one choice can be made.

In these circumstances, a positive value plaintiff's valuation may not accord with the highest-value use of the entitlement. All would benefit if he could be compensated by the others, who attach a greater value to a different use of the entitlement, in exchange for waiving his right (which in this context would consist of consenting to rather than challenging the governmental action). However, liberal standing rules create transaction cost and hold out problems that make such Pareto optimal arrangements impossible. By giving many individuals the power to veto a government action that implicates the rights of many or all, broad standing makes constitutional rights inalienable *de facto* though they remain alienable *de jure*. As in any other context, the inalienability of a resource prevents it from being put to its highest value use.

For entitlements to be put to their highest value use, they must be alienable to some degree. This is because the law does not always know what the highest value use is in the wide variety of circumstances that might arise. The original entitlement holder's use may be the highest value one in the most common circumstances or under the circumstances that obtain when the entitlement is allocated -- but it may not be optimal in all circumstances. The debate about the relative merits of property, liability and inalienability rules is largely about *how* alienable entitlements must be for them to be put to their highest-valued use.³⁸ Inalienability is only desirable when there is a high degree of confidence that the original distribution of entitlements is optimal under all circumstances. This is rarely the case, and thus most entitlements are alienable to a significant degree. This is just as true of constitutional entitlements as private law ones. Sometimes circumstances make resources that are legally alienable *de facto* inalienable. High transaction costs are a common source of alienability limitations, and lowering them is universally regarded as a good role for law.

³⁸ Compared to property rules, liability rules promote relatively easier transfer of entitlements, and thus on this score may promote efficient allocations; on the other hand, there is a greater chance that the transfer price under a liability rule would not be accurate, thus encouraging either too much or too little transfer.

B. Defining the Problem

1. Jointness.

Liberal standing doctrine can result in socially inefficient outcomes by making rights effectively inalienable when *i*) a single government program or course of conduct *ii*) infringes on a large number of people's constitutional entitlements (the entitlement violated is the same for all people), and *iii*) and the affected group includes people with both negative and positive valuations of the right in question *iii*) and the program by its nature cannot be tailored to affect only non-objecting entitlement holders – opt-out is impractical. The inability to disaggregate governmental conduct that affects many at once will be called the “*jointness problem*.” In such cases, one person's exercise of their entitlement necessarily implicates the entitlements of everyone else affected by the action. This will be called a situation of “*overlapping rights*.” The likelihood of fatal barriers to bargaining, and thus inalienability, increases the larger the class of potential plaintiffs, the looser its definition, and the more open its membership. Furthermore, the larger the size of the class, the greater the likelihood for holdout by low-value entitlement holders, free rider problems among the high-value entitlement holders.

2. Inaugural example.

The efficiency implications of broad standing can be best explained with an example, taken from a little-noted recent case that would have commanded national attention were it not dismissed for lack of standing. Everyone has a individual right under the First Amendment to be free of an establishment of religion. The right is personal: establishment does not violate the constitution in some sterile sense, but rather infringes on the separate anti-establishment entitlements of a great number of people.³⁹

A few months before a presidential inauguration, it becomes clear that the event will involve public prayers delivered by sectarian clergy. Learning of this, a committed atheist sues in federal court to enjoin the imminent violation of his entitlement against religious Establishment.⁴⁰ Unlike the

³⁹ See *Flast v. Cohen*, 392 U.S. 83 (1968) (upholding taxpayer standing to challenge government spending on establishment grounds). Indeed, challenges to Ten Commandments displays on public land proceed without the courts making a peep about standing. *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005); *Van Orden v. Perry*, 125 S.Ct. 2854 (2005). At the same time, there is no taxpayer or citizen standing to challenge in-kind subsidies of religious institutions, suggesting at least some tension or confusion in the Establishment Clause standing doctrine. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86 (1982).

⁴⁰ *Newdow v. Bush*, 355 F. Supp.2d 265, 268 (D. D.C. 2005) (describing the plaintiff

plaintiff, most people are not bothered by such an inauguration, even though they also have a right to be free of it (call them the Indifferent). A second group prefers to have such an inauguration, for the sake of tradition, national unity, or any other reason. Call them the “Inaugurationists.” The plaintiff belongs to a third, much smaller portion of the population (the “Dissenters”) that feels aggrieved by the pending inauguration. The Inaugurationists and Dissenters correspond respectively to the positive and negative valuation entitlement-holders discussed above.

Let the Indifferent make up 30 people out of a hypothetical population of 100. Their welfare will not be affected one way or the other by the inauguration or lack thereof. The second group consists of 69 people, who would each get \$100 benefit from the inauguration. Their right to be free of this establishment has a negative value: for the sake of having the inauguration, they would give up their entitlement to be free of it and pay \$100. (Entitlements can become liabilities, like a property interest in a junked car.) Finally, the third group consists of just one person, who would experience a \$1000 loss from the ceremony. Finally, there is in objective external indicator of what group one belongs to. Group membership is open, since it depends entirely on subjective valuations. One can become religious or loose religion; one could acquire or loose an interest in inaugurations; one can become disgusted or indifferent to religious overtones at public events. A crucial consequence is that no one knows the size of their own or any other group.

The socially optimal outcome is for the inauguration to proceed. The inauguration would produce \$6900 worth of social value and \$1000 of social cost. And so long as the entitlements are alienable, the socially optimal outcome will triumph; the sixty-nine Inaugurationists could settle with the one Dissenter so that he would not pursue his Establishment Clause claim. Any settlement between \$1000 and \$6900 would leave everyone better off.

A liberal standing regime would prevent such efficiency gains from being realized. While the original dissenter has an entitlement that would allow him to block the inauguration, so does everyone else. As a result, the Inaugurationists gain nothing from settling with the first dissenter, because as far as they know, someone else could come along and bring the same claim, necessitating the same settlement. Assume all settlements are for \$1100. In the absence of the problem caused by standing, the Inaugurationists would be willing to settle with up to six people. But unless

challenging 2005 inauguration as a “well-known atheist litigant”). Newdow also brought a similar suit against the 2001 inauguration, where standing was also denied. *Id.* at 268-89. In the second case, he has obtained a ticket to the inauguration, whereas in 2001 he had said he would watch it on television.

they know that there are *no more* than six dissenters, it does not make sense for them to settle with even one. Thus in the example with only one dissenter, there will be no settlement, despite its efficiency.

Moreover, because of the way class membership is defined, it is impossible to know the number of dissenters because this number is likely to change. Assume that now that there initially *six* dissenters. They all settle their claims for \$1100. However, if they did so, a seventh person could become a dissenter and bring the same claim. This is because the characteristic that creates the class – objection to the inauguration – does not create a *closed* class. This discussion does not assume insincere behavior: rather, someone can actually change their valuation of the entitlement. The problem becomes much more severe if one introduces insincere behavior; indeed, it becomes more severe simply if the Inaugurationists *expect* insincere behavior.

Returning to the example, if a subsequent seventh dissenter were paid off, settlement costs would exceed the social value of the inauguration; if he is not, he could enjoin the inauguration, making the \$6600 in payments to the first six dissenters pure waste. The outcome either way is inefficient, and so the Inaugurationists would not bother settling with anyone in the first place. Thus each individual's right is in effect inalienable. This benefits no one, not even the dissenters. Were standing narrower the dissenter would be able to trade his right for something worth more to him.

To summarize, several features of broad standing raise transaction costs to the point of inalienability. Since everyone has constitutional entitlements, the absolute number of individuals involved can make bargaining difficult. But this cannot be the defining feature of standing – a large number of plaintiffs is not generally seen as a jurisdictional bar, especially in an era of nation-wide class actions. Perhaps more importantly, liberal standing rules make bargaining difficult because buyers (high value entitlement holders) cannot *identify* sellers – the difference between the two turns on unobservable characteristics such as ideology or sensibility or other matters of preference. This also leaves the seller class *open*. The openness combined with the ability of any one person to veto the entire transaction threatens to make negotiation with any identified class member pointless.

3. Holdout.

Even if the dissenting class were small, identifiable and closed, the strategic behavior could foil socially valuable action because any one entitlement holder exercises veto power over a government program that involves the entitlements of many. The situation resembles one where the government needs to purchase ten adjacent lots to expand an airport runway. Each transaction is legally distinct; each property owner can only

transfer his individual parcel. However, to realize its goal, the government must purchase all the lots; it does not get 90% of the benefit if it buys nine houses but not the one in the middle; rather, until it secures 100% of the rights, it gets none of the benefit.

While each individual only owns his own parcel, the structure of the situation gives him the bargaining power that an owner of *all* the parcels would have. Because the realization of the social surplus depends on the consent of each owner, each owner can hold out for a disproportionately high share of surplus – in this example, more than one tenth. In effect, the *combined* parcels have ten different owners. This kind of strategic behavior, known as holdout, makes transactional breakdown likely.⁴¹ Satisfying the demands of all of the owners would wipe out the social surplus. Of course, a complete failure of the transaction is a lost opportunity for the owners. They might try to organize themselves to present a coordinated settlement. Here they will face all the difficulties of cartelization. Even assuming they can do this, there will always be an incentive for one of the owners at the last minute to demand a slightly greater amount from the government. Entitlement holders in these situations are likely to be geographically isolated, with few or no prior interactions, united only by their common valuation of the entitlement (that is, by valuing the affirmative exercise of the entitlement more highly than its waiver). It would be difficult for such a group, lacking any means of coercion over its members, to organize itself and prevent last minute cheating.

Thus broad standing presents the holdout problem on a massive scale. The more open the standing doctrine, the greater the number of de facto “co-owners” of the entitlement. As the number of co-owners increases, so does the likelihood of holdout. Moreover, the possibility of co-ordination decreases. In the inauguration example, when the potential plaintiffs include everyone in the country, holdout seems guaranteed.

4. Other problems.

Thus far it has been assumed that the only obstacle to the Inaugurationists dividing a social surplus with potential objectors is that the diffuse and uncertain distribution of entitlements makes them inalienable. Holdout problems prevent potential objectors from organizing themselves to surmount this difficulty. But broad standing makes it difficult for *both* sides to organize. While the negative-valuation people face holdout problems, the positive-valuation ones would face free-riders problems in organizing themselves to pay compensation. The same thing that makes it

⁴¹ See Calabresi & Melamed; A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1078 (1980).

difficult for the Inaugurationists to know who the dissenters are will make it hard for them to identify who members of their own group are; certainly some will claim to be dissenters or Agnostics when the contribution hat is passed. In short, broad standing raises transaction costs in a way that can make otherwise attractive arrangements practically impossible.

If the number of positive-valuation entitlement-holders were high enough, one can imagine the government acting as an agent for them. This would be convenient since in a constitutional case, the government will be the defendant and thus its interests coincide with those of the positive-valuation group. This is an imperfect solution, of course. Its willingness to pay is an imperfect measure of the value of the entitlement. The government may settle even when it is inefficient – that is, it may offer a settlement that exceeds the surplus of the Inaugurationists simply to avoid an adverse constitutional ruling.

5. Cause of action theory distinguished.

Understanding the “jointness” problem to which standing responds shows that both the courts and commentators at least partially misunderstand the nature and function of the doctrine. Standing is not about the identity of the plaintiff, as doctrine would have it. Nor is it simply about whether the plaintiff has a legally protected right, as critics of the doctrine claim. Rather, the standing problem arises because of the nature of the *challenged action*.

In the account of standing given here, the doctrine does its work precisely when a plaintiff has a genuine cause of action but the social costs of entertaining it exceed the plaintiff’s valuation of his entitlement but transactions costs block an efficient solution. This account accepts the criticism of standing doctrine that an individual who claims to be injured by a violation of his constitutional rights cannot be presumed to be a liar at the pleading stage. At the same time, it rejects the critics’ view that the *sole* question is whether the statute gives individuals such as the plaintiff a cause of action. Because even if it does, one must ask whether the individual causes of action overlap, and if this will result in socially suboptimal allocations of the individual rights.

This does not deny the importance of the academic criticism of standing – no doubt courts sometimes deny standing based on implicit judgments about whether the plaintiff can state a claim, or hostility to the kind of rights the plaintiff asserts.⁴² Using standing to discuss substance is unjustifiable – and in such situation, standing can not be expected to solve jointness problems because there may be no jointness problem to solve. Standing

⁴² See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984).

does not serve efficiency purposes simply by being invoked by a court; it needs to be invoked in response to a particular structure of challenged conduct and distributed rights. However, this Article shows that there is an autonomous role for standing doctrine, entirely separate from the merits, and when used in this role, the doctrine serves broad social ends.

C. Denying Standing

The definition introduced Part II.B.1 only identifies situations that might raise the problems to which standing responds. It does not mean that denying standing is the best response in all such situations. The denial of standing on transaction cost grounds must depend on at least two additional determinations. First, that the plaintiff is not the high-value user – that is, that the buy-out of an injunction would be the socially desirable outcome. Second, that transaction costs would likely frustrate such an efficient resolution between the plaintiff and higher-value users.

The first inquiry in particular risks being impressionistic and ad hoc. Judges, especially before discovery, have little direct evidence of the plaintiff's valuation of her entitlement, and even less about the valuations of the myriad absent entitlement holders. To be sure, a court is not entirely without information about the valuations of the large mass of non-litigious entitlement holders. As many commentators have noted, the fact that the plaintiff's preferred use differs from that of the great majority of other entitlement holders can be inferred from the mere fact that the plaintiff, unlike others, has chosen to seek judicial remedies. What it does not know is whether those who do not pursue remedies are indifferent, or whether they have a definite preference for waiver.

This suggests that not every case raising standing problems requires a denial of standing answer. Rather, dismissals might be reserved for cases where the social value determination (which it must be stressed is not a normative one) seems clear, such as *Richardson*. Of course, such an approach to standing sounds more like a prudential policy rather than a strict jurisdictional bar, and were the Court to take such approach, standing doctrine would seem erratic (as it currently does) in that the same *kind* of injury would sometimes get standing and sometimes not. On the other hand, one might think such pessimism is unwarranted, as the endeavor is not so different from a court attempting to "reconstruct the hypothetical bargain" in contract interpretation. In both situations, the court attempts to anticipate what would happen if transaction costs did not prevent an explicit agreement. Still, from an efficiency perspective, the lack of information about private valuations is the main limitation or objection to the standing

doctrine as a solution to the jointness problem.⁴³ As Part III argues, this objection drops away if the jointness and overlapping rights problems are viewed from a rights-based perspective.

Once a jointness problem is identified, and the court think the plaintiff's might not be the highest value use, the second question arises: whether the court *needs* to preempt the market because transaction costs would prevent efficient final allocations. This is the question of whether the transaction costs are high enough to block efficient exchange. Jointness is a matter of degree. At the extreme end of the spectrum are single, national actions like an inauguration, a congressional prayer or the disclosure of official information. In these situations, the costs of liberal standing will be highest. At the other end of the spectrum are actions with minimal rights overlap, such co-owners Fourth Amendment search rights. These present no jointness problems. Many cases will in middle – where the action affects a subset of the population. Most religious display cases will be of this variety. A Ten Commandments display in a county courthouse will affect many people, but fewer than a national inauguration.

Again, the question of when transaction costs from group size become high enough to threaten efficient bargains is an empirical one, and not unique to the standing doctrine. Despite the extensive law and economics literature on large-numbers transaction costs in private law, there is almost no discussion of what might constitute “large.”⁴⁴ Still, given what is considered a “large group” in the experimental literature,⁴⁵ it seems that all assume that jointness on the scale created by even localized government action would pose significant transaction problems. (Recall also that the jointness problem is not simply one of large numbers, but also of an indefinite and open class.)

D. The Definition Applied.

Having defined the identifying features of a transaction-cost based standing problem and shown the differences between this and the cause-of-action understanding of standing, this section will show how this definition

⁴³ See James E. Krier and Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. Rev. 440, 464 (1995) (arguing that difficulty of assessing private values argues for property rules in almost all situations).

⁴⁴ See Elizabeth Hoffman and Matthew L. Spitzer, *Experimental Tests of the Coase Theorem with Large Bargaining Groups*, 15 J. LEG. STUD. 149, 171 (1986) (concluding from experiments with students that transaction costs of negotiating not prohibitive when there are less than 38 parties). See also, Ward Farnsworth, *Do Parties To Nuisance Cases Bargain After Judgment? A Glimpse Inside The Cathedral*, 66 U. CHI. L. REV. 373, 382 (1999) (presenting case studies suggesting that post-injunction bargaining often does not occur even when there are few parties).

⁴⁵ See Hoffman & Spitzer, note __ *supra*.

can be used to identify standing problems involving constitutional rights that all agree create individual entitlements and causes of action. The example shows how the function of standing described here can in particular cases produce results different from those that would be reached under the dominant understandings of the doctrine. The first example would be justiciable under standing doctrine as understood by the Court, but not under the definition presented here; the second might not be justiciable under current doctrine but should be under the definition presented here.

1. Fourth Amendment and data mining.

Individuals subject to searches have standing to raise Fourth Amendment objections.⁴⁶ But this is not inherent in the Fourth Amendment, rather, it is a consequence of the kinds of *actions* that typically violate it. Searches take place one person, or one premise, at a time. Even if a single police sweep targets many homes, each person can individually seek to enjoin the search. If five out of a hundred people sue and obtain injunctions while the other ninety-five consent, ninety-five searches can take place: the action is divisible. The divisible nature of the defendant's conduct means standing questions will not arise.

Now consider a situation where standing problems can arise under the *Fourth Amendment*. The government uses a data mining program to sift and process massive amounts of anonymous personal information.⁴⁷ Vast databases from credit card companies, airlines, and others are fed into the program, which searches for patterns suggestive of terrorist activity. Because the information is not initially tagged with people's names, and the databases that are used must remain secret for the program to work, it is impossible to seek out people's consent to such a search. Because it is impossible to exclude opt-outs from the program, a Fourth Amendment challenge would raise the exact same jointness problem seen in *Richardson* and *Schlesinger*.

The assertion of Fourth Amendment rights by one person would lead to an injunction that would block the (potentially) consensual searches of a vast multitude. The analysis presented here shows that though the entitlement involved is the Fourth Amendment, the suit raises a standing

⁴⁶ See *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (holding that Fourth Amendment provides a basis for judicial relief even without a congressionally-created cause of action).

⁴⁷ This hypothetical is motivated by programs like the Computer Assisted Passenger Profiling System II or the Defense Department's Total Information Awareness Program. It does not attempt to faithfully represent the details of any particular data mining effort, many of which remain classified. It is sufficient for present purposes that a program with the characteristics described here is one the government could very realistically wish to implement.

problem, and the correct resolution *may* be to deny standing. Whether standing should be denied will depend on a court's estimation of what proportion of the affected group prefer to enjoin the practice, what proportion would consent, and the relative valuations of each.

2. Legislative standing.

In the 1970s, congressmen began to turn to the federal courts, and in particular, the D.C. Circuit to challenge actions by the Executive or even their own house.⁴⁸ The question is whether they have standing on the ground that the action weakens the power of their office or branch.⁴⁹ The Supreme Court only recently entered the fray, denying standing to a few members of the House and Senate who challenged the Line Item Veto Act on separation of powers grounds.⁵⁰ The plaintiffs argued that if the president could unbundle legislation, it reduces the voting power of each legislator. The Court found this too "abstract and widely dispersed" to constitute an "injury-in-fact."

In terms of the transaction-cost function of standing, *Raines* appears unjustified. Congress consists of a relatively small number of people, whose identities are known and fixed. Legislators and Congress as an institution can be successfully negotiated with either by other legislators or the Executive Branch; it happens every day.

There may be a concern that allowing individual legislator standing effectively creates a one-congressman veto, far different from the majority rule envisioned by Art. I. But it will exist only if the challenged action is actually unconstitutional; the veto is not the legislator's but the Constitution's. Unlike in the situations discussed above, there is nothing about the transaction costs would prevent effective bargaining.

E. Objections.

The discussion has assumed that rights can be understood in the

⁴⁸ FALLON, MELTZER HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM at 165.

⁴⁹ The D.C. Circuit has generally allowed such suits. *See, e.g.,* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (holding that senator has standing to challenge constitutionality of pocket veto because it negates his vote for the vetoed legislation); Mitchell v. Laird (holding that congressmen have standing to challenge Vietnam War on separation of powers grounds but dismissing on political question grounds); Nader v. Bork, 366 F. Supp. 104 (D. D.C. 1973) (finding legislative standing but no citizen standing to challenge firing of Watergate Special Prosecutor). *But see* Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2nd Cir. 1973) (holding that congresswoman lacks standing to challenge Vietnam War on separation of powers grounds)

⁵⁰ *Raines v. Byrd*, 521 U.S. 811 (1997).

fundamentally utilitarian Coasean framework. Now two broad objections will be addressed. Much of liberal constitutional theory holds that rights are “trumps,” and rejects the notion that they should yield to even powerful social welfare considerations.⁵¹ This is a radically individualistic understanding of rights – each individual’s exercise of her rights supersedes all communal considerations.⁵²

The second objection regards constitutional rights as merit goods, designed to protect not only or even primarily the individual entitlement-holders, but rather broader social interests.⁵³ Assigning these rights to individuals is merely a convenient enforcement tool since they will have the most immediate knowledge of violations and the greatest incentive to litigate. However, individuals’ private valuations of their rights do not reflect the social benefit of exercising the right. In this view, there is cause to celebrate if liberal standing, by preventing settlement, blocks encroachments on constitutional entitlements. The inefficiencies that might result from liberal standing are illusory, in that they are calculated solely on the parties’ private valuations, disregarding the even larger merit good value of the right. Liberal standing, by making rights effectively inalienable, gets the results argued for by Owen Fiss’s radical *Against Settlement* position⁵⁴ through a backdoor – a good thing if one thinks there is no such thing as an efficient violation of constitutional rights.

The rights-as-trumps argument will be dealt with more fully in the next Part; the merit good argument will be considered here. Undoubtedly the exercise of constitutional entitlements can have structural benefits, and an individual’s valuation of a right may not capture all the positive externalities of its exercise. The value of a right can have both private and public components. However, determining what portion of right’s value is the private value and what is the additional merit value is difficult. Saying there is some broader value not reflected in individuals’ valuations does not mean the efficient level of constitutional violation is zero – yet a liberal standing regime will result in a zero level so long as one person is willing to sue. Similarly, saying private valuation captures much of the value in a right does not mean it captures all of it. Thus there could be cases where the sum

⁵¹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184-205 (1977) (“[T]he prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do.”).

⁵² See Richard Pildes, *Rights are Not Trumps*, 27 J. LEG. STUD. 725 (1988).

⁵³ See REDISH, *POLITICAL ORDER* at 93-95 (arguing that issues involved in litigation go far beyond the interests of the particular plaintiff, and thus injury-in-fact requirement artificially limits ability of courts to vindicate those interests); Tribe, *Inalienable Rights*, 99 HARV. L. REV. at 332-3334 (arguing that there are some rights that are not individual but try to structure society in particular ways, and “individuals cannot waive them because individuals are not their sole focus”).

⁵⁴ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984)

of the plaintiff's private value and the merit good value exceeds the aggregate of the private valuations on the other side. This means that a denial of standing is not always the correct response to a transaction-cost based standing problem.

The goal here is not to make a normative case for a private-rights view of the constitution. The only contention is that there is nothing artificial or unfaithful to the constitutional system in describing standing as a way to safeguard against social welfare losses where social welfare is measured as the aggregate of private values. The design of our system of rights is premised on individual values being good proxies for public values. This is suggested by the central role of individuals in asserting constitutional rights. As will be discussed in more detail in Part III, constitutional rights are freely alienable at the discretion of their individual holders. They can be contracted away for consideration or waived for no reason at all. If a person, or group of people, wish to tolerate a violation of their constitutional entitlements, nothing in the law can compel them to stand on their rights. There is no doctrine of *misprision* of constitutional violations, as there is for felonies. The vast flexibility which individuals have in disposing of their constitutional entitlements suggests the system is based on an assumption that there is little slippage between the public and private value of right assertion.

This function of standing is not based on any independent view of the public value of rights. Rather, on the face of prohibitive transaction costs, standing attempts to replicate as closely as possible the situation that would obtain if transaction costs were low. Recall that the efficiency-promoting property of standing is purely an artifact of jointness, which is entirely a matter of circumstances, lacking any value-content. When a single individual chooses to waive or settle a constitutional entitlement – by agreeing to suppress a newspaper story, for example, the merit good value of asserting the constitutional right is forfeit. The ubiquity of such waivers and the general tolerance of them, suggests that at least on the individual scale, the merit good component of rights is less than its private value. Jointness simply involves the aggregation of many private and merit good values across many people; the ratio of the private to merit value does not necessarily change when many are injured. It seems artificial to think individuals are the best judges of the value of their entitlements when the government violates them serially, but not when the government violates them simultaneously. Indeed, settlement is permitted in class action suits involving constitutional rights – even when the settlement does fully vindicate the interests of some class members.⁵⁵ Thus even in group

⁵⁵ See *Isby v. Bayh*, 75 F.3d 1191, 1997 (7th Cir. 1991) (citation omitted) which held that the constitutional status of class action claims does not prevent their settlement:

litigation involving public rights, individual valuations play the leading role.

Jointness may sometimes result in a conflict between maximizing the private and public value of an entitlement. Thus far, only corner solutions have been considered: denying the private value (liberal standing) or the public value (narrow standing). One does not need to deny the reality of public value to think that when it is in tension with private value, the outcome should depend on whether the aggregate private loss exceeds the public value. Parts IV will alternatives solutions that would at least partially vindicate both interests.

III. STANDING AS PROTECTION FOR RIGHTS

Understanding the jointness problem allows one to recognize another publicly-minded function of the injury-in-fact requirement: protecting individuals' choices about the exercise of their rights. This Part develops a new account of standing that parallels the transaction-cost account in Part II. Here, however, the Coasean framework is set aside in favor of a rights-based approach. As will be seen, jointness produces undesirable outcomes in a framework that treats rights as incommensurable or trumps.

This Part also responds to a series of related objections to the jointness theory of standing. Recall the "rights-as-trumps" objection raised in Part II.E. Constitutional theory does not typically conceptualize constitutional rights as "resources" or "entitlements," so the notion that constitutional law should direct them towards their highest-value use may seem odd. Moreover, many believe that for reasons of incommensurability, constitutional rights cannot be reduced to the arithmetic of efficiency. Furthermore, constitutional rights are a response to fears of majoritarian exploitation. Individual rights lose their luster if they do not protect the unpopular activity of the few, or even the one. One might think the efficiency function of standing is illegitimate, as it contemplates sacrificing the rights of a few to satisfy majoritarian preferences.⁵⁶

This Part shows that because of the jointness phenomenon, liberal standing has consequences that can be measured purely in terms of individual rights. The rights of the plaintiff whose standing is in question

Where . . . constitutional claims are asserted, we recognize that public interests may potentially conflict with the desire of the parties to settle their dispute. The presence of constitutional claims does not, however, prevent us from applying the principles that guide our review which allow ample room for settlement and compromise.

⁵⁶ See REDISH, *POLITICAL ORDER* at 93-95 (arguing that injury-in-fact requirement interferes with Court's function as a counter-majoritarian check of the political branches); Epstein, *Standing and Spending*, at 34.

conflict not merely with the *preferences* or *welfare* of others, but with their own constitutional rights. Thus standing problems represent not just a trade-off between the vindication of constitutional rights and the maximization of social welfare; they also represent a “rights-rights” trade-off.⁵⁷ The efficiency and rights-based functions of standing are isomorphic but logically and doctrinally distinct. They also have different normative implications, with the rights-based function more clearly supporting a robust standing doctrine than the more fact-dependent efficiency function.

A. *Two sides of rights.*

1. Non-exercise and waiver.

An important but often overlooked portion of a legal entitlement is the right to *not* exercise it through litigation. One need not bring all causes of action one possesses. One can waive one’s rights because of distaste for litigation, a desire to maintain good relations with others, or any other reason. This is evident for standard tort or contract causes of action. As first-year students realize, with a chill, when reading *Vosburg v. Putney*, tort causes of action accrue all the time; it is mostly the aggrieved entitlement holders’ private decisions not to exercise their rights that keeps the courts from being flooded with claims of assault.⁵⁸ Torts occur far more often than they are litigated because rights-holders choose to not assert them.

The same is true of constitutional rights, as will be developed below. Constitutional rights give their bearers the *option* to block governmental action, but they do not require them to do so.⁵⁹ They can exercise their right, relinquish it in exchange for some consideration, to avoid social stigma, or waive it for no reason at all. In Calabresi & Melamed terms, constitutional rights are protected by property rules rather than inalienability rules.⁶⁰

⁵⁷ See ROBERT COOTER, *THE STRATEGIC CONSTITUTION* at 258.

⁵⁸ See *Santabello v. New York*, 404 U.S. 257, 260 (1971) (suggesting courts could not function were it not for the high rate of plea bargains by criminal defendants).

⁵⁹ See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 3017 (1983) (arguing that plea bargaining is underpinned by the “autonomy value” of rights, defined as “the right to waive one’s rights as one method of exercising them”). See generally, Lynn A. Baker, *The Prices of Rights: Toward A Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1217 (1990) (“[O]urs is primarily a market economy and that economic structure has inescapable implications for the meaning and operation of constitutional rights,” such as the fact that the exercise of rights has an explicit or implicit price).

⁶⁰ The picture is actually more complicated. Inalienability is a matter of degree, and almost all rights are inalienable in some weak sense. A right is inalienable in the strongest sense if it cannot be waived or bargained away *in whole or in part* for any reason. Perhaps only the Thirteenth Amendment is inalienable in this sense. See *Bailey v. Alabama*, 219 U.S. 219, 241-43 (1911) (Holmes, J.) (holding unenforceable a voluntary personal service

Injunctive relief is not automatically activated when the entitlement is threatened; equity only acts at the petition of the rights-holder. As with private law property rules, the option to enjoin the government simply sets the maximum price at which the entitlement can be taken, namely, the owner's reservation price. This can be zero, or even negative (which would mean the owner would not only waive the right, but pay the government to take the action).

2. Constitutional entitlements.

While constitutional entitlements are regarded as more solemn than common law or statutory ones, they are generally waivable like ordinary tort rights.⁶¹ This is most evident for the Constitution's numerous rights for criminal defendants.⁶² To take a ubiquitous example, plea bargains waive the Fifth Amendment right to liberty⁶³ in exchange for favorable consideration from the prosecutor, to avoid the bother or embarrassment of trial, a desire to pay for one's crime, or no reason at all. A plea-bargain also

contract that contemplates enforcement through specific performance or punitive damages). See also, Kontorovich, *Liability Rules*, at 763-64 n.18 (describing Thirteenth Amendment's ban on "involuntary servitude" as a inalienability rule); Kreimer, 132 U. PA. L. REV. at 1293. A weaker inalienability forbids trading the right, but allows simple waiver and abandonment. The right to vote is of this kind. One cannot sell it, but one can waive it, as most people do. (By contrast, in many Western nations, voting is obligatory because it is seen as serving primarily public; the absence of such laws in the U.S. is due in part to the presumptive waivability of rights.)

In the weakest version, one simply cannot permanently waive or trade *all* of the protection afforded by an entitlement. For example, one cannot permanently shrug off Fourth Amendment protection with a single act. Most if not all constitutional rights are inalienable in this very loose sense. However, the right to object to particular actions is a component of the broader entitlement. And while the latter can be inalienable as a whole, the smaller parts are alienable, and indeed, the sum of the parts can alienable. But this very narrow kind of inalienability of constitutional rights has nothing to do with constitutional values. One also cannot contract away one's ability *in general* to make contracts, or to be protected by the tort system, though one can contract away one's ability to make contracts with particular people or to recover for torts in certain circumstances.

⁶¹ *Adams v. Carroll*, 875 F.2d 1441, 1444 n.2 (9th Cir. 1989) (observing that "most constitutional rights are waivable"). See Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985) ("In our constitutional system, rights tend to be individual, alienable.... [and] subject to boding waiver or alienation.")

⁶² See Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 871 (2003) (observing that while the "waiver doctrine" generally permits forfeiting or even bargaining away criminal defense rights in exchange for some benefit from the government, the parallel doctrine of unconstitutional conditions severely restricts individuals' ability to bargain away First Amendment rights).

⁶³ *United States v. Goodwin*, 457 U.S. 368, 378 (1982) (noting legitimacy of plea bargaining).

waives all constitutional trial rights, such as the right not to incriminate oneself, the right to a jury, and the confrontation right. All of these rights can also be waived with or without consideration from the government.⁶⁴

The Sixth Amendment entitles criminal defendants to a lawyer. This right is considered important enough that suspects must be informed of it upon their arrest, and government must pay for counsel for those who cannot afford them. However, defendants can forgo the entitlement to counsel even for idiosyncratic or foolish reasons,⁶⁵ and even if this does not serve the broader social end of justice, in the sense of the search for the objective truth or the restraint of governmental misconduct. The individual controls the disposition of his entitlements because he bears the *immediate* and most salient consequences of his choices, not because he bears all the consequences.⁶⁶

The ability to bargain away constitutional rights for something of greater value is not peculiar to criminal procedure. People can block unwarranted searches of their homes or belongings. But they can also consent to such searches. This right is often waived because the entitlement holder feels the governmental action benefits him more than it harms him. For example, someone may consent to a search to be assured that a dangerous fugitive is not hiding in his house. More generally, someone might forgo the right to avoid unwarranted searches because they estimate the cooperation with the police generally facilitates law enforcement and produces social benefits that outweigh the intrusion of the search. The crucial point is that the individual himself, and no one else, weighs the benefits of the government action relative to the intrusion on his constitutionally-protected privacy.

Journalists have a First Amendment right to publish at least some national security-related information over the government's objection. However, the press can waive this right by agreeing to *not* publish the information at the government's request. This consent might be given out a belief that the national security interests involve trump the informational

⁶⁴ To be sure, plea agreements are policed by the court for voluntariness and the like. The doctrine of unconstitutional conditions prevents, in certain circumstances, the government from leveraging its market power in one context to extract concessions in another. But this does not take any of the constitutional entitlements involved out of the general paradigm of alienability. Even the right to contract away entitlements in private law is limited at the margins by judicial policing against fraud and overreaching, akin to review of plea agreements. And the ability to transfer rights through contracting is limited by antitrust restrictions on tying arrangements. See Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 14-15 (1988).

⁶⁵ *Faretta v. California*, 422 U.S. 806, 801 (1975).

⁶⁶ *Id.* (noting that the "right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.").

ones, even in a situation in which a court would strike this balance differently. Such a waiver of First Amendment privileges can even be granted for purely self-interested reasons -- to avoid alienating readers or for promises of scoops in the future.

The ability to consent to unconstitutional activity is evident from the recent cases invalidating long-standing public religious displays, such as the Ten Commandments. Presumably these displays were unconstitutional since their inception,⁶⁷ thus violating the rights of tens of thousands of individuals. That a case only emerged after several decades of ongoing violation shows that all the affected individuals chose to forgo the judicial assertion of their rights, presumably because the value they attached to the display was greater than the value they attached to their Establishment right net of litigation costs.

The waiver or consent discussed here, like the bargains discussed in Part II, are usually informal and implicit – an entitlement holder simply does not bring a legal action. But constitutional entitlements can also be contracted away in a formal manner.⁶⁸ A rights holder can bring a suit against the government and then settle it. The settlement extinguishes his right to sue, in exchange for some consideration – and a settlement of a constitutional claim is simply a common law contract.⁶⁹

B. Rights-rights trade-offs

The role of the standing doctrine as a response to jointness problems can now be described. As we have seen, constitutional rights can generally be waived or contracted away. Each individual can decide how to use their right – negatively or affirmatively. But under conditions of jointness, people cannot choose individually to trade their rights. The active exercise by one party precludes the passive exercise by all others. If the passive exercise is understood as a legitimate *way of exercising* rights, then the one plaintiff limits all the other entitlement holders' ability to exercise their rights as they see fit.

A constitutional entitlement's value to its owner has two relevant

⁶⁷ Indeed, the Court suggested that time may blunt their illegality.

⁶⁸ See *Brentwood Academy v. Tennessee Secondary School Athletic Assoc.*, 442 F.3d 410, 446 (6th Cir. 2006) (“Most individually held constitutional rights may be waived. . . Some constitutional rights are so obviously alienable that no one would challenge the idea.”); *Erie Telecommunications v. City of Erie*, 853 F.2d 1084, 1096 (3rd Cir. 1988) (“[C]onstitutional [free expression] rights, like rights and privileges of lesser importance, may be contractually waived”).

⁶⁹ *Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 489 (7th Cir. 2002) (“Because the parties are not diverse, any suit to enforce the settlement agreement . . . would have to be brought in state court even though the settlement was of federal . . . claims.”)

components. Part of its value comes from being able to use it affirmatively, to be free of conduct that violates the entitlement. Part of the value consists in the option to waive or trade it. This is the option value of the entitlement. Even if the entitlement holder would never actually trade it, the power to do so in the future has some real present value. Thus an action by a third party that prevents alienability destroys part of the right's value.⁷⁰ In *Richardson*, for example, if even one individual brings suit, everyone else can no longer exercise *their* individual option to sue or not sue; to know or not know. If part of the value of a right is the ability to not exercise it, then the Accounts Clause plaintiff diminishes the value of everyone else's right – he interferes with their ability to use their right as they see fit by rendering any waiver moot.

The important point here is the tension is not between one person's exercise of his constitutional entitlement and the naked majoritarian preferences of others. Everyone has just as much rights at stake. The ability to waive a right is ultimately a product of the right. And thus the tension is between rights on one hand and rights on the other. Even if one thinks that the "right of way" should be given to the affirmative exercise of a right as against the passive exercise, this does not say how to deal with a situation where there is one affirmative exercise on one side, and a thousand passive exercises on the other.

Because one person's exercise of his right implicates everyone else's exercise of theirs, it becomes clear that **all** proper uses of the standing doctrine are in an important sense about third-party standing or *jus tertii*.⁷¹ This is a prudential doctrine that prohibits a plaintiff from litigating the rights of others, even when there is a cognizable injury to the absent party. The Court has observed that a reason to deny standing when "the rights of third parties are implicated [is] the avoidance of the adjudication of *rights which those not before the Court may not wish to assert*."⁷² The analysis here shows that all true injury-in-fact problems are in part third party standing problems. In situations of jointness, a party seeking to vindicate his own rights necessarily litigates the rights of others as well.

⁷⁰ See Frank J. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 347:

One aspect of the value of a right--whether a constitutional right or title to land--is that it can be sold and both parties to the bargain made better off. A right that cannot be sold is worth less than an otherwise-identical right that may be sold. Those who believe in the value of constitutional rights should endorse their exercise by sale as well as their exercise by other action.

⁷¹ See POSNER, *ECONOMIC ANALYSIS OF LAW* at 598.

⁷² *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978) (emphasis added).

C. Alienability as a Right

One might object that the right to waive or trade a constitutional entitlement is not of the same dimension or magnitude as the right to exercise it. The right to be free of governmental conduct might not include the *right* to consent to it. Of course, consent is allowed – but this may be for practical rather than constitutional reasons. The waiver right might be thought of as a second-order, derivative right. One might sharpen this argument and contend that the right to waive constitutional rights is not itself a constitutional right at all, but merely a consequence of having constitutional rights in a system of private litigation. The consequence is tolerated, but not protected.

Such a conception of the waiver right is plausible, but not obviously correct. The alienability of rights seems to be not an accident, but a feature, albeit implicit, of the system of constitutional entitlements. That is, the waivability of constitutional protections is the *constitutional* default, as evidenced by *inalienability* having to be a specified exception. To put it differently, if the *inalienability* of certain rights is a matter of constitutional law, it suggests, until demonstrated otherwise, the *alienability* (through contract or waiver) of the majority of rights is also a matter of constitutional law. Thus alienability is itself a constitutionally protected interest. Finally, accepting the passive use of a right as being part of the right itself does not require believing that it is as important as the affirmative use. One need only believe that both are aspects of the same right. For if the alienability right is relatively less important than the exercise right, but both are “rights,” than the alienability rights of many people might trump the exercise rights of a few.

There is little law or scholarship on this question, no doubt because waived rights do not give rise to cases. The few Supreme Court cases touching on this issue will now be examined closely. The cases are ultimately inconclusive, but they suggest, especially the more recent ones, that the non-exercise of a right is part of the protected autonomy interest conferred by the right.

1. *Singer v. United States & Faretta v. California.*

The two occasions on which the Supreme Court has most explicitly considered these questions (both times with respect to trial procedure rights), it has come to different conclusions. In *Singer v. United States*,⁷³ a criminal defendant wanted, against the prosecutor’s wishes, to waive his right to a jury and have his case tried to the bench.⁷⁴ He premised his

⁷³ *Singer v. United States*, 380 U.S. 24 (1965).

⁷⁴ *Id.* at 26 (“Petitioner further urges that since a defendant can waive other

argument on the general waivability of constitutional rights. The Supreme Court upheld the trial judge's refusal to allow the waiver – not because there jury right cannot be waived, but because the Constitution does not affirmatively give anyone a right to a bench trial.⁷⁵ While the court found the defendant did have the “ability” to waive a jury if the judge and prosecutor agreed, it went on to find that the “defendant's only constitutional right concerning the method of trial is to an impartial trial by jury.”⁷⁶ This language could suggest that the waiver right is of a lesser dimension, and perhaps different source, than this substantive right.

Singer would lead some to think that a defendant has no right to refuse counsel,⁷⁷ yet ten later the Court in *Faretta* held that the right to counsel *does* include a right to waive counsel. The Court reconciled *Singer* by taking an implied rights approach. The Court concluded that the right to assistance of counsel implies, by virtue of its goals and history, a substantive right to no counsel – this is not a waiver right, but a substantive right of its own. On the other hand, nothing about the history or purposes of a public trial right suggests it needs to be supported with an implicit right to a bench trial alternative.⁷⁸ The entire discussion is thus framed not in terms of whether one has a right to waive rights, but whether one has a right to particular outcomes. As a result, *Faretta* attempts to reconcile itself with *Singer* by saying that there is no general answer to the waiver question, but rather a separate inquiry for each right. Of course, this smacks of ad hockery - a desire to limit the previous case to its facts.⁷⁹ The Court does note in a dictum that a “defendant's *power* to waive [a] right” does not “mechanically” give rise to a constitutional “right” to waiver, but rather a right-by-right analysis is required.⁸⁰

There is a better way to understand these cases. They simply mean that a negative right cannot be transformed into an affirmative one. As is well known, constitutional law disfavors the creation of affirmative duties from the government to citizens. In the typical waiver context, the individual has

constitutional rights without the consent of the Government, he must necessarily have a similar right to waive a jury trial.”).

⁷⁵ *Id.* at 34.

⁷⁶ *Id.* at 34-35 (emphasis added).

⁷⁷ *See, e.g.,* *People v. Sharp*, P.2d 489, 493 (Cal. 1972) (“[C]onstitutional language granting the right to the assistance of counsel lends no express support to a claim that an accused has the constitutional right to defend without counsel. . . the right to waive a constitutional protection is not itself necessarily a right of constitutional dimensions.”), citing *Singer*.

⁷⁸ *Singer*, 380 U.S. at 28-33.

⁷⁹ *See Faretta*, 422 U.S. at 819 n.15 (noting that the decision is not a “mechanical” application of previous principles).

⁸⁰ *Id.* (emphasis added).

an entitlement to be *free* of certain action; the waiver allows the action to take place but does not obligate the government to do it. If a citizen sees a police officer on the street, stops her and consents to be searched, the officer is not obligated by the fact of the citizen's waiver to search him. The officer simply has the option. Similarly, in a plea negotiation, the defendant's desire to plead guilty does not obligate the government to accept a plea.

However, in the trial context, there are two options, judge or jury, each of which must be provided by the government. Because there are only two options, waiver in effect creates an affirmative right, that is, obligates the government to provide the defendant with a particular thing, here, a bench trial. Given the reluctance to find affirmative governmental obligations in the constitution, the *Singer* result is not surprising. The case does not hold that having a right does not generally come with the right to waive it, but rather that "the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."⁸¹ In *Faretta*, by contrast, the defendant starts with that rare creature, an affirmative constitutional entitlement, and wishes to waive it. Here the waiver does not obligate the government to provide the entitlement holder with anything at all, and so waiver is allowed by right.

2. *Elk Grove Unified School District v. Newdow*⁸²

Both views of the relative value of the two aspects of an entitlement (the right to assert it offensively and the right to waive or trade it) can find support in two recent Supreme Court cases.⁸³ In an overlooked part of the first case, the Court described an entitlement holder's desire to acquiesce to a constitutional violation as a "constitutionally protectable interest" in its own right.⁸⁴ Regrettably, the Court did not expand on this characterization. However, a closer look at the facts of the case reveals a microcosm of the jointness problem, which the Court resolves by favoring the waiver interest over the exercise interest.

Newdow, whose daughter attends California public schools, brought as her next friend an Establishment and Free Exercise challenge against the mention of "G-d" in the Pledge of Allegiance recited at school. He claimed the girl was, like him, an atheist, and thus put upon by the state-sponsored religious reference. The girl's mother, who had joint custody, intervened to argue that the child was actually a Christian who did not mind the Pledge and would be harmed if it were *repealed*.⁸⁵

⁸¹ *Singer*, 380 U.S. at 28-33.

⁸² *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

⁸³ Compare *id.* with *Georgia v. Randolph*, 126 S.Ct. 1515, 1523-24 (2006).

⁸⁴ *Elk Grove*, 542 U.S. at 15 n.7 (citation omitted).

⁸⁵ *Id.* at 9.

The dispute between Newdow and the mother can be seen as a *jus tertii* question. Various third parties seek to espouse the interests of a principal, and it is unclear which advocate, if any, of them truly represents the interests of the principal; but it is clear the third-party claims are derivative. Such cases are properly treated as outside the core of the standing inquiry. What is interesting here is that the dispute between the child's potential representatives focused not on *how* to best assert her constitutional rights, but rather on whether affirmative assertion or waiver had the greatest net benefits.

In other words, there are two joint owners of the right to espouse the child's claims. One wishes to use that right to challenge a highly colorable violation of the child's constitutional rights (and presumably those of other schoolchildren); the other wishes to use the rights by not using them. (Unlike other third party standing cases, there is no possibility that the principal will eventually resolve the matter directly.) Thus the parents are effectively co-owners of the right to bring the Establishment challenge, but they disagree on the highest value use of this right.⁸⁶ Each has veto power over the other's preferred use, and it can not be split down the middle.

The Court explained its decision in favor of the mother by noting that she seemed to have the slight preponderance of custody under state law -- though the division of custody is admittedly unclear, and silent on the question of legal assertion of rights. A few words in a custody order is an extraordinary basis on which to decide a dispute about the highest-value use of an entitlement to challenge unconstitutional government action.

What is particularly noteworthy is what the Court did *not* do: it *could have* refereed between the two irreconcilable claims by throwing the tie to the side that wishes to use the entitlement affirmatively. This is exactly what the court of appeals had done below:

[The mother] has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action. Newdow's assertion of his retained parental rights in this case, therefore, simply cannot be legally incompatible with any power Banning may hold pursuant to the custody order. Further, Ms. Banning may not consent to unconstitutional government action in derogation of Newdow's rights or waive Newdow's right to enforce his constitutional interests.⁸⁷

Such reasoning finds no expression in the Court's opinion reversing the Ninth Circuit. On the contrary, for the Court, preventing violations of

⁸⁶ *Id.* at 15 ("Newdow's rights . . . cannot be viewed in isolation.").

⁸⁷ *Newdow v. United States Congress*, 313 F.3d 500, 505 (9th Cir. 2002).

constitutional rights (the daughter's and others) is not an automatic trump value. The Court recognized that a party whose constitutional rights are being violated may prefer to waive those rights if they think the benefits (here, the primary benefit was avoiding social opprobrium) justify it and that such a preference is legitimate. Indeed, such a preference may dominate a contrary one *even when this entails preventing another party from exercising their constitutional entitlement.*⁸⁸

3. *Georgia v. Randolph*⁸⁹

The case began with a wife's domestic violence call. When the police asked for permission to search the house, the wife consented – but her husband vociferously objected. The Court held that the husband's veto made the search unconstitutional “as to him.” The wife could consent to a search of the home, but so long as the husband was there objecting, the search could not be applied “to him.” This is an attempt to disaggregate the simple overlapping entitlement, and as Justice Scalia shows in his dissent, even at this level the cut is sloppy: if the search is valid “as to her,” would not the plain sight rule also allow the search to spill over to the drug paraphernalia the husband had left out?⁹⁰ Carving out opt-outs when entitlements overlap is not easy.

Here, two people have overlapping entitlements in the privacy of their home. One wishes to trade the entitlement (for a police search), the other to use it affirmatively. The Court throws the tie to the affirmative use of the entitlement: “In the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place.”⁹¹ The Court here treats the affirmative use of the right as outweighing the waiver use. However, it does not treat the affirmative use as a trump: the affirmative use is explicitly weighed against the other side's various possible interests in consenting, which the Court treats quite seriously. The balancing is based partly on a belief that the interests of the consenting party could be served through other means that do not sacrifice the objector's right, while the opposite is not true.

Of course, the Court was dealing with a simple two-party situation,

⁸⁸ Newdow had also raised constitutional claims in his own name, to the effect that the Establishment violation harmed his ability to teach his daughter his religious views. *See Elk Grove Village* at 16-17. This claim also overlapped with the daughter's Establishment clause right, in that its successful exercise would prevent the daughter from acquiescing. The Court denied standing for this claim as well without any additional explanation.

⁸⁹ 126 S.Ct.1515, 1523-24 (2006).

⁹⁰ 126 S.Ct. at 1536.

⁹¹ *Id.* at 1523-24.

where there is no reason to prefer the consent use to the affirmative use (though there were on the facts of the case: the police had come on a domestic abuse call from the woman). The balance might look quite different with one objector out of ten thousand. After all, *Elk Grove Village v. Newdow* could be thought of as a case about three people with a rights-interest in a jointed action – Newdow, the daughter, and her mother. Two out of three favor waiver, and waiver wins the day.

IV. ALTERNATIVES TO STANDING: DISAGGREGATING JOINTNESS

This Part considers whether the jointness problem can be better dealt with through methods other than standing restrictions. The problem shows explains what is at stake in crafting standing doctrine. It does not demonstrate that the right response should be to adopt a restrictive standing regime. While standing can avert massive social losses and interference with people's exercise of their rights, it is not costless. Standing cuts the transaction-cost knot by entirely denying relief to plaintiffs, leaving them with uncompensated losses. This downside of standing is purely distributional. The second – and socially more important – cost of standing involves the merit good component of constitutional rights. To the extent that constitutional litigation is a vehicle for the vindication of broader social interests, the denial of standing frustrates this goal. For example, it limits the production of the public good of precedent regarding permissible government conduct.⁹²

A. Liability Rules

The typical judicial remedy for a jointness problem in other contexts is not to deny relief but rather to make it monetary rather than injunctive – to switch from a property rule to a liability rule. The jointness problem is, as has been seen, one of high transaction costs arising from a large number of disorganized entitlement holders, and the potential of strategic holdout among them. In such situations, Calabresi and Melamed famously found that the socially preferable solution would be to switch from the property rule protection that generally accompanies private law rights to liability rule protection – thus allowing a nonconsensual buy-out of the aggrieved parties' entitlements at a judicially-determined price.⁹³ Generally an entitlement is either protected by property rules or liability rules all of the

⁹² See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEG. STUD. 235, 240 (1979) (identifying precedent as a public good).

⁹³ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

time, but when transaction costs change dramatically, a switch in the remedial regime would be warranted. Calabresi & Melamed suggested as much, and while their theory has had limited effect on the nuisance entitlements that they took as their subject, it is descriptive of the legal response to such problems in other areas.⁹⁴ In private law, one sees this in minority shareholders' rights in corporate law,⁹⁵ and in constitutional law, a switch to liability rules can be found in the Takings Clause.⁹⁶

A response along these lines that could be an alternative to standing would be to take injunctive relief off the table in jointness situations. One might say standing exists only at law, not in equity. The remedy would be monetary, the court's estimation of compensatory damages for the plaintiff's injury. Injunctive relief is binary, while monetary relief is continuous. To the extent a court can value a person's individual stake in a *de facto* joint entitlement; it can effectively separate the entitlement into multiple awards of monetary relief.⁹⁷

Liability rules would capture many of the benefits of restrictive standing while also incorporating some of the advantages of the liberal approach. It avoids the potentially massive social losses that arise from property rule protection when rights are inalienable. At the same time, unlike the current standing doctrine, it does not simply let losses lie where they fall, but rather grants some measure of recompense to those aggrieved by the governmental action. Perhaps more importantly, it allows the courts to address the merits of plaintiffs' claims, giving them occasion to pronounce on the constitutionality of government action. This has expressive,⁹⁸ precedential,⁹⁹ and educational¹⁰⁰ benefits that should not be

⁹⁴ See Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 5-6 (2002).

⁹⁵ See *id.* at 33-39 (describing appraisal right, essential facilities doctrine, and other private law rules as "pliability rules").

⁹⁶ U.S. CONST. AMEND. V.; see Kontorovich, *Liability Rules*, 56 STANFORD L. REV. at — (describing current and possible constitutional pliability rules).

⁹⁷ Professor Fallon has recently noted that standing doctrine seems motivated by concern about cost of injunctive remedies, in particular, ongoing supervisory decrees, and such concerns would fall away in a damages regime. Fallon, *Remedies*, *supra* note —, at 650-651, 665-66. While the solution may be similar, this is an entirely different remedial concern from the one discussed here, which focuses on the inability to buy out an inefficient injunction due to transaction costs.

⁹⁸ See Amar, *supra*, at 718 (arguing that law-declaring function of court argues for a relaxation of standing restrictions). See generally, Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 69 (1996) (arguing that decisions of the Court "and may well have major social effects just by virtue of their status as communication").

⁹⁹ An existing judicial determination of the issue could be used to get an injunction in such subsequent cases where jointness is not a problem. Moreover, establishing precedent on constitutional issues has become particularly important given qualified immunity and the new standard for federal habeas petitions. See generally, John C. Jeffries, Jr., *The*

underestimated. A determination that the government is acting illegally would impose a potentially large shaming penalty on officials.

B. Problems With Liability Rules

When high transaction costs prevent bargaining, property rules threaten to lock in inefficient resource allocations. The (academically) accepted solution is to protect the entitlements with liability rules, which allow for forced takings at a judicially-determined price. Instead, what standing doctrine does when confronted with a jointness problem is to switch from the robust property rule default to a rule of *zero* protection. This section will explore the limitations of liability rules as an alternative to standing restrictions. These limitations may explain why standing effectively eliminates the plaintiff's entitlement, rather than cashing it out with liability rules. One reason may be "injunctive essentialism" -- a mistaken assumption that constitutional plaintiffs are always entitled to property rule protection. Furthermore, liability rules would create a new set of problems - valuing the entitlements and screening out opportunistic plaintiffs - that may be as serious as those under property rules.

1. Injunctive essentialism.

In private law, entitlements can be protected either through liability or property rules. Whether an entitlement will be protected with liability or property rules often turns on whether transaction costs are high enough to block efficient trade.¹⁰¹ The situation is quite different for constitutional entitlements, which are thought to require, by their very nature, property rule protection.¹⁰² Those subject to an ongoing or prospective constitutional violation are presumptively entitled to an injunction.¹⁰³ Nothing in constitutional law dictates property rules as the sole protective regime. Indeed, constitutional law uses liability rules in a surprising number of

Right-Remedy Gap in Constitutional Law, 109 YALE L. J. 87 (1999) (arguing the qualified immunity doctrine encourages courts to develop constitutional law deferring the full costs of doing so).

¹⁰⁰ Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992)

¹⁰¹ See Calabresi & Melamed.

¹⁰² See CHARLES ALLAN WRIGHT, ARTHUR R. MILLER & MARY KAYE KANE, 11A FEDERAL PRACTICE & PROCEDURE § 2944 ("[I]f a constitutional violation is established, usually no further showing of irreparable injury is necessary") (2006); *id.* at § 2948.1 n.21 (collecting cases); Laycock at 57 ("Injunctions are routine in all civil rights and constitutional litigation.")

¹⁰³ See Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 758 (2004) (demonstrating the general belief in a near-automatic right to injunctions for constitutional violations).

situations generally characterized by high transaction costs.¹⁰⁴ And the structure of the Bill of Rights suggests liability or property are equally valid options when, as is almost always the case, the Constitution specifies only the substance of the entitlement but not the remedial regime.¹⁰⁵ Nonetheless, there is a belief among judges and scholars that liability rules for constitutional rights are inappropriate and perhaps unconstitutional (aside, of course, from the Takings context).

2. Valuation difficulties.

Accurately appraising the plaintiff's loss is always a problem with liability rules, which replace a market mechanism for determining price with a governmental one. The severity of the problem depends on the nature of the entitlement in question. When an entitlement is not traded in thick markets or has elements of idiosyncratic value, accurate judicial valuation becomes more difficult. The difficulty manifests in both decision costs (such as legal fees, judicial salaries, and discovery) and error costs (the incorrect incentives created through inaccurate valuations). The wide use of property rules in private law is due, in part, to a belief that valuation difficulties are so ubiquitous and intractable that legal remedies are never adequate.¹⁰⁶

Yet juries do assign values to even the most inchoate injuries, such as extreme emotional distress and loss of consortium. Such damages are controversial, and may be systematically wrong; certainly one is more skeptical of them than damages for economic loss, which helps explain restrictions on the recovery for non-pecuniary injuries. Juries are often asked to put a price on constitutional entitlements, as when they award damages to victims of illegal seizures, police brutality or malicious governmental discrimination. These awards are made only because it is too late for anticipatory relief, but it bears noting that the law does not regard the valuation of these entitlements as being a task beyond the competence of courts.

To be sure, constitutional entitlements are, on the whole, harder to value than private law entitlements,¹⁰⁷ and the inchoate rights typically at issue in

¹⁰⁴ See Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 U. VA. L. REV. 1135 (2005) (showing how liability rules are used in the prior restraint doctrine, Eighth Amendment Bail Clause, procedural due process, Fourth Amendment search and seizure rules, and the Fifth Amendment privilege against self-incrimination).

¹⁰⁵ *Id.* at 1165-69.

¹⁰⁶ See Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53 (1993) (arguing that equitable relief is the norm in much broader area of private law than generally appreciated).

¹⁰⁷ See Kontorovich, *Two Dimensions*, at 1147-48 (discussing valuation difficulties

standing problems will be particularly troublesome. What is less clear is whether constitutional entitlements pose any greater valuation problems than the inchoate entitlements in common law. The correct measure of damages is how much the plaintiff would demand to be paid to suffer the injury, and it is hard to see why this is more speculative when the injury is an establishment of religion rather than intentional infliction of emotional distress.

Concerns about valuation difficulties are often put in terms of whether a damages award will capture the “full” cost of the harm – that is, the assumption is often that error will be systematically biased towards under-compensation. (Error is only a social problem if it is systematically biased one way or another.) Injunctive essentialism is partly based on the view that money will not make the plaintiff whole. It seems the opposite could also be true; it is actually a difficult empirical question. One can imagine a rejected applicant challenging an affirmative action program. Had someone approached him before he applied, he may have accepted a modest sum to take his chances under the program; a damage award, made in hindsight could be much larger.

On the other hand, the role of the jury may raise a particular problem in hard standing cases, where the great majority of entitlement holders assign a zero or negative value to exercising the entitlement. Here a judge could not charge a jury to award damages based on how much they would need to be paid to suffer the same injury (a common way of getting at non-pecuniary damages) because most would suffer it gladly.¹⁰⁸

3. Free riders.

Valuation problems are not unique to the jointness problem; a more particular problem with liability rules in this context involves distinguishing those genuinely aggrieved by the governmental action (those that, unlike the majority, place a positive value on their entitlement) from possible pretenders. With the kind of entitlements and injuries that hard standing cases involve, the only observable difference between these two classes is that the former comes forth to litigate. Ideology (broadly understood as beliefs, politics, religions, appraisal of risks, temperament, concern or some similar subjective disposition) is all that separates the ideological or public interest plaintiff (or any plaintiff in a situation where many are harmed but

with constitutional rights).

¹⁰⁸ See Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of A (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771 (2003) (noting that since judges are themselves taxpayers, one might think that they would have all have a conflict of interest in presiding over a taxpayer standing suit).

few sue) from everyone else. The problem for liability rules is that such internal states are easy to fake or opportunistically adopt.

Imagine in *Richardson* a liability rule substituting for the standing *jurisdictional bar*. The case would proceed to the merits, where the plaintiff wins. Instead of enjoining the CIA to reveal its accounts, the court would remedy Richardson's injury by awarding him \$1,000. Under the theory behind the liability rule, all other positive value entitlement holders should be able to recover as well. Unless the full cost to the positive-value people is internalized, there is no assurance that the government's policy has a net social benefit.¹⁰⁹

However, once the first plaintiffs win their case, it becomes difficult to determine who the positive-value people are. At this point, anyone claiming that they are aggrieved by the CIA's nondisclosure could come forth and, relying on *Richardson* as a precedent, claim \$1,000 for themselves. Assuming a unified and indivisible course of government conduct – which this Article treats as the predicate for standing problems – once the first award is made, every American willing to profess the views of the original plaintiff, at least in a complaint, can be interchangeably plugged in as a subsequent plaintiff. The Supreme Court greatly mitigated this problem when it held the new doctrine of nonmutual offensive collateral estoppel¹¹⁰ inapplicable to suits against the United States.¹¹¹ But this merely changes the problem from one of collateral estoppel to one of *stare decisis*.¹¹²

Nonetheless, winnowing out insincere plaintiffs would be a difficult task, requiring an individualized inquiry into the subjective beliefs of each plaintiff. For most there would be no evidence apart from their own testimony. Even for those where evidence could be had of a contrary prior disposition, it would be difficult to use this to block relief, for that would result, quite oddly, in less constitutional protection for people who change their minds than for those of long-established views.

The key point is that given the nature of the protected entitlement, it

¹⁰⁹ The discussion here holds to one side questions about the extent to which the government internalizes costs. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). It also assumes the government acts as an agent for society at large rather than pursuing its own agenda. Clearly if internalization and agency are problematic, it weakens the analysis of the Article, along with much of the rest of constitutional theory.

¹¹⁰ This is the practice where a subsequent plaintiff uses the victory of a prior plaintiff against a common defendant to conclusively establish facts or issues common to both cases. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

¹¹¹ *United States v. Mendoza*, 464 U.S. 154 (1984).

¹¹² If the first suit was resolved by the Supreme Court, the effect on subsequent litigation would be the same. Otherwise, the free-rider problem would be reduced as free-riding would only be possible within *circuits* where plaintiffs had won.

would be very difficult to distinguish sincere plaintiffs from the opportunistic ones, who would have waived (or even paid to not exercise) their entitlement under a property rule. If enough negative-value entitlement holders take advantage of a prior judgment to receive damages, the cost of compensation could exceed the social benefit of the government action, and the liability rule cure would be worse than the property rule disease.

C. Making Liability Rules Work

In situations where the standing doctrine is currently used to bar suits for lack of an “injury-in-fact,” it might be preferable to recognize standing but to use liability rules rather than property rules. A major problem with this is separating sincere plaintiffs from opportunistic ones; the first subpart below considers a possible solution. Correctly valuing the entitlements is another problem; the second section below considers an important standing situation where valuation difficulties seem tractable.

1. Liability rule with an event-based statute of limitations.

A better solution would be to switch to liability rules while limiting the preclusive effect of the first favorable judgment. The best way to do this would be with a statute of limitations that expires when a favorable judgment becomes final after appeal in whatever case first reaches that mark. In other words, to get within the limitations period one would have to file before any favorable appellate judgment in any of the other suits on the matter becomes final. (Since all potential plaintiffs are injured by the same course of government conduct, the clock would start running for everyone at the same time; in cases where this may not be true, tolling would of course be appropriate.) The statute of limitations would cut out concern about stare decisis free-riding because the limitations period would end the moment that *res judicata* effect would begin.¹¹³ At the same time, this would allow an indefinite number of genuinely aggrieved plaintiffs to receive compensation by filing early. Presumably it is the ideological plaintiffs, those with the greater injury, who will file first, and thus compensation will roughly track injury. Thus this solution also acts as a filter between sincere and strategic plaintiffs.

2. Taxpayer remedies for taxpayer standing.

The valuation difficulties caused by liability rules may be easiest to deal with in taxpayer suits, which have long been a major source of standing

¹¹³ In a similar but narrower vein, Prof. Brilmayer has suggested eliminating the stare decisis and collateral estoppel effect of judgments adverse to the plaintiff of questionable standing as an alternative to the standing doctrine. See Brilmayer, 93 HARV. L. REV. at 309.

controversies.¹¹⁴ Taxpayer suits are seen as the paradigm of generalized grievances.¹¹⁵ Taxpayer suits challenge the legality of governmental spending; the invocation of the plaintiffs' status as taxpayers ostensibly distinguishes their interest in the matter from a purely abstract or altruistic one, from a mere citizen's interest. Striking down the challenged program would reduce total expenditures and ultimately bring a reduction in taxes. Thus the theory behind taxpayer suits seeks to connect something that looks like pure citizen standing to the most traditional of injuries, economic harm. The Court has had little truck with this theory. If a program is struck down, the government would most likely find something else to spend the money on, rather than refund it – thus the element of “redressability” is missing. With massive deficit spending, there is even less connection between being a present-day taxpayer and financing of current government operations.

Moreover, the Court recognizes that taxpayer standing cannot be understood as anything other than a fiction¹¹⁶ to disguise what is at bottom a citizen or private attorney general suit. Almost everyone pays taxes, and thus the plaintiff's interest is indistinguishable from those of many others;¹¹⁷ and all government actions involve money either obtained through taxation, or fungible with it. Thus federal taxpayer status has been consistently rejected as a basis for standing despite ongoing attempts to assert it,¹¹⁸ with the important exception of Establishment Clause suits challenging Congressional spending programs.¹¹⁹

Understanding the problems to which standing responds – problems caused by overlapping and thus inalienable rights regarding a single course of conduct – gives a new perspective on the taxpayer suits. The problem with these suits is not the lack of injury or redressability, but the remedy sought. Though they base their standing on a purely economic injury, the taxpayer suits do not seek monetary relief but rather to enjoin the spending program.¹²⁰ If their interest in the legality of the program stems from their status as taxpayers, then the relief they seek is overbroad; nothing about being a taxpayer should entitle them to question how their funds *and those of others* are being spent.

If the program is unitary in the sense that opt-outs cannot be excluded,

¹¹⁴ See Frothingham.

¹¹⁵ TRIBE at s.3-17 pg. 421.

¹¹⁶ TRIBE at s.3-17 pg. 421.

¹¹⁷ Frothingham.

¹¹⁸ See Staudt, *Taxpayers in Court*, 52 EMORY L.J. 771 (showing that federal courts bar federal taxpayer standing but may permit municipal taxpayer standing).

¹¹⁹ See *Flast v. Cohen*.

¹²⁰ See Staudt, *Taxpayers*, at 776 (“The goal of the lawsuit is to halt government spending or, in the alternative, to re-fashion it to ensure the spending projects comport with existing statutory or constitutional norms.”).

an injunction raises the problems discussed in Part II. However, the taxpayer theory, and the objection to *spending* on the program, shows how the unitary program can be disaggregated. If the remedy is at law – a refund of the plaintiff’s pro-rated contribution to the program – then one plaintiff’s disposition of her entitlement would not affect other potential plaintiffs’ disposition of theirs. While action may be unitary, money is infinitely divisible.

All of the problems with a liability rule solution seem easier with a taxpayer suit. Damages are easy to calculate – the cost of the program multiplied by the plaintiff’s fractional share of the national tax revenue. Injunctive essentialism seems at its weakest here, where the plaintiff complains of an essentially economic injury. The liability rule answers the redressability concern that hangs over taxpayer suits by ensuring that the plaintiff benefits from winning the suit. (To be sure, for most taxpayers and most spending programs, the individual’s share would be minute enough that they would be dwarfed by the costs of litigation, and even by the administrative costs of distributing the damages.) On the other hand, this solution shares the weakness of liability rules as a response to jointness -- it does nothing to address free-rider problems. However, those could be dealt with through the kind of statute of limitations discussed in the previous subsection.

D. Disaggregation with Property Rules

The problem to which standing responds can be managed to some extent even under a property rule system. Two alternatives are discussed. The first focuses simply on narrowing the scope of injunctions; this would represent the most modest reform discussed in this Article. However, it cannot be applied to all or perhaps even most types of government action, thus greatly limiting its utility. Furthermore, it may reduce the magnitude or probability of jointness problems but not enough to make a difference. Still, if one finds the costs of robust standing unacceptable, this proposal will be a practical and almost costless alternative in that it does not seek to limit plaintiff’s standing at all, but only the *scope* of injunctive relief. The second alternative is more innovative, and would probably require legislative implementation. But it might serve the goals of standing better than either current doctrine or the alternatives discussed here.

1. Narrowing injunctions.

As has been seen, a key feature of the standing problem is a single government action that infringes on the entitlements of many people, rather than many independent actions directed at many people. The indivisibility

of the action creates the holdout problem. Its applicability to many people makes it difficult to have alienability of the entitlements to be free of the action. However, whether an action or program is truly unitary is not always clear, and in some way is a function of other aspects of the law, in particular, the choice of remedial regime.

To the extent law can disaggregate governmental actions into smaller parcels, along geographic or other lines, the problem that standing seeks to address diminishes. The inauguration case discussed in Part II.B.2 is a clear example of a completely unitary action with nationwide scope. But consider another suit by *Newdow*, where he challenged the recitation of the pledge of allegiance in schools on Establishment Clause grounds. The recitation of the pledge is geographically divisible. It can be recited in some judicial circuits but not others, in some school districts but not others, even in some classrooms in a particular school but not in others.

Such disaggregation can be implemented simply by issuing narrow injunctions. Indeed, the narrower the remedy is on the back end, the less the need for narrow standing on the front end. If one can only challenge the recitation of the pledge in one's own classroom, the problems that standing responds to greatly diminish. For one, the class of potential plaintiffs in each classroom would be small, definite (knowable in advance) and difficult to manipulate. This would make bargaining among the people with different valuations easier. By contrast, if the question is the Pledge nationally, the class of potential plaintiffs is vast, difficult to identify, and manipulable.

This is not so different from what courts do when applying the standing doctrine in Establishment Clause. In cases challenging religious displays or symbols, standing is often limited to those with some "personal connection" or geographic nexus to the display, such as those who routinely see it, "usually in the[ir] home or community."¹²¹ Similarly, a plaintiff challenging his local religious display should presumably not have standing to challenge that of a far-off town, even if set up as part of the same program.

The "personal connection" test serves the transaction costs purposes of standing limitations very poorly, because while it may reduce the number of people with standing, it still leaves class membership undefined and completely open.¹²² A potential plaintiff can easily acquire a "personal connection" by slightly changing his routine to occasionally pass by the display. The potential for the class to expand in this way makes settlement with known members futile, and holdout easy. When looking for axes along which an action can be divided, the key is to create discrete groups of

¹²¹ *Newdow v. Bush*, 355 F. Supp.2d. at 278.

¹²² The same can be said of the nexus requirements imposed on plaintiffs in statutory rights cases like *Lujan*. These requirements have been widely ridiculed as artificial by critics of standing.

potential plaintiffs corresponding to each unit. Thus it is important to try to carve out discrete plaintiff groups whose membership is *defined ex ante*, *identifiable*, and *closed*.

To be sure, the idea that injunctions should be narrowly cast is an old maxim of equity. Yet it seems forgotten in cases of broad public concern, for obvious reason – if the pledge is unconstitutional why not ban it everywhere? The answer suggested here is because people everywhere are not complaining, and a remedial zealotry would lead to jointness problems.

2. Random standing.

Perhaps the best way of realizing the efficiency goals of standing without the downsides of the current doctrine would be a system of random standing. Standing to litigate a given injury would be given to – and confined to – a representative sample of the allegedly injured population. The system would be triggered by the court concluding that a suit before it raised a standing problem as defined in Part II – a government program that infringes on many peoples rights in a similar or identical fashion. If the disaggregation solution suggested above did not seem feasible, the court would send notice to representative sample of the affected class. The notice would inform them of the alleged rights violation, and that they were one of a certain number of people given standing to pursue equitable remedies against the violation. The sample group would be chosen using methods such as those used by polling agencies; it should be just large enough to be statistically representative. The expenses and administration of the sampling would be, at least originally, borne by the original plaintiff and her attorneys – the system is essentially that of class action notification, except seeking opt-ins, not opt outs.

Anyone in the sample group could, if they wished, sue to redress the constitutional violation. If even a single one of them chose to do so, they would have standing *per se*; the Court would not be able to say their injury was too abstract or general. However, if none of the random group chose to challenge the government program, no one else could so.

The random system has many advantages. Unlike current standing doctrine, it would never result in a system where no one has standing to challenge a constitutional violation that affects many. At the same time, the class of potential plaintiffs would be small, closed and identifiable – indeed, the names of group members should be shared with the defendant to facilitate bargaining. This would prevent some of the most severe inefficiencies that could result from a liberal standing regime.

One of the greatest difficulties for standing's efficiency function is that it depends on the Court making ad hoc and poorly informed judgment about

the relative proportion of positive and negative value rights holders. The existence of one plaintiff out of 300 million potential ones says very little. However, one out of a few thousand would suggest the negative value rights holders are numerous enough that despite their being a minority, they still might be the highest value users of the right.

Random standing would go a long way to solving the problems of jointness by creating a manageably small, closed and identifiable class of rights-holders. It would not entirely solve the problem; the possibility of holdout would remain. That is, because any one individual among the sample group can hold hostage the entire social surplus (assuming it exists), the incentive for such strategic behavior will remain. The probability of holdout preventing an efficient solution decreases with the number of potential veto-holders, but with any group large enough to be meaningfully representative, holdout may be a possibility.

E. Summary.

The discussion of alternative methods of avoiding the welfare losses caused by jointness help explain why it is in reality addressed by the ungainly injury-in-fact standing doctrine. Alternative methods of avoiding the welfare losses caused by jointness appear unattractive, inadequate or impractical. Liability rules recapitulate many of the problems seen under property rules. Random standing may get better results, though it only reduces, rather than eliminates the holdout problem. However, it is exceedingly unlikely that random standing would ever be implemented by Congress: making the vindication of constitutional rights explicitly depend on fortuity cannot be politically attractive. As for the narrow injunctions approach, it is easy enough to implement in situations where divisions can be made along geographic lines, but altogether impossible to implement in other important contexts, like *Richardson*, or the Inauguration case. Liability rules with a statute-of-limitations to screen out insincere plaintiffs may be the best answer, but would almost certainly require some legislative authorization. But while arguments can be made for the constitutionality of confining constitutional plaintiffs to legal remedies,¹²³ they go against the grain – as does an event-based, rather than a time-based statute of limitations. Not surprisingly, Congress has not arrived at a solution that would involve a combination of two such unusual and controversial features.

¹²³ See Kontorovich, *Two Dimensions*; Kontorovich, *Mass Detentions*.

V. FURTHER IMPLICATIONS

This Part will consider some miscellaneous implications of the account of standing elaborated above.

A. Non-Hoehfeldian plaintiffs.

Denials of standing usually involve non-Hoehfeldian plaintiffs, that is, plaintiffs whose are not seeking redress for a violation of their personal, common law rights. Some argue that this is because judges invented the doctrine to obstruct the exercise of the new “public rights.”¹²⁴ The role of standing described in this Article suggests another explanation (though of course it does not exclude sloppy or politically-motivated judging). First, the amorphous and abstract nature of non-Hoehfeldian interests makes it likely that they will be widely held, and that it will be difficult to identify injured entitlement holders *ex ante*. Second, the abstract nature of the injury makes it easy to simulate, and thus prevents the plaintiff group from every truly being closed, thereby preventing efficient settlement. Jointness problems arise more frequently with non-Hoehfeldian or public rights, but they are not limited to them.

Thus one would expect to see fewer standing problems where constitutional rights track common law rights than where they do not. Common law entitlements were generally defined in such a way as to avoid overlapping rights. Thus one can predict that as the law moves away from using the common law definition of property and towards “expectation of privacy” to define the scope of protection under Fourth Amendment, standing problems will become more common. Standing problems will be most frequent under the structural provisions of the Constitution and the Establishment Clause because actions that violate them necessarily affect many people in the same way.¹²⁵

B. Equal Protection

When the rights of some are violated but the same rights of others similarly situated are protected, the account of standing presented in Parts II and III does not apply. A defining feature of jointness is that the government action affects a broad class of people who have an entitlement to be free of it. It is not a situation where a majority countenances the infringement of the rights of a minority, but rather where the rights of all members of the class are infringed, and the only possible difference among class members is how much they would pay to be free of the infringement.

¹²⁴ See, e.g., Sunstein; Jaffe.

¹²⁵ See Redish, Political Order at 103.

One protection against abuse is that all must have their rights on the line.

Yet the gist of the equal protection claim is that basis by which the class of affected people was defined was in itself illegitimate. So it would be odd to deny standing on injury-in-fact grounds for an Equal Protection claim.¹²⁶ Equal protection violations involve singling out a particular class for inferior treatment; and singling out is the antithesis of jointness, for the singled-out class is presumably limited and defined.¹²⁷

C. Class actions.

Standing determinations involve some of the same considerations as class certification.¹²⁸ Both involve efforts by one party to get an adjudication of widely-held rights. The points developed above suggest that liberal standing would result in a dysfunctional version of the class action without any of its safeguards. Broad standing makes everyone a member of what can be a nationwide plaintiff “class.” As with class actions, a question arises as to who can determine what a fair settlement is. In a class action, the class is represented by unitary counsel; the defendant knows that settling with the named representative’s counsel will transfer all of the class members’ entitlements. Because this is a significant power, both named plaintiff and counsel achieve representative status only after demonstrating their fitness to the court.

Broad standing is like a class action where, in effect, no one can settle the class’s claims. Unlike in a formal class action, those with different preferences cannot opt out. A minority can effectively dictate the remedies for the entire class, who might prefer something entirely different.¹²⁹ One person can bring the entire “class” to litigation while all other members would benefit from settlement.

In the class action process, the party that determines the disposition of the class’s entitlements must have interests closely approximating those of all other class members. With broad standing, there are no such guarantees,

¹²⁶ *But see* Allen v. Wright.

¹²⁷ One could imagine the opposite problem – what might called “intentional jointness,” where the government broadens the scope of a constitutionally dubious action to include a great number of people specifically to create standing difficulties. It is not clear if such a thing has even happened. If the government ceases a challenged action to evade review, courts will entertain a challenge despite its mootness. Presumably they could take the same approach to intentional jointness.

¹²⁸ *See* Schlesinger, 418 U.S. at 216 (noting analogy between standing to assert broadly held rights and class representative status); Epstein; Scott; Jensen, et al.; Redish; Brilmayer, “*Case or Controversy*” Requirement, 93 HARV. L. REV. at 307-09.

¹²⁹ Thus the representation problem in class actions arises not just because the absent class members will be bound by the collateral estoppel effect of the judgment, as Prof. Brilmayer has suggested, but because of the immediate effect of the judgment, assuming injunctive relief is sought. *See* Brilmayer, *Perspectives* at 308.

and the plaintiff may have interests diametrically opposed to the rest of the group whose rights are affected.¹³⁰ When the plaintiff is a poor representative, or there are cleavages within the proposed class, the proper course is to deny certification and allow the suits to proceed individually, or to certify subclasses. Yet jointness prevents such disaggregation. The court must then choose whose valuation of the right will prevail. Such a decision is unavoidable when conflicting claims are made to a common resource. Sometimes denying standing means no one can bring a case at all; but this is little different from denying certification on grounds of heterogeneity to a purported class whose members individually all have negative value claims.

In short, liberal standing would allow for a kind of class action that cannot be settled by the plaintiff, cannot be opted-out of by absent class members, and where the plaintiff may have interests that sharply conflict with those of the class – a class action with few of the protections of the Rule 23 regime and less advantages.

D. Statutory rights.

The discussion has thus far focused on entitlements created by the Constitution. Yet standing issues can arise regardless of the source of the substantive law. Indeed, much of the criticism of the Court's standing jurisprudence has come in response to cases where the government is sued for purely statutory violations, most commonly in the context of regulatory action.¹³¹ As a positive matter, the analysis of standing's consequences for statutory rights is much the same as for constitutional ones. However, it may have different normative implications for statutory rights.¹³²

Both the inalienability and holdout problems discussed in Part II arise regardless of the source of the underlying entitlement. Broader standing increases the likelihood of inefficient outcomes. Even if, as Prof. Sunstein

¹³⁰ The situation is analogous to smoking or asbestos-exposure class actions that seek to simultaneously espouse the claims of dead, symptomatic, and asymptomatic individuals. While all have suffered the same legal injury, the vast difference in the degree and nature of their harm may make symptomatic plaintiffs poor representatives of asymptomatic ones. Indeed, they may have opposing interests, with one side favoring a cash judgment that would ruin the defendant but would provide immediate relief, while others favor the establishment of a trust that would only pay out a small portion of its assets in the present period but ensure that the defendant company would be around to pay medical expenses that arise ten years later.

¹³¹ See, e.g., Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988) (arguing that applying standing limitations, which are based on common-law concepts of injury, to administrative action improperly constitutionalizes common law notions of injury).

¹³² See Cass R. Sunstein, *Standing Injuries*, 1993 S. CT. REV. 37, 60 (suggesting that injury-in-fact requirements may be proper in constitutional cases on constitutional avoidance grounds).

points out, regulatory injuries by their nature affect a broader class of people than common law ones, this does nothing to reduce transaction costs that arise when a large and amorphous class of people have standing. When transaction costs are high, so long as a governmental program causes *some* prohibited harm, it can be blocked regardless of its net benefits.¹³³ However, this subpart will suggest this is a weaker justification for standing limitations for statutory rights than constitutional ones.

Constitutional entitlements, in contrast, are cut from a uniform cloth. Everyone has them in equal amounts.¹³⁴ It is in the nature of American individual rights that they protect all individuals;¹³⁵ structural provisions organize the government that governs everyone. If one wanted to limit the exercise of such entitlements in certain unusual circumstances characterized by high transaction costs, it would be difficult to incorporate such a limitation into the definition of the right. However, a natural way to do it would be to build in jurisdictional flexibility and one can imagine the “cases or controversies” limitation filling this role.

Proponents of the “cause-of-action” theory of standing would argue that this general availability of constitutional entitlements itself represents a constitutional determination about standing, namely, that it should be broad. There are several responses to this point. First, on a doctrinal level, both the distribution of entitlements and the “case or controversy” limitation spring from the same document. There is no *a priori* reason to think that the distribution of entitlements represents a complete judgment about what constitutes a “case or controversy.” Instead, “case or controversy” may be a judgment about the acceptable conditions for the exercise of entitlements created elsewhere. Unless one believes (or believe the Framers believed) that the correct level of constitutional violations is strictly zero in all situations, there is no reason to think that the creation and allocation of constitutional rights, unmitigated by a standing barrier in jointness situations, represents the only and last word on when rights can be asserted.

This is not always the case for statutory rights. Unlike constitutional entitlements, statutory and regulatory entitlements are made-to-order by Congress. They are often nuanced and detailed. Congress to bestow rights

¹³³ This assumes the illegal feature of the program is integral to it, so that that enjoining the harm effectively blocks the entire program.

¹³⁴ See COOTER, *STRATEGIC CONSTITUTION* at 249 (describing the “equality constraint” on constitutional rights, under which “one person’s liberty cannot change without the same change in everyone’s liberty”).

¹³⁵ This is truer after the Reconstruction Amendments. Many questions remain about the availability of constitutional rights to foreigners abroad. Compare J. Andrew Kent, *A Textual Case Against a Global Constitution*, 95 *GEO. L. J.* ___ (2007), with Kal Raustiala, *The Geography of Justice*, 73 *Fordham L. Rev.* 2501 (2005); Jules Lobel, *The Constitution Abroad*, 83 *AM. J. INT’L L.* 871 (1989).

of action only on particular types of parties, can condition their exercise in a variety of highly particular ways, and in short, set up highly reticulated mechanisms for the enforcement and exercise of rights that it creates. Congress can create an entitlement and vest its enforcement only in the Executive, or in certain groups, or in everyone.

Thus when Congress broadly extends statutory rights, it suggests a deliberate choice to allow a potential minority of dissenters to determine the ultimate use of the right. A citizen-suit provision suggests that Congress regards the proper level of violation to be zero. This is because when Congress creates regulatory rights, the enforcement scheme can be matched with the right with a great degree of specificity.

Part III showed that standing protects the exercise of rights by people other than the plaintiff. This is because almost all constitutional entitlements can be waived or traded for something of greater value: they are presumptively waivable. This need not be the case with statutory rights. Congress can tailor rights so as to not have a “flip side.” For example, an entitlement can just be given to people “*adversely affected*” by the government action; in which case there is no “negative entitlement” for others to trade and thus no autonomy problem.

Liberal standing can result in significant social losses in situations of jointness. Congress can choose to adopt inefficient statutes – there is no social surplus maximization principle constraining it. But Congress can make these choices – and unmake them – one statute at a time. It can create some rights that would be unconstrained by social welfare concerns and others that are. Because of the uniform nature of constitutional rights, their silence as to remedies, and the extraordinary difficulty of amending it, one should be more hesitant to adopt a interpretation of the Constitution that would periodically result in large social losses. Thus it makes more sense to think that the Constitution contains a built-in safety-net against such problems than it does to think statutes are limited by an Art. III injury requirement. And indeed, the Court seems to take a more liberal view of the injury requirement in statutory than in constitutional standing.¹³⁶

CONCLUSION

Standing is a pragmatic response to a real and potentially serious

¹³⁶ See RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONST. L. § 2.13(f)(2) (3d ed. 2006); Logan at 48-49. For an example of how standing can be denied for the same type of injury when brought as a constitutional claim but granted in a suit pursuant to a statute authorizing action by “any person,” compare *Richardson with Akins vs. FEC*.

problem. It is not an ideal response. Purely legal relief would be preferable to a jurisdictional dismissal on a variety of grounds, both instrumental and “equitable.” However, liability rules may not be a realistic option for both doctrinal and functional reasons. There may be ways around the liability rule problem, and there are entirely different types of solutions, such as random standing. But these are not avenues the legal system is likely to explore. Taking these alternatives off the table, the Court must choose between the default property rule paradigm and pure condemnation of the relevant entitlement. A former could lead to massive social losses; losses created not by the perverse preferences or illegitimate tastes of the majority, but out of the transaction cost structure of the situation, one in which the government would need unanimous consent to carry out a particular policy. In a larger group unanimity is impossible, but 99% is certainly impressive and may suggest that the majority of rights holders would prefer to buy out any dissenting plaintiffs, but cannot do so simply because of the transaction costs. Standing allows the Court to ignore the difference between 99% and 100% in situations where transaction costs prevent the 99% from securing the consent of the minority. Thus standing becomes a “second-best” response to the transaction cost problems arising out of jointness.

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