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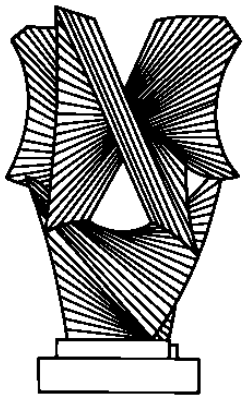

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INTRODUCTION

THERE is an unacknowledged tension today between two unquestioned axioms of constitutional jurisprudence. One is the familiar black letter law rule that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[1] This principle finds roots in Chief Justice John Marshall's opinion in *Marbury v. Madison*, which directed federal courts "solely to decide on the rights of individuals."[2] The second axiom is implicit in numerous Supreme Court precedents dating back decades yet rarely articulated explicitly. It holds that private individual litigants can secure relief not merely for violations of their own individual rights, but also for infringements of the Constitution's *institutional* architecture—that is, states' rights or federal branches' prerogatives. Judges routinely invoke principles of separation of powers[3] or federalism[4] that seem to adhere primarily in institutions even as they award relief to in-

[1] Warth v. Seldin, 422 U.S. 490, 499 (1975); see also Horne v. Flores, 129 S. Ct. 2579, 2592 (2009) ("Here, as in all standing inquiries, the critical question is whether at least one petitioner has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." (internal quotation marks and emphasis omitted)); William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 222 (1988) ("[Standing] ensur[es] that the people most *directly* concerned are able to litigate the questions at issue." (emphasis added)).

[2] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (punctuation omitted). Chief Justice Marshall distinguished the vindication of individual rights from inquiry into "how the executive, or executive officers, perform duties in which they have a discretion." Id.

[3] See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154–56 (2010) (invalidating dual for-cause limitations on the removal of Public Company Accounting Oversight Board members); Clinton v. City of New York, 524 U.S. 417, 436–49 (1998) (invalidating line-item veto); Bowsher v. Synar, 478 U.S. 714, 732−34 (1986) (invalidating direct congressional control of spending); INS v. Chadha, 462 U.S. 919, 951−59 (1983) (invalidating legislative veto).

[4] See, e.g., Printz v. United States, 521 U.S. 898, 929–30 (1997); New York v. United States, 505 U.S. 144, 168–69 (1992).

dividual litigants. Although equally hallowed, these two axioms coexist only uneasily, for structural constitutional principles are rarely conceived in individualized terms. Rather they align more closely with a class of "generalized grievance[s] shared by a large number of citizens in a substantially equal measure"[5] that Article III has been crafted to keep at bay. Individual standing for the structural constitution hence seems a species of otherwise impermissible third-party standing.[6]

In a little-noticed opinion handed down in the penultimate week of the October Term 2010, the Supreme Court identified this tension and resolved it unanimously in favor of justiciability.[7] Writing for a unanimous Court in *Bond v. United States*, Justice Anthony Kennedy held that "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable."[8] Individuals are also protected by the separation of powers, observed Kennedy, and so are "not disabled from relying on [that] principle[] in otherwise justiciable cases and controversies."[9] *Bond* in effect means that an individual otherwise properly situated for Article III purposes can involve not only her own interests but also those of shared constitutional institutions as grounds for relief.

Bond occasioned thunderous silence in the law reviews.[10] Perhaps the inattention is understandable. *Bond* upset no statutory or doctrinal consensus. While hardly a mundane sight, individual plaintiffs do periodically invoke structural constitutional flaws as grounds for judicial remediation, and have done so for more than a century.[11] Nor did *Bond*

[5] Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 80 (1978).

[6] In this Article, I use the term "individual standing" as shorthand to refer to standing for private, non-institutional actors, in contrast to "institutional standing." I mean to include in the former term standing for corporate and associational entities that are not part of the federal or state government.

[7] Bond v. United States, 131 S. Ct. 2355, 2363, 2366–67 (2011). *Bond* was handed down on June 16, 2011 along with four other decisions. See Davis v. United States, 131 S. Ct. 2419 (2011); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011); Tapia v. United States, 131 S. Ct. 2382 (2011); Smith v. Bayer Corp., 131 S. Ct. 2368 (2011). It arrived in the term's penultimate week—the dog days insofar as landmark decisions go.

[8] 131 S. Ct. at 2364.

[9] Id. at 2365.

[10] An exception is a largely descriptive piece by Scott G. Thompson & Christopher Klimmek, Tenth Amendment Challenges After *Bond v. United States*, 46 U.S.F. L. Rev. 995, 995–96 (2012).

[11] See, e.g., Hammer v. Dagenhart, 247 U.S. 251, 273 (1918) (invalidating a federal statute that prohibited the interstate transportation of goods produced in factories that employed

occasion downstream policy upsets. Given the historical pedigree of individual standing in structural constitutional litigation, its Article III holding presages no large reordering of federal court litigation. On the contrary, the brevity and unanimity of Justice Kennedy's opinion suggested the Court was merely resolving a trivial housekeeping matter in the "incoherent and confusing" field of standing.[12]

Such approbatory inattention, however, is unwarranted. The question whether individual litigants ought to have standing to raise structural constitutional questions is, at minimum, more complex than the *Bond* Court and commentators presume. No judicial opinion or academic assessment has, in my view, yet taken the full measure of individual standing for the structural constitution. This Article aims to fill that gap. My ambition, to be clear at the threshold, is not to conduct that analysis by developing an account of the structural constitution from first principles. More modestly, I accept as given for present purposes both the general contours of Article III jurisprudence and the standard accounts of structural constitutionalism.[13] By homing in on the narrow question of

children); Minnesota v. Barber, 136 U.S. 313, 317–29 (1890) (habeas action striking down on Commerce Clause grounds a law that required all meats sold in the state to be inspected before being sold); In re Coy, 127 U.S. 731, 758 (1888) (considering the constitutionality of a statute under which defendant had been charged). It is arguably possible to go back further to find cases enforcing the structural constitution at the behest of individuals. See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 596 (1832) (invalidating a Georgia law requiring a license to live on a reservation as a violation of the exclusive federal power to regulate commerce with Indian tribes); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436–37 (1827) (invalidating a state statute imposing a license tax for the privilege of selling imported goods under the Commerce Clause and Article I, § 10). The claim advanced in this Article, for obvious reasons, does not turn on historical practice—which, I want to emphasize, squarely cuts in the other direction. Note, however, that *Coy* and *Barber* concern habeas proceedings, where the scope of cognizable legal error is a function of scope of the common law writ, which might encompass structural constitutional questions. See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807) (Marshall, C.J.) ("[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law . . . .").

[12] F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 276 (2008).

[13] In other pieces, I have raised questions about the analytic coherence of judicially created doctrine to enforce the structural constitution. See, e.g., Aziz Z. Huq, Does the Logic of Collective Action Explain Federalism Doctrine?, 66 Stan. L. Rev. (forthcoming 2014). Others have raised concerns about the lack of a common baseline or unit of analysis in thinking about the separation of powers. M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127, 1194–97 (2000) ("We do not know what 'balance' means, and we do not know how it is achieved or maintained."); accord Eric A. Posner, Balance-of-Powers Arguments and the Structural Constitution 1 (Univ. of Chi. Inst. for Law & Econ., Working Paper No. 622, 2012), available at http://ssrn.com/abstract=2178725. Even a

whether the *Bond* holding rests on firm footing in relation to its larger doctrinal environment, I aim to test thoroughly that discrete rule's coherence or conflict with the Court's larger body of constitutional jurisprudence.

My assessment of individual standing for the structural constitution is based on both "internalist" doctrinal and "externalist" political economy considerations. To begin with, I consider the Court's tangled frameworks for constitutional and prudential standing,[14] a jurisprudential morass famous for its "unpredictability and ideological nature."[15] Precedent can be deployed either for or against individual standing for the structural constitution. Despite this ambiguity, I suggest that one central principle of Article III jurisprudence is especially relevant: Limits on standing strive to sort cases for adjudication vel non based on whether there are large spillover effects, or externalities, affecting third-parties not before the court. Painting in broad brushstrokes, the Court has strived to cabin Article III justiciability to those categories of cases in which the practical results of litigation neither depend upon nor fall heavily upon third parties. Using this idea of spillovers as a touchstone for analysis, I suggest that the *Bond* Court failed to account for Article III's orienting ambition, and thus is unjustified on doctrinal grounds.

The second strand of my analysis situates individual standing for the structural constitution in a political economy context. I press the perhaps counterintuitive point that increasing the pool of cases (by adding individual to institutional plaintiffs) will not necessarily generate closer compliance with the structural constitution. More is not necessarily bet-

reader who views the balancing aspirations of structural constitutionalism as infeasible or otherwise beyond reach should nonetheless perceive that others will continue to make structural arguments both inside and outside the courts for many years to come. Such structural constitutionalism skeptics might see value in responding to these claims on their own doctrinal terms, notwithstanding their underlying analytic weaknesses, and might want to view this Article with a corresponding suspension of disbelief.

[14] See ASARCO Inc. v. Kadish, 490 U.S. 605, 619 (1989) (distinguishing prudential and constitutional standing).

[15] Daniel A. Farber, Standing on Hot Air: *American Electric Power* and the Bankruptcy of Standing Doctrine, 121 Yale L.J. Online 121, 122 (2011); Gene R. Nichol, Jr., Standing for Privilege: The Failure of Injury Analysis, 82 B.U. L. Rev. 301, 304 (2002) ("Standing cases, taken as a whole, reveal inadequate patterns of decision-making."). For a more nuanced and cautious assessment based on an empirical study of taxpayer standing cases, see Nancy C. Staudt, Modeling Standing, 79 N.Y.U. L. Rev. 612, 615–18 (2004) (noting the "common" view that "standing doctrine is so completely incoherent that judges have no choice but to resort to their own viewpoints when determining who has the right to be in court," but rejecting this view where judges have clear guiding precedent).

ter, at least in this context. Supplementing institutional plaintiffs with individual plaintiffs yields no necessary increase in the attainment of structural constitutional goals, I caution, because of the different kinds of incentives that motivate individual and institutional litigants. Individuals' incentives, I argue, will tend to conduce away from the goals of structural constitutionalism, instead exacerbating rent-seeking pathologies in the legislative process. In contrast, political institutions have more meaningful—although not perfect—cause to invoke judicial supervision only when truly warranted. However distant from the ideal, institutional plaintiffs alone are still likely to generate relatively sound outcomes. In net, this (concededly rough) comparative analysis suggests that structural constitutional values are best entrusted in the courts to the institutions they directly benefit, and not chanced on the happenstance of which individual litigants find self-serving gain in their invocation.

In lieu of the current Article III disposition, I instead propose the following rule: *When an individual litigant seeks to enforce a structural constitutional principle that immediately redounds to the benefit of an official institution, and there is no reason the latter could not enforce that interest itself, a federal court should not permit the individual litigant to allege and obtain relief on the basis of the separation of powers or federalism*. In the mine run of cases, Congress, the executive branch, or a state will be available to vindicate a structural principle. The relevant institution should be left to elect whether to do so (assuming that it otherwise has standing[16]). I propose, however, that there should be no individual implied cause of action to vindicate the structural constitution. Instead, individual litigants should be categorically barred from obtaining relief based on the disparagement of governance structures held in common even if they have been hauled into court in the first instance as a civil or a criminal defendant. Consistent with my proposed rule, I nonetheless identify a subset of cases in which individuals ought to retain standing. In these cases, litigants assert a due process-like interest isomorphic with Article III of the Constitution.[17] Individual interest and structural principle wholly overlap, and no official actor stands available

[16] The question of how to allocate justiciability among institutional plaintiffs is not one I take up in this Article, which is focused solely on the propriety of *individual* standing for structural constitutional principles.

[17] See, e.g., Stern v. Marshall, 131 S. Ct. 2594, 2608–20 (2011) (finding that a bankruptcy judge's power to enter final judgment on a state law counterclaim violated Article III).

to enforce the structural principle. In such instances alone, standing should be permitted for individual litigants.[18]

This Article is heterodox in two ways. To begin with, I argue against the conclusion drawn by the unanimous Court in *Bond*, a conclusion also implicit in many canonical earlier cases in which litigants (including criminal defendants) have challenged statutes as ultra vires on structural grounds.[19] While I would not reject all structural challenges by either criminal or civil defendants,[20] I believe many run afoul of Article III. In so doing, I resist conventional wisdom, confirmed in *Bond*, and common lawyerly intuitions. Skeptical readers, persuaded at the threshold by the conventional wisdom, might nonetheless ask themselves whether our current practice is obviously sensible. Does it really make sense to adjudicate the sprawling, multidimensional issues of federal-state relations implicated in *Bond* and its ilk through the narrowly calibrated criminal adjudicative process? Or to allow individual plaintiffs to vindicate Article II values against the wishes of the president? Or to make Tenth Amendment arguments when there are states weighing in on the other side of the issue? There is nothing *obvious*, I would submit, about our current structural constitutionalism litigation arrangements. Rather, more careful analysis of a sort pursued in this Article is needed.

Second, and relatedly, I diverge from an emerging body of scholarship that seeks to assimilate rights and structure as substitutable strategies for securing the identical end of limiting government and providing space for individual liberty.[21] That scholarship conforms to a long, deep-

[18] An important body of scholarship takes the more extreme position that courts should never pass on questions of structural constitutionalism. See, e.g., Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 263 (1980); see also John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1944 (2011) (arguing that "the Constitution adopts no freestanding principle of separation of powers" for courts to enforce (emphasis omitted)). My argument proceeds along different grounds, and is neither an alternative to nor inconsistent with the position adopted by Professors Choper and Manning.

[19] My argument about standing, however, relies on the "injury-in-fact" rule of Article III justiciability, which only came into force in 1970. See Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152–53 (1970). Before that date, there was no doctrinal tension of the kind identified here, and it would be somewhat anachronistic to criticize the pre-1970 Court.

[20] For details of the exception, see infra Part V.

[21] See, e.g., Daryl J. Levinson, Rights and Votes, 121 Yale L.J. 1286, 1288 (2012) (arguing that "rights and votes have been viewed as functionally similar in this way in a wide array of constitutional and political contexts"); accord Akhil Reed Amar, The Bill of Rights as

ly felt assumption in American constitutional law that structural protections and what James Madison called the "parchment barriers" of individual rights are devices to the same end (and, additionally, that the former are more efficacious than the latter).[22] At least for the purposes of crafting federal court jurisdiction, I argue that a chasm indeed opens between the vindication of structural constitutional values and of individual rights. Both may well be devices for promoting effective, limited government under law. But each operates with different mechanisms, along divergent channels, and with distinct effects. Placing structural values in the hands of individual litigants should not be equated with giving those same litigants the power to seek judicial vindication of their own individual rights.

The analysis proceeds in five steps. Part I begins by defining the domain of relevant inquiry, delineating the class of cases in which an individual litigant seeks to vindicate the structural constitution. Part II canvasses the relevant standing doctrine and sketches the *Bond* Court's log-logic. Parts III and IV comprise the analytic heart of the paper. Part III situates *Bond* in its wider doctrinal context. I argue that the relatively parsimonious analysis of the *Bond* opinion, while not wholly without doctrinal warrant, lies in some tension with Article III's larger aims. More aggressively, I press the suggestion that a contrary holding in *Bond* would cohere better with the spillover-limiting ambition of Article III jurisprudence. Part IV turns from doctrine to political economy. Drawing on institutional design and public choice analytic tools, I identify a spectrum of undesirable effects from supplementing institutional with individual standing for the structural constitution. Part V then proposes an alternative rule that would preclude most (but not all) individual standing for the structural constitution.

I. INDIVIDUAL LITIGANTS AND THE STRUCTURAL CONSTITUTION

Structural constitutional questions come to federal courts in several ways. To clarify the scope of my argument, I begin by identifying the subset of cases with which I am concerned here. I then explain why

a Constitution, 100 Yale L.J. 1131, 1132–33 (1991); Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1677 (2012).

[22] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* Jack N. Rakove, Declaring Rights: A Brief History with Documents 160, 161 (1998). Madison used the same phrase elsewhere to refer to structural constitutionalism. See The Federalist No. 48, at 274 (James Madison) (E.H. Scott ed., Chicago, Scott, Foresman & Co. 1898).

these cases in fact implicate the defense of structural interests alone, and cannot be fairly characterized as involving the defense of some sort of individual right—specifically, what has been called a right to a valid rule.

A. Structural Constitutional Litigation in Federal Court

To begin with, what is the class of litigation in which individuals, rather than official, institutional actors, bring structural constitutional claims? It is certainly not the entire domain of structural constitutional litigation. Institutional actors often press their own constitutional interests in federal court. The president, for example, routinely asserts an Article II interest in exercising control over administrative agencies.[23] Congress, acting through its committees, can also file suit seeking to vindicate constitutionally grounded interests in the midst of inter-branch conflicts.[24] States too vindicate federalism interests by resisting national commandeering,[25] asserting sovereign immunity,[26] and challenging conditions freighted with federal spending.[27] Indeed, the only constitutionally salient institution that lacks the capacity to lodge objections in court

[23] See, e.g., Myers v. United States, 272 U.S. 52, 116, 176 (1926) (invalidating statutory constraints on the President's removal power respecting a first-class postmaster); see also Wiener v. United States, 357 U.S. 349, 356 (1958) (finding limits to the President's power to remove members of the War Claims Commission implicit in the preclusion of the President from influencing the Commission's decisions with respect to particular claims); Humphrey's Ex'r v. United States, 295 U.S. 602, 627–28 (1935) (endorsing statutory limits on the President's authority to remove members of the Federal Trade Commission).

[24] See, e.g., Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 92−93 (D.D.C. 2008); see also Josh Chafetz, Congress's Constitution, 160 U. Pa. L. Rev. 715, 735–42 (2012) (describing congressional contempt authority). Individual legislators also have standing to seek relief based on impermissible exclusion from a chamber, see Powell v. McCormack, 395 U.S. 486, 489 (1969), or alleged unconstitutional dilution of voting power, see Michel v. Anderson, 14 F.3d 623, 625–26, 632 (D.C. Cir. 1994) (holding that plaintiff legislators had standing, but rejecting claim on the merits).

[25] Printz v. United States, 521 U.S. 898, 929–30 (1997); New York v. United States, 505 U.S. 144, 168 (1992).

[26] See Seminole Tribe v. Florida, 517 U.S. 44, 54, 72–73 (1996) (disallowing ouster of state sovereign immunity pursuant to Article I); see also Alden v. Maine, 527 U.S. 706, 712 (1999) (extending state sovereign immunity to state court proceedings).

[27] See, e.g., Sossamon v. Texas, 131 S. Ct. 1651, 1658 (2011) (concluding that absent an "unequivocal expression of state consent" the phrase "appropriate relief" in the 2000 Religious Land Use and Institutionalized Persons Act could not be construed to permit money damages).

on structural constitutional grounds is the Article III judiciary itself.[28] With that one exception—to which I return later[29]—the doors to the federal courthouse stand, as a practical matter, open to any of the institutional entities picked out in the Constitution as salient features of our structural constitution.

But the courthouse doors also stand open to *individual* litigants seeking to vindicate structural constitutional values. In the separation of powers context, for example, an individual litigant can lodge a facial challenge to federal legislation on the ground that it violates some aspect of the constitutional structure. Consider the 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[30] In *Free Enterprise Fund*, a Nevada accounting firm challenged the regulatory authority of the federal Public Company Accounting Oversight Board ("PCAOB").[31] The accounting firm did not assert PCAOB had infringed on any constitutionally protected individual right or interest that the firm possessed, but rather that the Board's organic act "contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control."[32] Even though the President evinced no wish for greater control of the board,[33] the Court invalidated one part of PCAOB's organic statute so as to establish more direct presidential control.[34]

Free Enterprise Fund is not an outlier. In many earlier separation of powers cases, individual litigants have been allowed to raise the interests of either Congress or the executive as a shield against regulation or coercive action.[35] Most recently, the Court of Appeals for the District of

[28] The interests protected by Article III might be vindicated in the context of litigation filed by an individual judge. The Court to date has resisted invitations to develop that sort of case law. See Nixon v. United States, 506 U.S. 224, 228–35 (1993) (holding that the judiciary may not review the procedures used by Congress to impeach judges due to the political question doctrine).

[29] See infra Part V.

[30] 130 S. Ct. 3138 (2010).

[31] Id. at 3149.

[32] Id.

[33] Id. at 3154 (stating that the Solicitor General, representing the President's interests, "was unwilling to concede that even five layers between the President and the Board would be too many" (emphasis omitted)).

[34] Id. at 3161–62 (declining to invalidate the statute in its entirety, instead severing the unconstitutional dual for-cause removal provisions from the remainder of the statute).

[35] Hence, in *INS v. Chadha*, the Court invalidated the line-item veto at the behest of a noncitizen litigant in an immigration proceeding. 462 U.S. 919, 930−31, 959 (1983). In *Clinton v. City of New York*, the Court allowed recipients of federal spending to challenge Presi-

Columbia in *Noel Canning v. NLRB* allowed a business regulated under the National Labor Relations Act ("NLRA")[36] to challenge an enforcement action on the basis of an alleged failure to comply with the Recess Appointments Clause of Article II in respect to new members of the National Labor Relations Board.[37] The *Noel Canning* plaintiffs had waived the Article II objection by failing to raise it before the agency, a waiver that triggered a statutory bar to judicial review. Yet the circuit court exercised its statutory discretion to overcome that waiver, suggesting that the Article II issue "go[es] to the very power of the Board to act and implicate[s] fundamental separation of powers concerns."[38] It then framed and resolved the plaintiffs' challenge not as a gloss on what the NLRA required, but as a direct and unmediated inquiry into constitutional law.[39] *Noel Canning*, therefore, comfortably fits within the class of cases this Article addresses: It involved an extraordinary exercise of discretionary jurisdiction to reach and resolve a constitutional question conceptually decoupled from the statutory grant of authority at stake.

Noel Canning shows how structural constitutional principles can supplement generally available grounds for agency supervision, such as the workaday allegation that an agency has exceeded its statutory ambit.[40] But it also bears noting that the Article III standing question at stake in *Noel Canning* would not have been materially different had the statutory grant of jurisdiction conditioned agency sanctions on compliance with a

dent Clinton's use of a line-item veto as an infringement on Congress's lawmaking authority. 524 U.S. 417, 421 (1998).

[36] 29 U.S.C. §§ 151–69 (2006).

[37] Noel Canning v. NLRB, 705 F.3d 490, 499 (D.C. Cir. 2013) (identifying U.S. Const. art II, § 2, cl. 3 as basis of challenge), cert. granted, 133 S. Ct. 2861 (2013).

[38] Id. at 497 (relying on language contained in 29 U.S.C. § 160(e) (2012)). Readers familiar with the federal courts approach to federal habeas corpus review under 28 U.S.C. § 2254 (2012) should be especially struck by this claim: In that domain, the constitutional character of a flaw in the underlying process provides no additional justification at all for judicial review. To the contrary, rules such as procedural default and abuse of the writ routinely preclude the federal court adjudication of alleged constitutional flaws in anterior process. The *Noel Canning* court gave no justification for why review of agency action should be so differently organized.

[39] *Noel Canning*, 705 F.3d at 499–512.

[40] This sort of ordinary assertion of statutory error does not become a structural constitutional claim merely because it can be redescribed as an allegation of executive ultra vires action. Whether a rule regulating primary conduct touches on a specific litigant, that is, does not implicate the spillover or political economy concerns aired in Parts III and IV.

structural constitutional rule.[41] At present, the generic judicial review provision of the Administrative Procedure Act ("APA") anticipates constitutional challenges to agency action and is construed broadly when violations of individual constitutional rights are alleged.[42] The statute, however, does not unequivocally invite the full gamut of structural challenges, as distinct from more mundane challenges to the effect that an agency has exceeded its statutory authority through erroneous construction of its organic statute.[43] Rather than being wholly open-ended, APA review obtains only when a "legal wrong" is inflicting and is otherwise subject to important limits.[44] So it is at least unclear whether the APA installs federal courts as free-ranging censors of constitutional errors of administrative agency.

Had Congress expressly authorized judicial review based on *any* structural constitutional error, a Court would have to address the question raised in this Article—whether such individual standing for the structural constitution should be permitted. The inquiry would be corrugated by the persisting uncertainty as to whether the Court believes that Congress has discretion to loosen otherwise applicable Article III constraints.[45] Further undermining the potential for prediction, Congress's choice of procedural vehicle may also influence the scope of review for

[41] The Administrative Procedure Act, 5 U.S.C. § 702 (2006) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[42] Webster v. Doe, 486 U.S. 592, 603 (1988) (holding that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear . . . to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim" (citations omitted)).

[43] A claim that an agency has exceeded its statutory authority can be characterized in two ways. First, it is a request for mundane error correction on a matter of statutory law. Second, it is a challenge to ultra vires agency action in violation of the separation of powers. Because the APA clearly encompasses the former, there is no reason to construe it as widely as an open-ended permission to hear structural constitutional claims.

[44] See, e.g., Hinck v. United States, 550 U.S. 501, 504 (2007) (noting exception for decisions "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2)).

[45] Compare Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) ("Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch . . . ."), with id. at 580 (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view."). See also Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009) (describing the tripartite *Lujan* test as a "hard floor").

legal error.[46] For the purposes of this analysis, however, I largely bracket the question whether congressional authorization of individual standing for the structural constitution that Article III bars would be permissible in favor of resolving the first-order constitutional problem.

Individual enforcement of structural values is also observed in federalism cases. The Court allows individual litigants to challenge federal statutes enacted under the Commerce Clause on the ground that the reserved authority of the several states has been violated.[47] It also permits individual litigants to challenge state measures for trenching upon federal prerogatives.[48] In *National Federation of Independent Business v. Sebelius ("NFIB")*, both individual and state plaintiffs challenged the 2010 Patient Protection and Affordable Care Act as beyond Congress's Article I powers.[49] Other cases, however, have involved only individual plaintiffs. In the path-marking 1995 case of *United States v. Lopez*, for instance, the litigant challenging the Gun-Free School Zones Act[50] as beyond Congress's Commerce Clause authority was a former student ar-

[46] For example, the scope of constitutionally mandated judicial review differs according to whether the APA or habeas is the vehicle for challenging agency action. In the former case, there is no constitutional problem with outcome-determinative deference to executive branch determinations of questions of law in the judicial review of agency action. See, e.g., Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984); see also Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 969–70 (1992) (describing sweeping consequences of varying the degree of judicial deference). In the latter case, judicial review must extend to all questions of law by dint of the Suspension Clause. See INS v. St. Cyr, 533 U.S. 289, 301–05 (2001) (suggesting that the Suspension Clause mandates that the writ permit judicial decisions on any "pure questions of law" implicated by a detention). The interaction of the Suspension Clause with the scope of legal review raises complex questions that are beyond the scope of this Article. My tentative view, however, is that habeas jurisdiction outside the postconviction arena entails challenges to the absence of legal authority, but would not permit the full gamut of challenges on Article I or Article II grounds.

[47] See, e.g., Gonzales v. Raich, 545 U.S. 1, 15–17 (2005); United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 552 (1995). For an overview of how these cases fit within a larger trajectory of Commerce Clause jurisprudence, see Aziz Z. Huq, Tiers of Scrutiny in Enumerated Powers Jurisprudence, 80 U. Chi. L. Rev. 575, 589–96 (2013).

[48] See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 784–85, 838 (1995). The individual plaintiff in *Thornton*, a member of the League of Woman Voters, challenged a state constitutional amendment on the ground that it violated Article I of the U.S. Constitution. Id. at 784–85.

[49] 132 S. Ct. 2566, 2580 (2012) (listing plaintiffs). At least with respect to the Commerce Clause analysis, the various opinions in *NFIB* evince little attention to the difference between individual and official institutional plaintiffs.

[50] 18 U.S.C. § 922(q) (Supp. V 1988) (amended 2012).

rested at his high school in possession of a firearm.[51] So self-evident was it that Mr. Lopez could bring a Commerce Clause challenge that neither Chief Justice Rehnquist's majority opinion nor any of the *Lopez* concurrences or dissents stopped to explain why he should have that entitlement. Similarly, in *United States v. Morrison*, the Court did not pause to ponder whether Mr. Morrison and his codefendants in a civil action filed under the Violence Against Women Act had a right to challenge that statute as a valid Commerce Clause measure.[52]

In summary, a powerful case on behalf of individual standing for the structural constitution can be made simply on the basis of practice.[53] The question persists, though, whether to interrogate that practice as misguided on other constitutional grounds.

B. Why Structural Constitutional Rules Are Not Individual Rights

If it is banal to see individual litigants invoking Article III jurisprudence and obtaining rulings on structural constitutional grounds, should not the further inference be drawn that in doing so, they are vindicating their own constitutional entitlements? Indeed, perhaps such litigation is evidence that the structural elements of the Constitution vest individuals with legally cognizable rights to raise before the federal bench. This Section considers and rejects that possibility. In Section I.C, I then raise and reject an alternative justification of individual standing for the structural constitution in which individuals are said to have a cognizable right against legal rules that are invalid on structural constitutional grounds, even on the assumption that the separation of powers and federalism do not engender discrete, individualized legal entitlements.

A differentiation between constitutional structure and rights is not immediately obvious on the face of the Constitution. Provisions now taken as self-evidently generative of rights speak in terms of the government's powers.[54] In contrast, some structural provisions are redolent

[51] *Lopez*, 514 U.S. at 551.

[52] 529 U.S. at 603–04 (discussing initial civil action).

[53] Cf. Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 414–17 (2012) (offering an account and a partial critique of the use of historical gloss).

[54] See, e.g., U.S. Const. amend. I ("Congress shall make no law . . . .").

of rights-talk.[55] Moreover, neither federalism nor the separation of powers is instantiated in simple form in the text.[56] Superficial textual exegesis, in short, provides no ready rule of classification.[57] Absent further hermeneutical labor, it is simply unclear whether there are individual rights to the structural constitution.

Although the text is silent, there is reason to think that the Framers did indeed distinguish individual rights from structure. Accounts of the Constitution from its inception take pains to stress the difference between rights and structure. Writing as Publius, Alexander Hamilton thus urged that the original Constitution—which, of course, contained the separation of powers and federalism principles—not be understood in terms of vested rights. To the contrary, Hamilton inveighed, "Bills of Rights . . . are not only unnecessary . . . but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted."[58] Echoing this claim, James Wilson later argued in favor of ratification on the ground that "[i]t would be very extraordinary to have a bill of rights, because the powers of Congress are expressly defined. . . . We retain all those rights which we have not given away to the general government."[59] Hamilton's and Wilson's skepticism is also consistent with Madison's earlier warning that it would not be "sufficient to

[55] See, e.g., U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . . .").

[56] This has led some commentators to query whether such structural principles should be given legal force. See John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2037–47 (2009); Manning, supra note 18, at 1944.

[57] It is also a truism that rights impose constraints on government action, and that their justiciability empowers courts to block elected branches' choices. But this is to say that rights-related litigation has an effect on the separation of powers, which is quite different from concluding that there is an individual right to certain structural arrangements.

[58] The Federalist No. 84, at 469 (Alexander Hamilton) (E.H. Scott ed., Chicago, Scott, Foresman & Co. 1898). Hamilton also lists the rights contained in the original Constitution—and pointedly does not list either federalism or the separation of powers. Id. at 467–68. There is rich irony in the fact that Hamilton would be the progenitor of perhaps the most aggressive readings of Article I in the early Republic—readings that made his Federalist 84 claims wholly implausible. That irony, however, does not impinge the point that the original public meaning of the 1787 Constitution, as reflected by Publius, did not attach rights to structural provisions.

[59] Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 540 (1969) (second alteration in original).

mark, with precision, the boundaries of [government power],"[60] and that institutional design would have to be exploited to keep government in check rather than mere individual entitlements. In short, to the extent original public understandings of the Constitution's aims are salient, they tend against conceptualizing structural constitutional principles in granular individualistic terms.

Additional evidence corroborating that conclusion derives from the idiom of modern case law. Even though it is willing to allow individuals to litigate the structural constitution, the Court does not generally focus on the liberties of specific regulated individuals when adjudicating structural constitutional litigation. It instead directs attention to the interests of the branches or the several states. In *Lopez*, for example, Chief Justice Rehnquist began his inquiry into the "outer limits" of congressional power by invoking "our dual system of government."[61] Explaining why the challenged statute had "nothing to do with 'commerce' or any sort of economic enterprise," the Chief Justice invoked the *states*' primacy in administering criminal justice.[62] Sounding the same chords in *Morrison*, Chief Justice Rehnquist observed that "the Framers crafted the federal system of Government so that the people's rights would be secured *by the division of power*"[63]—that is, not directly, but through empowerment of the states. Rather than stressing any individual privilege on the challengers' part, Rehnquist contrasted federal disability with "the police power, which the Founders . . . reposed in the States"—a power that included the power to sanction the challengers' conduct.[64] Simply put, the idiom of the case law is at odds with the notion that there is an individual right to federalism or the separation of powers.

In yet another way, the observed fact of structural constitutional litigation cannot be easily reduced to the conclusion that structural principles in the Constitution create individual rights: In none of the structural constitutionalism cases mentioned above[65] does a challenger assert an absolute privilege to act in a specific way. That is, there is no claim that an individual (or firm) has a zone of privileged action from *any* federal or state regulation. To the contrary, in many of the aforementioned cas-

[60] The Federalist No. 48, supra note 22, at 274.
[61] 514 U.S. at 557 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).
[62] Id. at 561 & n.3.
[63] *Morrison*, 529 U.S. at 616 n.7 (emphasis added).
[64] Id. at 618 & n.8.
[65] See supra Section I.A.

es, the exact same act by the exact same individual can plainly be regulated by some governmental entity. After *Lopez*, for example, Congress enacted a new statute with substantially the same reach as the one invalidated by the Supreme Court, albeit with a supplemental jurisdictional element to remedy the constitutional defect.[66] Another Mr. Lopez would likely have found no immunity from that statute. Similarly, the *Free Enterprise Fund* plaintiffs asserted no absolute right to be free of properly constituted federal regulation of accounting firms operating in interstate commerce, and only claimed the 'right' to a slightly different regulatory architecture. In neither case is the individual conduct at issue categorically protected, and so in neither case does it make obvious sense to talk of an individual negative right being infringed by the federal government.

Alternatively, consider the relationship between individual rights and structural principles through the lens of the cause of action doctrine. The question whether a litigant possesses a cause of action pertains to "whether, in light of all legal determinants that relate to a particular transaction or occurrence, the plaintiff is entitled to some form of judicial relief," and as such is acoustically separate from allocations of primary rights or eventual remedies.[67] Rather, the cause of action is a concept that in effect mediates between the definition of rights and the distribution of remedies. At present, not all constitutional violations engender implied rights of action for damages. The Court instead vests individual litigants with an implied right of action to seek damages based on constitutional violations by federal actors in respect to some, but not other, individual constitutional rights.[68] Hence, another way of framing the question I am pressing here is to ask whether there is an individual implied right of action for either damages or injunctive relief in respect to alleged violations of the structural constitution. Given the currently patchwork distribution of implied rights of action against the federal

[66] See 18 U.S.C. § 922(q)(2)(A) (2012) ("It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.").

[67] Anthony J. Bellia, Jr., Article III and the Cause of Action, 89 Iowa L. Rev. 777, 781 (2004) (emphasis omitted).

[68] Compare Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (endorsing implied cause of action under the Fourth Amendment), with Bush v. Lucas, 462 U.S. 367, 368 (1983) (finding no implied cause of action for retaliation claim under the First Amendment).

government, it is by no means clear that current doctrine either requires or forbids recognition of implied individual causes of action for structural violations.

In short, there is little reason to think that the Constitution's structural provisions, properly glossed, engender individual entitlements in the same way as the First Amendment or the Fourteenth Amendment's Equal Protection Clause. Instead, individual standing for structural principles is unanchored in any readily available account of discrete, personalized rights in constitutional structure and thus requires a distinct justification.

C. The Valid Rule Doctrine

Even setting aside the idea that there is an individual right to federalism or the separation of powers, the gravamen of challengers' arguments in *Free Enterprise Fund*, *Lopez*, and *Morrison* might nonetheless be characterized in a way that redounds in cognizable individual-rights terms. On this view, individual litigants raising separation of powers or federalism claims are pressing a "right to insist on the application of a constitutionally valid rule."[69] As first framed by Professor Henry Monaghan, this "valid rule" doctrine directs that federal court litigants are "always" allowed to "insist that [their] conduct be judged in accordance with a rule that is constitutionally valid."[70] Hence, a litigant always has standing to raise questions about the "constitutional sufficiency of the rule actually invoked against him" in the course of a coercive government action.[71] This individualized interest sounds in due process,[72] yet is not reducible to a more familiar right against laws that "exercis[e] judicial power or abrogat[e] common law procedural protections."[73]

[69] Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 4.

[70] Id. at 8; accord Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 283 (1984) [hereinafter Monaghan, Third Party Standing] ("Any litigant has the right to make a facial challenge to the constitutional sufficiency of the rule actually invoked against him [or her], without regard to whether his [or her] own conduct could validly have been regulated by a differently formulated rule." (footnote omitted)); see also Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1331–32 (2000) (endorsing the "valid rule" formulation).

[71] Monaghan, Third Party Standing, supra note 70, at 283.

[72] Id. at 282 (describing jus tertii challenges as resting on "a substantive due process right to interact with a third party right holder free from unjustifiable governmental interference").

[73] Chapman & McConnell, supra note 21, at 1677. The valid rule doctrine is orthogonal to another important account of due process that has recently been offered by Professors Chapman and McConnell. They, too, explicitly tether their originalist account of due process

In my view, the valid rule doctrine does not provide a satisfying account of these cases for three independent reasons. First, the valid rule doctrine is inconsistently applied in ways that undermine the claim that it has explanatory power in a litigation context. More specifically, the text of the Constitution generates a cornucopia of structural rules respecting the mechanics of government. Taken seriously, the valid rule doctrine would entail that litigants could challenge *any* coercive measure based on *any* defect in the enacting process.

But that is simply not a plausible account of current constitutional practice. Individual litigants cannot now complain about any flaw in the official process leading to the enactment of a challenged law. For instance, a litigant complaining that a law is invalid because it was enacted in violation of the mandatory Article I, Section 7, process of bicameralism will find no judicial audience.[74] Formally, litigants do have standing to claim the Origination Clause was violated.[75] But there is no case in which such a claim secures relief, and indeed it is hard to envisage the Court acquiescing in the judicial invalidation of a federal statute on such grounds any time soon.[76] Or imagine a case in which a member of Congress is unlawfully appointed to an executive branch office, in violation of the Emoluments Clause,[77] and then takes a coercive action against an

to structural constitutional principles. But they root due process in (1) the forms of common law judicial protection, and (2) the protection of vested property rights. Id. at 1726–27. Their due process principle does not explain (and does not purport to explain) cases such as *Chadha*, *Bowsher*, or *Free Enterprise Fund*, where no vested property interest is at stake. Nor does it seek to account for cases in which the allegedly imperiled structural principle is unrelated to the judiciary. Consequently, it would be an error to identify the valid rule doctrine with the distinct account offered by Professors Chapman and McConnell. Further, the arguments I tender against the valid rule doctrine are not intended to bear on their distinct and different claim.

[74] This is a consequence of the enrolled bill doctrine. See Pub. Citizen v. U.S. Dist. Court for D.C., 486 F.3d 1342, 1351 (D.C. Cir. 2007) (noting that "the Courts of Appeals have consistently" barred challenge to federal laws based on the claim that different versions of the law passed the two Houses); OneSimpleLoan v. U.S. Sec'y of Educ., 496 F.3d 197, 203 (2d Cir. 2007) (finding that the Supreme Court has a longstanding tradition of denying standing to plaintiffs who challenge a federal law by arguing that the text of the final law differs from the text of the enrolled bill).

[75] United States v. Munoz-Flores, 495 U.S. 385, 394 (1990).

[76] Cf. Tex. Ass'n of Concerned Taxpayers v. United States, 772 F.2d 163, 166–67 (5th Cir. 1985) (holding that the meaning of "raising revenue" within the Origination Clause was a nonjusticiable political question left to Congress to define).

[77] See U.S. Const. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United

individual that the displaced officer had eschewed. No court will intervene on the basis of that constitutional process flaw.[78] Indeed, so firmly entrenched is the Emoluments Clause's judicial desuetude that some commentators have suggested that a "constitutionally conscientious" official might legitimately disregard its command.[79]

Yet even as these structural rules can be flouted, the Court is willing to grant standing to individuals threatened with a coercive proceeding on the ground that an investigating officer is subject to insufficient hierarchical control under Article II.[80] What explains the difference in judicial treatment? It cannot be grounded in a distinction in the degree of textual entrenchment. The Court has strikingly chosen to leave unenforced structural constitutional rules with a plainly expressed textual berth (such as the Emoluments Clause), but has granted individuals relief based on violations of an atextual rule in favor of presidential removal authority. Nor can a "valid rule" principle elucidate why some constitutional provisions generate cognizable rights against "invalid" rules, while others do not. On the contrary, the valid rule doctrine does no helpful analytic work explaining the divergent treatment of various constitutional process flaws.[81] It merely provides a convenient label for the post hoc classification of outcomes.

Second, the valid rule doctrine is descriptively inaccurate insofar as it fails to explain why the Court is willing to deny relief in cases when an otherwise enforceable constitutional right has been violated. That is, just as the valid rule doctrine cannot explain the piebald treatment of structural principles, so too it cannot justify the chiaroscuro enforcement of individual rights. Writing a decade after having first limned the valid rule doctrine, Professor Monaghan recognized as much when he resisted

States, which shall have been created, or the Emoluments whereof shall have been encreased [sic] during such time.").

[78] See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209, 217 (1974) (denying standing in a challenge to the eligibility of members of Congress to hold commissions in the Armed Forces Reserves during their continuance in office).

[79] Mark Tushnet, Taking the Constitution Away from the Courts 51 (1999).

[80] See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010); Morrison v. Olson, 487 U.S. 654, 669–70 (1988).

[81] Further, to the extent that the government can act before a court might intervene and then resist any ex post damages award, it is not clear that the valid rule has any meaningful role to play. See, e.g., El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1365 (Fed. Cir. 2004) (denying damages to plaintiffs allegedly harmed by U.S. military action based on political question grounds).

the then-emergent doctrine of harmless error in constitutional cases.[82] Since then, the Supreme Court has expanded harmless error analysis in the postconviction context while raising the burden necessary to warrant reversal.[83] Harmless error doctrine, moreover, is only one of a slate of doctrines—including absolute and qualified immunity, nonretroactivity, and limits on vicarious liability—that ensures a "right-remedy gap in constitutional law."[84] Although there might be sound justifications for that divide,[85] its existence speaks loudly against the valid rule doctrine—a rule that cannot fairly account for the observed lacunae in the remediation of uncontested constitutional rights violations today.

Third, the valid rule doctrine coexists with another principle of federal adjudication, which might be labeled the light footprint principle. This stipulates that courts must minimize the displacement of democratic preferences in legislated form.[86] Showing fidelity to this light footprint principle, the Court prefers narrow, as-applied challenges as opposed to the "strong medicine" of facial invalidation.[87] It occasionally suggests "[a] challenger must establish that no set of circumstances exists under which the Act would be valid" to prevail in a facial challenge.[88] And "when confronting a constitutional flaw in a statute," the Court tries "to limit the solution to the problem," and prefers "to enjoin only the unconstitutional applications of a statute while leaving other applications in

[82] Henry P. Monaghan, Harmless Error and the Valid Rule Requirement, 1989 Sup. Ct. Rev. 195, 211 ("I do not think that the Supreme Court can invoke harmless error principles to sustain the imposition of sanctions when the . . . state court has itself proceeded on the basis of an invalid rule.").

[83] Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993) (requiring that the state show that a constitutional error did not substantially influence the jury).

[84] John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 91 (2000).

[85] Id. at 90 (arguing that the gap "fosters the development of constitutional law" by lowering the price of doctrinal change).

[86] This is in effect a rule of institutional settlement that makes the more democratic branches, rather than the courts, the residual claimant on the exercise of discretionary policy choice.

[87] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)); accord United States v. Salerno, 481 U.S. 739, 745 (1987); United States v. Raines, 362 U.S. 17, 20–22 (1960); Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219–20 (1912).

[88] *Salerno*, 481 U.S. at 745.

force . . . or to sever its problematic portions while leaving the remainder intact."[89]

In combination with each other, the valid rule and light footprint principles suggest that the Court should invalidate only the set of applications of a challenged statute that are not valid rules, while preserving applications that are constitutionally valid. The Court should further invalidate a statutory provision in toto only if that provision cannot be subdivided into valid (sub)rules and invalid (sub)rules.[90] Hence, rather than striking down a whole federal law on Commerce Clause grounds, the Court ought to narrow it to the subset of instances in which it can be validly applied to individuals within Congress's Article I reach.

But this is not what the Court does. That is, the Court does not distinguish cases in which a federal law can be applied validly to an individual from cases in which an individual is beyond Congress's power. Instead, both *Lopez* and *Morrison* yielded facial invalidations of the statutes being challenged.[91] In neither case did the Court even entertain the possibility of disaggregating the challenged provision into valid rules and invalid rules. Similarly, in the recent challenge to the federal healthcare law, Chief Justice Roberts's pivotal opinion treated the challenged individual mandate provision as a unit whole, not a collection of potentially disparate applications.[92] His failure to disaggregate valid and invalid applications of the individual mandate is even more striking than the lacunae in *Lopez* and *Morrison* because there were (unrefuted) ar-

[89] Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328–29 (2006) (citations omitted).

[90] This is the view taken by commentators of very different methodological stripes. See Fallon, supra note 70, at 1331 (identifying "an implicit assumption that any constitutionally invalid statutory *subrules* . . . could be severed or separated from valid ones"); Gillian E. Metzger, Facial Challenges and Federalism, 105 Colum. L. Rev. 873, 877 (2005) ("What really distinguishes a facial challenge is not its breadth, but that it involves an attack on the general rule embodied in a statute."). Rejecting traditional models of severity, Professor Kevin Walsh also finds historical support for the idea that courts should "not . . . infer invalidity beyond unconstitutionality." Kevin C. Walsh, Partial Unconstitutionality, 85 N.Y.U. L. Rev. 738, 743 (2010). Professors Fallon, Metzger, and Walsh diverge in how they frame the analysis, but are united in their respect for what I have called the light footprint principle.

[91] *Morrison*, 529 U.S. at 619 (stating that "the Commerce Clause does not provide Congress with authority to enact § 13981"); *Lopez*, 514 U.S. at 559 (analyzing statutory provision as a unitary whole, not as severable application); see also Metzger, supra note 90, at 907 (noting that *Lopez* and *Morrison* "quite clearly continue the Court's willingness to entertain facial challenges to the constitutionality of commerce power legislation").

[92] See, e.g., *NFIB*, 132 S. Ct. at 2590 (analyzing the "individual mandate's regulation of the uninsured as a class").

guments aired by courts of appeal judges to the effect that many (if not all) applications of the mandate were plainly constitutional even under an ungenerous reading of the Commerce Clause.[93] In effect, the Court in Commerce Clause litigation evinces no concern with the validity of the federal statutory rule as applied to a specific litigant. Instead of applying the valid rule test to the specific circumstances of individual litigants, the Court focuses on the offense to states' interests writ large that flows from a federal statute. The Justices, hence, strike down statutes in toto when the latter impinge upon *states'* rights. "[T]he nature of the claim being asserted"[94] and vindicated in these cases is the alleged offense to federalism values—not an individual privilege to sally forth armed at high school, rape women, or freeride on a federal medical safety net. This constitutional offense cannot be assuaged by shaving individual applications from the law's reach in accord with the valid rule doctrine. It is sated only by facial invalidation.[95]

In summary, there is a class of structural constitutional litigation in which the Court's concern is not well understood as vindication of an individual constitutional right or privilege, such as the valid rule doctrine. Rather, the Court's analysis and remedies make sense only on the assumption that the Justices are vindicating a *structural* principle of federalism or the separation of powers—one that benefits in the first instance institutions—but doing so at the behest of individual litigants. It is in respect to this class of cases, which includes both federalism and separation of powers matters, that there is cause to press further on the justifications for permitting individual litigants to obtain relief when the interests of states and branches are disregarded.

II. THE STRUCTURAL CONSTITUTION AGAINST STANDING DOCTRINE

To identify a set of cases in which individual litigants obtain access to federal court to vindicate the constitutional interests of third-party insti-

[93] See Thomas More Law Ctr. v. Obama, 651 F.3d 529, 565–66 (6th Cir. 2011) (Sutton, J., concurring in part), abrogated by *NFIB*, 132 S. Ct. 2566.

[94] Metzger, supra note 90, at 881 (treating this as key to whether a challenge is facial or as-applied).

[95] Moreover, it is almost never clear whether or when a law must be treated as a unitary whole as opposed to a series of separable subrules. Cf. Fallon, supra note 70, at 1331 (using terminology of "subrules"). The prevailing approach to severability turns on legislative intent, see Alaska Airlines v. Brock, 480 U.S. 678, 686 (1987), and so laws typically lack natural "joints" that can be employed to separate out subrules or separate families of applications.

tutions—occasionally even over the protests of those very institutions—is to set the stage for this Article's central puzzle: Canonical accounts of standing suggest that the federal courthouse door is open only to individuals seeking redress for violations of their own rights. How then is it that some individual litigants have standing under the structural constitution for the rights of institutions such as states and branches? To answer that question, it is helpful to begin with a brief overview of standing doctrine before turning to the Court's solution in *Bond*.

A. The Logic of Standing

Article III's "[c]ases" and "[c]ontroversies" language is glossed to require that litigants "demonstrate a 'personal stake' in the suit."[96] To test the sufficiency of that "personal" stake, the Court has developed a three-part doctrine of constitutional standing. There is also a similarly plural constellation of prudential rules, although they are applied more intermittently. Both the constitutional and the prudential standing frameworks have shifted recently from an approach focused on legal wrongs to one focused on injury in fact. Yet the resulting doctrinal frameworks have only partially displaced earlier approaches.[97] The resulting law is complex and contested. My purpose here is to describe it, and not to advocate its wholesale reform, however urgently the latter might be wanted.

To secure constitutional standing, litigants must show (1) they have "suffered an injury in fact"—one that is concrete, particularized, and either actual or imminent—that is (2) caused by "the conduct complained of," and that (3) "will be redressed by a favorable decision."[98] In addition to this tripartite constitutional core, the Court has also "self-imposed"[99] a series of "prudential" constraints on standing.[100] Hence, the Court has said (1) that claimants must be "arguably within the zone of

[96] Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011) (quoting Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009)).

[97] For a useful history of the doctrine, see Fletcher, supra note 1, at 224–28.

[98] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citations and internal quotation marks omitted).

[99] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

[100] Prudential standing rules can be overriden by Congress. FEC v. Akins, 524 U.S. 11, 20 (1998).

interests to be protected or regulated by [a] statute";[101] (2) that they must assert their own rights, and not "the legal rights of others";[102] and (3) that they cannot be seeking redress for mere "generalized grievance[s]."[103] Like the entangled warp and woof of a Persian carpet, these diverse constitutional and prudential elements imbricate and blur into one another. In particular, the particularized harm element of constitutional standing echoes the prudential rules against generalized grievances and third-party standing. For example, in rejecting taxpayers' objections to federal expenditures on constitutional grounds, the Court has framed their interests as too generalized (a prudential problem) since they are "shared with millions of others [and are] minute and indeterminable," rather than being concrete and particularized (a constitutional problem).[104] For better or worse, the complex network of standing doctrine has an internal logic and integrity of its own.

[101] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012) (quoting Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)); see also Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998) (explaining that the zone-of-interests test is nothing more than a requirement of "prudential standing" under the APA).

[102] Sprint Commc'ns Co. v. APCC Servs., 554 U.S. 269, 290 (2008); accord Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 955 (1984) (stating that a plaintiff ordinarily "'cannot rest his claim to relief on the legal rights or interests of third parties'" (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975))); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263 (1977) ("In the ordinary case, a party is denied standing to assert the rights of third persons.").

[103] See United States v. Richardson, 418 U.S. 166, 174 (1974) (Stewart, J., concurring) ("[A] taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" (quoting Flast v. Cohen, 392 U.S. 83, 114 (1968) (internal quotation marks omitted))).

[104] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343 (2006) (quoting Frothingham v. Mellon, 262 U.S. 447, 487 (1923)); see also Golden v. Zwickler, 394 U.S. 103, 109–10 (1969) (stating that a general interest in the constitutionality of law is not an actual controversy). Elsewhere, however, the Court has suggested that a "harm [can be] concrete," though "widely shared" provided that it is not "abstract and indefinite." *Akins*, 524 U.S. at 23–24. The *Akins* majority opinion sparked a sharp dissent from Justice Scalia, who emphasized that the generalized grievance bar arises not only when harms are widely shared, but also "undifferentiated," in that "the harm caused to" the litigant "is precisely the same as the harm caused to everyone else." Id. at 35–36 (Scalia, J., dissenting). Justice Scalia's logic on this point does not account for the fact that informational deprivations of the kind at issue in *Akins* can have particularized and differentiated effects on different members of the public. For example, opponents of the alleged political committee whose data was at issue in *Akins* had a distinctive and sharply defined interest that other members of the polity did not in obtaining the release of the information sought.

The central, and centrally contested, concept in contemporary standing doctrine is the injury-in-fact requirement.[105] While there is some question about the overall doctrine's historical pedigree,[106] it is tolerably clear that the injury-in-fact requirement as currently formulated is a judicial novation by Justice Douglas. Until 1970, the courts asked instead whether litigants had a "legal right," not an injury in fact.[107] Judges also tended to embrace a capacious construction of statutory judicial review provisions, permitting suit by those "aggrieved or whose interests are adversely affected."[108] It was not until the 1970s, and an opinion by Justice Douglas in *Association of Data Processing Service Organizations v. Camp* (*Data Processing*) that the Court coined the phrase "injury in fact."[109] Four decades of jurisprudence have not cast favorable light on the injury-in-fact rule.[110] The latter pushes courts into open-ended, free-form, and near metaphysical inquiries into the adequacy of alleged injuries. Persistent disagreement between the Justices shows that the concept

[105] Cf. Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 183–93 (1992) (critiquing persuasively the concept of injury in fact).

[106] In a series of influential articles, Professors Cass Sunstein and Steven Winter have advanced a claim that liberal Justices crafted standing doctrine as a way to insulate New Deal programs from court challenges. See id. at 179–80; Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1455–56 (1988). But see Daniel E. Ho & Erica L. Ross, Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006, 62 Stan. L. Rev. 591, 595–96 (2010) (presenting a more nuanced story to the effect that standing initially had cross-ideological support, which broke down in the 1920s); Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689, 691–92 (2004) (compiling evidence of eighteenth-century analogs to standing).

[107] Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137 (1939); Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249, 256–57 (1930).

[108] FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476–77 (1940) (discussing 47 U.S.C. § 402(b)(2) (1940)).

[109] 397 U.S. 150, 152 (1970); see Sunstein, supra note 105, at 185 (noting that "the *Data Processing* Court concluded that a plaintiff no longer needed to show a 'legal interest' or 'legal injury' to establish standing. . . . Henceforth the issue would turn on facts, not on law."); accord Elizabeth Magill, Standing for the Public: A Lost History, 95 Va. L. Rev. 1131, 1161 (2009); Fletcher, supra note 1, at 229–30. Justice Kennedy recently claimed (without support) that the injury requirement derived from "the English legal tradition." Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1441 (2011). Longstanding scholarship demonstrates this claim to be unfounded. See Louis L. Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1274 (1961); accord Sunstein, supra note 105, at 171–73. But see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 n.5 (1998) (arguing that doctrinal standing has a longer historical pedigree).

[110] See, e.g., Sunstein, supra note 105, at 185.

of injury remains opaque,[111] contingent on "extremely complex and unwieldy threshold issues of fact,"[112] and vulnerable to judges' ad hoc normative judgments.[113]

B. Standing for the Structural Constitution Under Bond

Four decades passed after *Data Processing* before the Court squarely addressed individual standing for the structural constitution. Justice Kennedy's unanimous opinion for the Court in the 2011 case of *Bond v. United States* held that individual litigants possess Article III authorization to invoke and obtain relief on the basis of structural constitutional arguments.[114] Justice Kennedy's resolution of the justiciability question in *Bond* is not without support in standing jurisprudence. I thus begin by sketching its result and airing its support.

Bond arose from criminal charges filed pursuant to the Chemical Weapons Convention Implementation Act of 1998 against Carol Bond, a microbiologist who had attempted to poison her husband's alleged lover with 10–chloro10H–phenoxarsine, a chemical with "the rare ability to cause toxic harm to individuals through minimal topical contact."[115] Ms.

[111] For example, in *American Electric Power Co. v. Connecticut* (*AEPC*), the eight-member Court divided equally on the question of whether states had standing to seek a federal common law remedy against air pollution, resulting in an affirmance of the circuit court's judgment granting standing. 131 S. Ct. 2527, 2535 (2011). The *AEPC* divide replayed the sharp disagreement between the Justices over state standing in *Massachusetts v. EPA*, 549 U.S. 497, 498–99, 501 (2007). Taxpayer standing in Establishment Clause challenges remains another point of sharp contention. Compare *Winn*, 131 S. Ct. at 1444–49 (finding no standing), with id. at 1450–51 (Kagan, J., dissenting) (arguing in favor of standing).

[112] Cass R. Sunstein, Informational Regulation and Informational Standing: *Akins* and Beyond, 147 U. Pa. L. Rev. 613, 639 (1999).

[113] See id. at 641 ("What is perceived, socially or legally, as an 'actual' injury is a product of social or legal categories giving names and recognition to some things that people, prominently people within the legal culture, consider to be (actual, cognizable) harms.").

[114] 131 S. Ct. 2355, 2355 (2011). Justice Ginsburg, joined by Justice Breyer, filed a concurrence without disagreeing with the majority's reasoning. The Court has since granted Ms. Bond's second certiorari petition concerning the validity of the statute under which she was charged as a Treaty Power enactment. 133 S. Ct. 978 (2013). One might query whether *Bond* is a typical example of individual standing for the structural constitution given the Treaty Power overlay and the peculiarity of the federal criminal law being invoked in respect to a putative chemical weapon. These aspects of the case, however, do not loom large in its resolution of the pure Article III question.

[115] United States v. Bond, 581 F.3d 128, 131–32 (3d Cir. 2009). Sinister as this sounds, Ms. Bond's efforts appeared to be sophomoric at best. Id. at 132 ("Bond attempted to poison Haynes with the chemicals at least 24 times over the course of several months. She often

Bond subsequently challenged the constitutionality of the 1998 Act on the theory that it was inconsistent with the Tenth Amendment's reservation of powers to the states.[116] The Third Circuit Court of Appeals invoked the 1939 Supreme Court opinion *Tennessee Electric Power Co. v. Tennessee Valley Authority*, which stated that individuals, "absent the states or their officers, have no standing" to raise a Tenth Amendment question.[117] Upon the grant of certiorari review, the U.S. Department of Justice switched from arguing that Ms. Bond lacked standing to accepting her Article III bona fides, leaving the Court to appoint an amicus to argue against her standing.[118]

The Court's resolution of the standing question in Ms. Bond's favor was brisk and analytically parsimonious. Justice Kennedy began by observing that as a criminal defendant, Ms. Bond satisfied the formal tripartite test for constitutional standing.[119] He then dealt with the specific precedent cited by the court of appeals. He distinguished *Tennessee Electric* on the ground that it concerned the availability of a cause of action, which "'goes to the merits' in the typical case, not the justiciability of a dispute."[120] Citing *Data Processing*, Kennedy also rejected the relevance of that merits question to resolution of the injury-in-fact prong of standing.[121]

would spread them on Haynes's home doorknob, car door handles, and mailbox. Haynes noticed the chemicals and usually avoided harm, but on one occasion sustained a chemical burn to her thumb.").

[116] Id. at 134.

[117] 306 U.S. 118, 144 (1939). The Third Circuit was not alone in reading *Tennessee Electric* to bar individual standing in Tenth Amendment cases. See *Bond*, 131 S. Ct. at 2361 (collecting courts of appeal decisions to the same effect).

[118] *Bond*, 131 S. Ct. at 2361. It is not wholly without irony that the *Bond* Court would adjudicate an Article III question absent the interparty adversity typically thought necessary to Article III adjudication. See Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 692 (2012) ("[W]hat, exactly, is the basis for appointing counsel in order to 'support or defend' the judgment below? Litigants have interests; but judgments? If the litigants have no actual interest in defending the judgment, or have abandoned positions taken below, what conception of judicial authority authorizes the Court to intervene?"). Given the Court's sua sponte authority to analyze standing even in the absence of a party raising the question, the practice has perhaps more justification in *Bond* than elsewhere.

[119] *Bond*, 131 S. Ct. at 2361–62; id. at 2366 ("An individual who challenges federal action on [structural constitutional] grounds is, of course, subject to the Article III requirements . . . .").

[120] Id. at 2362.

[121] Id. at 2363.

Having eliminated the sustaining prop of the opinion below, Justice Kennedy turned to the question of prudential standing. He framed the analysis as a response to the argument that Ms. Bond was asserting third parties' interests, not her own rights. Rejecting that charge, Justice Kennedy asserted that federalism "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions," such that all individuals have "a *direct* interest in objecting to laws that upset the constitutional balance."[122] He added in dicta that "individuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies."[123] Justice Kennedy presented these propositions as self-evident. Neither was supported by extensive argument or citation.[124]

Bond comprises an odd amalgam of arguments drawn from distinct moments in standing's history. On the one hand, Justice Kennedy's arguments depend on a post-*Data Processing* conception of standing. He leveraged the break affected by *Data Processing* between the "legal injury" test and the "injury-in-fact" regime to reject the Third Circuit's ruling as a relic of a confused and bygone era.[125] On the other hand, Justice Kennedy also argued that "the individual liberty secured by federalism [and, by extension, the separation of powers] is not simply derivative of the rights of the States."[126] In so doing, he implicitly invoked the pre-*Data Processing* analytic focus upon "legal rights." Indeed, Kennedy went out of his way to explain that the Constitution does vest individuals with a direct and unmediated interest in structural constitutional values—a kind of "merits" inquiry that, only two brief pages previously,

[122] Id. at 2364 (emphasis added); id. ("Federalism secures the freedom of the individual.").

[123] Id. at 2365. The Court also rejected the Solicitor General's submission that it should distinguish between ultra vires challenges and claims that a federal law interfered with a specific aspect of state sovereignty. Id. at 2366.

[124] In a brief concurrence, Justices Ginsburg and Breyer invoked the valid rule doctrine as a justification for the Court's holding. Id. at 2367 (Ginsburg, J., concurring). For the reasons developed in Part I, I am skeptical that the valid rule doctrine can explain the Court's willingness to adjudicate all federalism or separation of powers challenges.

[125] Cf. id. at 2362–63 (majority opinion) (criticizing *Tennessee Electric* for failing to distinguish the concepts of standing and a cause of action). But see Sunstein, supra note 112, at 639 ("As a matter of text and history, the best reading of the Constitution is that no one can sue without some kind of cause of action. An injury in fact, however, is neither a necessary nor a sufficient condition for standing.").

[126] *Bond*, 131 S. Ct. at 2364.

he had instructed was not to be "conflat[ed]" with standing.[127] *Bond*, whatever its other merits may be, thus showcases how the Court can toggle promiscuously between different conceptions of standing within the same opinion with apparent disregard for analytic coherence.

III. THE DOCTRINAL TROUBLE WITH *BOND*

The *Bond* Court's analytic parsimony raises the question whether, notwithstanding longstanding judicial practice, the larger aims of standing doctrine are consonant with individual standing for the structural constitution. In this Part, I develop three related arguments to the effect that such standing is an outlier in tension with Article III's larger ambition. The arguments are related because all derive from a central principle of Article III: Standing rules should sort out cases and controversies that can be resolved without large spillover effects on third parties who are unrepresented in the courtroom. To this end, standing doctrine aims to roughly categorize litigation based on the magnitude of spillover effects. The effort in this regard is concededly imprecise, and resulting doctrine is plainly both under- and overinclusive. But exceptions are cause for embarrassment and judicial retrenchment, not paradigm cases.

The central claim advanced in this Part is that structural constitutional litigation filed by an individual will almost inevitably conflict with this core Article III principle. I develop this point by exploring first the common law archetype of federal court litigation and showing how its doctrinal entailments can be explained as endeavors to avoid cases with large spillover effects. A second argument developed in this Part focuses on the fact that relief in those structural constitutional cases filed by individuals often turns on the independent action of an entity not before the Court—a form of spillover effect in sharp tension with basic rules of causation and redressibility. Finally, the *Bond* Court endeavored to rehabilitate individual standing for the structural constitution by pointing to a positive spillover effect—call it a liberty externality—from litigation propelled by individual plaintiffs. This ingenious inversion of canonical standing doctrine, however, is inconsistent with the observed consequences of structural litigation. It therefore provides no support for the proper exercise of Article III jurisdiction in such cases.

[127] Id. at 2362–63.

A. Bond *and Article III's Ambition*

Article III jurisprudence rests on a specific vision of federal courts' proper role, a vision with resonant historical and consequentialist justifications. Federal courts are tailored to the resolution of disputes in which all affected parties are before the court.[128] The archetypal suit fit for Article III is a common law tort or contract dispute.[129] In contrast, federal courts lack institutional competence to resolve disputes involving larger numbers of parties, only a portion of whom are properly before the bench. Litigation is licensed only if it does not have large externalities, or spillovers, onto unrepresented parties.[130] To be sure, the Court does not pursue this vision of Article III by making case-by-case judgments. Instead, it taxonomizes controversies into rough-hewn, imprecisely drawn categories. Political pressure or the felt needs of the day also generate exceptions, such as the class action or structural reform litigation. But the Court regards the latter as exceptions, rather than core cases, and strives to limit their reach.

Granting standing to individual litigants seeking to vindicate the structural constitution is in sharp tension with this core Article III principle. Almost all such disputes inevitably implicate not only parties before the court, but also a range of other unrepresented actors. Fidelity to that core, animating ideal of a well-tailored judiciary therefore generates a first reason to think that the practice of individual standing for the structural constitution is more constitutionally problematic than the *Bond* Court credited. That is, it is plausible to think that the entire *category* of individual suits to vindicate the structural constitution should be kept out of federal court. Through the balance of this Section, I lay out this argument in more detail.

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[128] Cf. GTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375, 382 (1980) ("The purpose of the case-or-controversy requirement is to limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." (internal quotation marks omitted)).

[129] See Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (noting standing's "common-law" roots); see also Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150–52 (1951) (Frankfurter, J., concurring); Coleman v. Miller, 307 U.S. 433, 460–61 (1939) (Frankfurter, J., concurring).

[130] To my knowledge, the Court has never pursued the possibility of Coasean bargaining between litigants and affected entities who are not in the courtroom. In effect, such bargaining might be thought to occur in some instances through the use of joinder and interpleader rules. Those rules, however, are far from pellucidly clear. Cf. Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 184 (characterizing the relevant rules as "underutilized" and "impossible to comprehend").

We can usefully begin with the Constitution's original design. The Framers envisaged a tempered role for federal courts in a constitutional republic. "Article III of the Constitution restricts [the federal judiciary] to the traditional role of Anglo-American courts."[131] This implies a "bipolar model of the lawsuit, which assumes a dispute between two unitary, diametrically opposed interests," rather than "a multipolar model in which the party structure is sprawling and amorphous."[132] Stated otherwise, Article III aims to select for disputes in which all interested parties are before the court, and to exclude from justiciability disputes with nontrivial spillover effects onto unrepresented parties.[133]

In applying this principle, it is salient that the "traditional role of Anglo-American courts" did not include the resolution of structural governance questions at the behest of individual litigants.[134] The Court has never identified an Anglo-American history of judges policing constitutional structure prior to the Revolution.[135] It simply would not have occurred to those seeking institutional reform in pre-1789 Britain to turn to the courts for relief. The same is true in the United States. At least until the beginning of the twentieth century, there was no American judicial tradition of enforcing structural constitutionalism (or, for that matter, any expansive tradition of judicial review) upon which the Justices could draw to legitimate such actions.[136] Viewed from a historical baseline,

[131] Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148 (2009).

[132] Susan Bandes, The Idea of a Case, 42 Stan. L. Rev. 227, 250 (1990); Maxwell L. Stearns, Standing at the Crossroads: The Roberts Court in Historical Perspective, 83 Notre Dame L. Rev. 875, 915 (2008) ("By demanding 'injury in fact,' 'causation,' and 'redressability,' standing doctrine seeks a set of factors that correlate to traditional bipolar litigation.").

[133] The notion of "relevant" spillover effects has been developed formally by James M. Buchanan & Wm. Craig Stubblebine, Externality, 29 Economica 371, 374 (1962). I do not try here to provide a formal definition of when precisely spillovers are great enough to raise Article III concerns. The concept is, in practice, only poorly specified.

[134] *Summers*, 129 S. Ct. at 1148.

[135] Even if England had separation of powers or federalism to police, its principal courts were in their origins instruments of the Crown. See J.H. Baker, An Introduction to English Legal History 37–51 (4th ed. 2007). Even prerogative writs issued by the King's bench, such as habeas corpus, "did not result from a contest between 'executive' and judicial bodies" or create any "checking and balancing" at least until the early 1600s. Paul D. Halliday, Habeas Corpus: From England to Empire 27 (2010).

[136] Cf. Aziz Z. Huq, When Was Judicial Self-Restraint?, 100 Calif. L. Rev. 579, 584–86 (2012) (summarizing path of judicial review from 1800 to 2000). Famously, Chief Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), states that the function of a federal court "is, solely, to decide on the rights of individuals." See also Massachusetts v. Mellon, 262 U.S. 447, 484 (1923) ("It is only where the rights of persons or

therefore, judicial superintendence of structural constitutional principles at the behest of an individual plaintiff is a novelty that may "risk[] injecting the judiciary prematurely in decisions that are not its to make."[137]

That "Anglo-American" template for judicial power reflects not only historical continuities but also important consequentialist concerns. Specifically, it embodies an abiding concern with judges' limited institutional competence by selecting for judicial resolution only those categories of dispute in which all (or most) relevant parties are before the court, while at the same time screening out disputes that entangle a scattered multitude of actors who cannot reasonably be brought before the court.[138] The latter kind of dispute is oft thought better suited for resolution by democratically elected political branches because of the presence of externalities that judges are ill-positioned to gauge empirically or to address. Legislatures and executives, by contrast, are thought to be better able to gather diverse and plural popular inputs, and also thought to possess larger institutional resources for managing disputes with complex and widely entangling spillover effects.[139] "Slow, cumbersome, and unresponsive though the traditional electoral process may be,"[140] it remains the default forum for deliberation and national policymaking about matters that touch on many parties. By preserving this institutional prerogative of the elected branches, Article III further allocates the scarce adjudicative resources of the federal judiciary to their highest

property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief." (citation and internal quotation marks omitted)).

[137] Woolhandler & Nelson, supra note 106, at 733. Different considerations arguably apply when the structural dispute is raised by the branches or governments involved. In those cases, the role of the federal judiciary as a supposedly neutral body, and the need to provide expeditious resolution of intergovernmental disputes in a way that does not generate gridlock, may well justify a different result notwithstanding the absence of historical antecedents.

[138] See Heather Elliott, The Functions of Standing, 61 Stan. L. Rev. 459, 477 (2008) ("[T]he Court has suggested that mere numerosity creates a standing problem.").

[139] See FEC v. Akins, 524 U.S. 11, 23 (1998) ("Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."); accord Los Angeles v. Lyons, 461 U.S. 95, 111–12 (1983); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974); see also Warth v. Seldin, 422 U.S. 490, 498 (1975) (noting that standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society"). Some commentators argue that the Court has been too aggressive in screening out cases that could properly be resolved by a court. See, e.g., Elliott, supra note 138, at 474–75, 483–92.

[140] United States v. Richardson, 418 U.S. 166, 179 (1974).

value use: categories of dispute that do not involve such spillovers, which can be fully resolved with only a handful of parties haled into court.[141]

Reflecting these historical, pro-democracy, and efficiency foundations, the "anti-externality" template of Article III jurisdiction underwrites both the injury-in-fact rule and the correlative doctrinal skepticism of generalized grievances of "an abstract and indefinite nature."[142] Both of the latter are efforts to pick out those classes of disputes that lack unmanageable spillovers. Hence, it is not the case that injuries in fact are defined exogenously to the law. Rather, the Court must exercise judgment in determining when to single out consequences as harms cognizable under Article III.[143] In the course of this fundamentally normative enterprise, the Court has mounted resistance to any conception of injury in fact that opens the courtroom door to cases with large externalities and thus transforms litigation into a substitute forum for far-reaching and complex policy change. It has used the injury-in-fact rule, in other words, to resist jurisdiction over multipolar disputes.

Consistent with that aspiration, Justice Scalia in *Lujan v. Defenders of Wildlife* cautioned against allowing "Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts."[144] To that end, he repudiated legislative efforts to create "individual rights" from "public rights that have been legislatively pronounced to belong to each individual who forms part of the public."[145] Absent such constraint, Scalia posited,

[141] In *Friends of the Earth v. Laidlaw Environmental Services (TOC)*, 528 U.S. 167, 191 (2000), the Court expressed the aim that "the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." The argument in the main text is similar, but not quite the same as *Laidlaw*'s point.

[142] *Akins*, 524 U.S. at 23. In the administrative law context, the Court has pressed the same distinction between general laws and specifically targeted adjudications. See Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445–46 (1915).

[143] See Sunstein, supra note 105, at 188–89 ("In classifying some harms as injuries in fact and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden and independent of facts." (footnote omitted)); accord Gene R. Nichol, Jr., Injury and the Disintegration of Article III, 74 Calif. L. Rev. 1915, 1918 (1986) (noting that the injury-in-fact analysis "carries two distinct inquiries under its broad mantle. Injury analysis demands the exploration of not only the directness or actuality of the litigant's claimed injury, but also the judicial cognizability of the interest alleged to be injured."); Fletcher, supra note 1, at 232–33 (same).

[144] Lujan, 504 U.S. at 577.

[145] Id. at 578. Or, as Justice Scalia put the matter in another section of his *Lujan* opinion, the "public interest in proper administration of the laws [cannot be] converted into an indi-

individual litigants (with congressional aid) could transform Article III courts into generalized "monitors of the wisdom and soundness of Executive action."[146] This would yield misuse of "a branch designed not to protect the public at large but to protect individual rights."[147] A straitened version of injury in fact, in short, conduces to the appropriate allocation of institutional responsibilities: Courts resolve the category of disputes where all relevant parties can be haled before the bench, whereas the elected branches resolve entangling and amorphous disputes characterized by large spillover effects.

Individual standing for the structural constitution disregards these historical, pro-democracy, and consequentialist entailments of Article III. Such standing is fundamentally and unavoidably multipolar and sprawling in nature. Correlatively, it almost inevitably generates unmanageable spillovers to unrepresented parties. It is thus precisely the sort of dispute about the "wisdom and soundness" of molar institutional arrangements that Article III is designed to shut out categorically from the federal courthouse. Hence the awkward fit between the narrowly defined procedural channels of a federal criminal trial and the large, structural questions handled in cases such as *Lopez* and *Bond*.

This point can be developed further by comparing individual standing in constitutional rights cases with individual standing for the structural constitution. In individual rights matters, a judge's core task involves balancing an individual's constitutional privilege against the aggregated interests of society at large as represented by the government.[148] Understood in such terms, constitutional rights litigation draws in all relevant parties to the courthouse. Indeed, a central assumption for judicial review in the rights context is the idea that the parties with the most at stake are almost always in the courtroom. In contrast, when that is not

vidual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." Id. at 576–77.

[146] Laird v. Tatum, 408 U.S. 1, 15 (1972).

[147] *Akins*, 524 U.S. at 36 (Scalia, J., dissenting). In *Akins*, Justice Scalia's dissenting opinion objected to the broad availability of relief Congress had enabled under the Federal Election Campaign Act, see 2 U.S.C. § 431(4) (2006), to seek information about political committees. Id. at 30 (describing the statutory framework). In a separate concurrence in *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 636 (2007) (Scalia, J., concurring), he pressed further on the same point by arguing that the institutional sorting function of standing precluded the judicial vindication of "[p]sychic [i]njur[ies]."

[148] The Court must also consider decision costs—that is, whether the proposed rule is one that can be operationalized effectively by judges. I bracket decision costs in the following analysis since they largely wash out.

so—when rights adjudication risks excessive spillover effects—the Court declines to find claims justiciable.[149]

To be sure, judicial review in rights cases cannot be justified upon the assertion that such adjudication *lacks* externalities entirely. This is plainly not so. Rather, polycentricism is arguably endemic to constitutional rights litigation. Every time the Court defines or refines a criminal procedure-related right pursuant to the Fourth, Fifth, or Sixth Amendments, for example, its decision not only has consequences for specific defendants and prosecutors. It also has spillover effects upon almost all members of the polity when a new rule renders crime-control either more costly or less expensive.[150] From this perspective, any push to cabin Article III litigation to instances in which there are no spillovers is whistling in the wind.[151]

But this kind of skepticism moves too fast. In the rights context, the state or federal government is typically on the other side of the courtroom from the rights claimant. In its litigation capacity, the government is not typically asserting solely its own institutional interests. Rather, government lawyers seek to vindicate a law by pointing to some set of "compelling interests"[152] belonging to society at large. In this way, the government defendant in a rights case is meant to aggregate into manageable form the plurality of social interests contrary to a right, and

[149] For example, in *Dandridge v. Williams*, 397 U.S. 471, 487 (1970), the Court rejected a constitutional entitlement to social welfare payments because of the complex interdependencies of any such right and its effect on parties not present in the courtroom: "Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." In an insightful new book, Professor Emily Zackin demonstrates that positive rights are often included in state constitutions, but judicial review is not necessarily central to their realization. See Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights 11–12 (2013).

[150] This is an important theme in the work of Professor William Stuntz. See, e.g., William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 4 (1997) ("As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs."); see also William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 780, 793 (2006) ("The government pays for criminal procedure rules in the coin of forgone arrests and convictions. When a particular rule turns winning cases into losers, prosecutors seek substitutes . . . .").

[151] For critique in this vein, see Daryl J. Levinson, *Aimster* and Optimal Targeting, 120 Harv. L. Rev. 1148, 1148 (2007) ("Deeply embedded in the conventional legal mindset is a common law model of adjudication and liability premised on the ideal of bilateral corrective justice. . . . From an economic perspective, every element of this model is dubious.").

[152] See, e.g., United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012).

bring them before the court. This is most obviously so in respect to the Solicitor General, who represents the United States in the Supreme Court, and who is expected to operate as a "Tenth Justice," impartially and objectively aggregating relevant social interests and presenting them to the court.[153] The Solicitor General's office, moreover, plays that role even if a state is the formal litigant.[154] Because the Court can assume that the government will aggregate relevant social interests, it is entitled to assume that there are no absent stakeholders, and hence a tolerable cap upon spillover effects.

Contrast this with structural constitutional litigation. Here, judges aim to strike the constitutionally desirable balance between the branches or between the states and the federal government. Adjudicating between the states and the federal government, the Court strives to preserve a "federal balance" involving a plurality of institutional actors.[155] That balance must reflect judges' efforts to guard against no less than "three types of transgressions": shirking by states, burden-shifting by states onto other states, and encroachment by the national government.[156] Similarly, in the context of horizontal interbranch relations, the Court does not simply strive to maximize the power of Congress or the President. Instead, the Court understands the "[s]eparation of powers" as "secur[ing] a proper balance of legislative, executive, and judicial authority."[157] Again, this presumes that the Court must be attentive to multiple species of constitutional violation implicating the interests of plural parties—infringements on legislative power, on executive power, or on judicial authority—rather than simply striking to maximize one value.

[153] For useful articulations of this function, see Drew S. Days III, The Solicitor General and the American Legal Ideal, 49 SMU L. Rev. 73, 76–79 (1995); Drew S. Days III, When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence, 3 J. App. Prac. & Process 509, 514–17 (2001).

[154] See Cornelia T.L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 Mich. L. Rev. 676, 706–07 (2005) (noting frequency with which the Solicitor General intervenes in both high court and lower court litigation).

[155] United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

[156] Jenna Bednar, The Robust Federation: Principles of Design 68–69 (2009). Others describe federalism as involving reciprocal risks of self-dealing by the states and the national government. See, e.g., Rui J.P. de Figueiredo, Jr. & Barry R. Weingast, Self-Enforcing Federalism, 21 J.L. Econ. & Org. 103, 104 (2005) (describing the "twin dilemmas" of federalism).

[157] Clinton v. City of New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring). The executive shares this view. See The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275, 276 (1980) (rejecting legal stances that "could jeopardize the equilibrium established within our constitutional system").

Employing either formalist or functionalist tools, the Court hence aims to strike an equilibrium among the branches that honors a gamut of constitutional interests held by diverse parties.[158] In both federalism and separation of powers contexts, that is, the constitutional relations relevant to the litigation tend to have more than two nodes and tend to pit a plurality of institutions against each other in diverse ways.

In this light, it is apparent that structural constitutional jurisprudence initiated by a private plaintiff possesses an inexorably multipolar character quite distinct in character from individual rights litigation. This is not solely because structural constitutional cases tend to implicate questions of "broad social import,"[159] in that they alter institutions impinging on the lives of many (although this is certainly so). It is more importantly a result of the fact that when an individual litigant brings an action to vindicate the structural constitution, it is almost certain that not all constitutionally salient actors will have a formal role in the ensuing litigation.[160] An individual plaintiff typically hales only one institutional actor into court as a defendant; others are not directly voiced in the courtroom even if their powers and prerogatives are forthrightly imperiled.

The underlying substantive question of federalism in *Bond*, for example, concerned not merely an individual defendant and the federal executive, but also the several states—which were not parties to the case. Similarly, *Lopez*, *Morrison*, and *National Federation of Independent Business* all presented multipolar disputes between individuals, the states, and Congress—not all of whom were involved in framing the litigation and developing its evidentiary foundations. Further, *Free Enterprise Fund* entangled not only an (unwilling) executive, but also implicated Congress's authority under the horizontal component of the Necessary and Proper Clause to design federal agencies to achieve de-

[158] Compare Morrison v. Olson, 487 U.S. 654, 690–91 (1988) (engaging in functionalist analysis), with Bowsher v. Synar, 478 U.S. 714, 725–27 (1986) (using a formalist analysis). The formalist analysis seeks to identify and assign categories of powers to create equilibrium, whereas functionalists aim to make contextualized judgments about how to maintain some rough equality of arms between branches.

[159] Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99–100 (1979).

[160] To be sure, states or branches can file amicus briefs, as they commonly do. (Executive participation via the Solicitor General is familiar fare, but for studies of Congress and the states, see respectively Judithanne Scourfield McLauchlan, Congressional Participation as *Amicus Curiae* Before the U.S. Supreme Court 1–3 (2005), and Paul M. Collins, Jr., Friends of the Supreme Court: Interest Groups and Judicial Decision Making 1–15 (2008)). But this does not provide them with the same ability to control the course of the litigation, introduce issues, or present evidence as if they were parties to the litigation.

sired policy outcomes, catalyzing a peculiar situation in which the executive was adverse to a litigant whose claim depended on the President's own possession of a prerogative power.[161] Even accepting *Bond*'s claim that structural principles directly benefit individuals,[162] any litigation in which an individual seeks to vindicate a structural constitutional interest will accordingly have complex repercussions for diverse institutional actors who likely will not all be before the court. Such cases almost always run afoul of Article III's core wisdom of sorting for cases without persistent and unmanageable externalities.

In contrast, suits lodged by the primary institutional beneficiary of a structural constitutional principle—say, by the states against an overbearing federal government, or by a congressional committee against recalcitrant executive officials—do not *necessarily* present the same spillover problems. Separation of powers disputes between Congress and the executive may well bring to the bench the most interested parties. Where all states agree that a federal enactment goes too far, a lawsuit filed by a state does not have intrinsic spillover effects. When the states are divided, and only some seek injunctive relief against a law, however, the possibility that unrepresented states have adverse interests that will not be aired in litigation might properly give a federal judge pause.

The disconnect between Article III's fundamental ambition and individual standing for the structural constitution is further evident from the interpretations of the injury-in-fact rule that the Court offers in cases such as *Bond*, *Free Enterprise Fund*, *Lopez*, and *Chadha*. All, in Justice Scalia's elegant locution, fashion "individual rights" from "public rights."[163] So even as the Court resists *congressional* attempts to turn federal judges into "monitors of the wisdom and soundness" of government policy,[164] it has done precisely the same thing itself by permitting individual litigants to assert not only their own privileges, but also the polity's collective interest in structural principles.

A defender of individual standing for the structural constitution might offer two rejoinders to these arguments. First, she might point to mechanisms such as the class action and structural reform litigation as instances of complex, multipolar lawsuits that remain within the bounds of Ar-

[161] For an extended analysis of the complex consequences of *Free Enterprise Fund*, see Aziz Z. Huq, Removal as a Political Question, 65 Stan. L. Rev. 1 (2013).
[162] But see infra text accompanying notes 237–71 (casting doubt on that claim).
[163] *Lujan*, 504 U.S. at 578.
[164] *Tatum*, 408 U.S. at 15.

ticle III. She might infer that multipolar litigation initiated by an individual plaintiff for the structural constitution implicates no greater concern. And, indeed, the point is a fair one: Article III does not seem to screen out all instances in which there are spillovers or where interested parties are, either de facto or de jure, unrepresented. Nevertheless, it is important not to make too much of these exceptions. Class actions, after all, are understood to be "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[165] They are also now "on the ropes" after a series of recent Supreme Court and lower court decisions ratcheting up the threshold hurdles to class certification.[166] Structural reform litigation is also on the wane even in its classical loci: prisons[167] and schools.[168] Further, federal judges increasingly resist through lobbying and public protestations any novel expansions of federal remedial power.[169] Exceptions to the narrow, generally bilateral terms of Article III's common law template thus are increasingly frowned upon and formally cabined. They are exceptions in search of special dispensation, not models for the balance of the federal docket.

Second, our critic might observe that *legislative* creation of litigable individual interests out of the amorphous stuff of broadly shared public interests implicates a different and more pressing cluster of separation-of-powers concerns than analogous *judicial* action. Therefore, judicial superintendence of disputes that would otherwise be resolved by the political process possesses no great constitutional concern. To support this argument, the critic would flag the Founding-era stipulation that Congress presents more of a threat to the autonomous operation of the exec-

[165] Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)).

[166] Myriam Gilles & Gary Friedman, After Class: Aggregate Litigation in the Wake of *AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 658 (2012); accord Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 375 (2005) ("[I]t is likely that, with a handful of exceptions, class actions will soon be virtually extinct.").

[167] See, e.g., Edward L. Rubin & Malcolm M. Feeley, Judicial Policy Making and Litigation Against the Government, 5 U. Pa. J. Const. L. 617, 661 (2003). A striking recent counterexample is *Brown v. Plata*, 131 S. Ct. 1910, 1910–11 (2011).

[168] See John C. Jeffries, Jr. & George A. Rutherglen, Structural Reform Revisited, 95 Calif. L. Rev. 1387, 1410–11 (2007).

[169] See Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 949–99 (2000) (collecting examples).

utive than the courts.[170] And the Court has duly worried about legislative infringement on the president's power to "take Care" that the laws are enforced.[171]

But the judicial transformation of public rights into individual interests in *Bond*, *Free Enterprise Fund*, *Lopez*, and *Chadha* may be no less troubling than congressional efforts along that margin. Judicial, no less than legislative, expansions of standing shrink the ambit of executive discretion and hence impinge upon democratically informed decision making. Moreover, "separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch."[172] That the Justices are effectively expanding their own authority, and in effect engaging in institutional self-dealing, suggests the judicial power to transubstantiate public rights into individual interests should be even more sharply cabined than any parallel congressional authority.

B. Reconsidering Causation and Redressibility

The second reason to hesitate before embracing *Bond*'s expansive view of individual standing for the structural constitution turns on the balance of the doctrinal test for constitutional standing.[173] In *Bond*, the presence of the three canonical elements of constitutional standing—injury, causation, and redressibility—were tolerably clear given the underlying proceeding's criminal complexion. This is not so in every case in which an individual litigant invokes structural constitutionalism. In a substantial portion of such actions, the causal link between injury and judicial redress is not confined to the four corners of the case, but spills over so as to implicate the contingent, independent decisions of third parties. This distinct form of spillover, which places third parties in an intermediating role, renders the formal doctrinal elements of causation and redressibility uncertain. Elsewhere, this suffices to derail Article III standing. It should do so here too.

In *Allen v. Wright*, for example, the Court held that a nationwide class of African-American parents could not challenge the Internal Revenue

[170] The Federalist No. 51, at 320 (James Madison) (I. Kramnick ed., 1987) ("In republican government, the legislative authority necessarily predominates.").

[171] *Lujan*, 504 U.S. at 577.

[172] Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 878 (1991) (citing Mistretta v. United States, 488 U.S. 361, 382 (1989)).

[173] See supra text accompanying note 98.

Service's ("IRS") failure to deny tax-exempt status to racially discriminatory schools.[174] The plaintiffs complained about the federal government's failure to cease subsidizing private schools, which provided exit opportunities from desegregating public school systems and thereby diminished African-American children's "ability to receive an education in a racially integrated school."[175] Dismissing the suit on standing grounds, the *Allen* Court pointed to the "numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools)" as ruptures in the causal chain from the IRS to the plaintiffs.[176] Because the Court thought that the causal pathway upon which the *Allen* plaintiffs relied exceeded the bounds of Article III, and implicated third parties, it declined to find standing.

Allen framed its analysis in terms of causation.[177] Substantially the same point about causal spillovers can be reprised in the idiom of redressibility. In *DaimlerChrysler Corp. v. Cuno*, the Court denied standing to Ohio taxpayers challenging property tax abatements and investment tax credits granted to an automobile manufacturer on the ground that any remedy "depends on how legislators respond to [the] reduction in revenue" caused by judicial intervention.[178] Citing the *Cuno* decision some five years later, the Court rejected an Establishment Clause challenge to an Arizona education-tax-credit scheme on the ground that invalidating it would require speculation that Arizona lawmakers would respond by passing along fiscal savings to taxpayers, as opposed to allocating them elsewhere in the state's budget.[179] Again, the core objection

[174] 468 U.S. 737, 766 (1984).

[175] Id. at 756; cf. Christopher Coleman et al., Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest, 30 Law & Soc. Inquiry 663, 687 n.153 (2005) (describing Alabama's 1956 change of its constitution to facilitate white flight to private schools as a means to thwart public school desegregation).

[176] *Allen*, 468 U.S. at 759; accord *Lujan*, 504 U.S. at 572 & n.6 (Scalia, J., plurality opinion) (identifying third-party intermediation as a barrier to Article III standing); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40–46 (1976) (same).

[177] To be sure, there may be a sound explanation for *Allen* if the older legal rights concept of standing were accepted (that is, that the plaintiffs in that case did not have a legal right embodied in the federal tax code). I do not mean to deny that possibility, but aim here to draw attention to a different feature of the case's logic. I also do not mean to suggest that I agree with the outcome in *Allen*, only that it is part of standing's doctrinal heritage.

[178] 547 U.S. 332, 344 (2006). The *Cuno* Court also evinced sensitivity to the "broad discretion" of state fiscal policymakers—a discretion it did not wish to crimp. Id. at 345.

[179] Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1444 (2011).

to standing in that case turned on causal spillovers and the role third parties played in connecting the challengers' harm to the court's potential remedy.

Third-party intermediation of the harm alleged to flow from structural constitutional wrongs occurs in many separation-of-powers cases.[180] Consider *Free Enterprise Fund v. Public Company Accounting Oversight Board*. According to the Court, the organic statute of the PCAOB was unconstitutional because its members could be removed only by the Securities and Exchange Commission ("SEC") and then only on a showing of good cause, whereas SEC commissioners could be removed by the White House only on a showing of good cause.[181] This "dual for-cause" regime created a buffer between PCAOB and the President that, the Court held, conflicted with the promise of democratic accountability immanent in Article II of the Constitution.[182] To remedy this constitutional flaw, the Court invalidated one level of for-cause protection, leaving the SEC with plenary removal authority over PCAOB members.[183]

The Court did not, however, explain how this intervention redressed the plaintiff accounting firm's injury in fact—that is, the prospect of an imminent investigation. Absent some cause to conclude that a marginal shift in political control would influence the Board's enforcement strategies, there is no reason to believe the *Free Enterprise Fund* plaintiffs were even incrementally differently situated after prevailing in the Court. Whether they benefit depends wholly on how the SEC—a third party which was not formally a litigant in the proceedings—behaves. It is "unjustifiable economic and political speculation"[184] to assume the SEC will change tack once it has greater control of PCAOB. Yet the Court's finding of standing in that case requires precisely such speculation.[185]

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[180] To be clear, the same difficulty with constitutional causation does not appear to arise in federalism cases.

[181] 130 S. Ct. 3138, 3147 (2010).

[182] Id. at 3151.

[183] Id. at 3161–62.

[184] *Winn*, 131 S. Ct. at 1443.

[185] In other cases, the Court has been willing to engage in such speculation. In *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.* ("*MWAA*"), for example, the Court invalidated the transfer of Washington National Airport to the control of a regional authority on the theory that a mixed executive-legislative board that had a veto power over any transfer had influenced the airport's disposition. 501 U.S. 252, 265 (1991) (stating because "invalidation of the [board's] veto power will prevent the enactment of the master plan [to which plaintiffs objected]," Article III standing was ob-

Notice that this uncertainty also seeps into and corrodes the causation prong of standing. It is far from clear in *Free Enterprise Fund* how any alleged Article II error *caused* the asserted injury in fact. To be sure, it is perfectly clear that the limitation on presidential removal authority at issue in the case was part of PCAOB's original statutory design. But this does not mean the removal-related rule was a *cause*, in any but the most etiolated and ethereal sense of that elusive word, of the plaintiff accounting firm's worries.[186]

Or consider the Court's invalidation of the legislative veto in *INS v. Chadha*.[187] Mr. Chadha sought federal court relief because of the legislative repudiation of an immigration judge's discretionary grant of an immigration benefit termed suspension of deportation.[188] On first blush, the *Chadha* decision seems unlike *Free Enterprise Fund* in that the judgment directly benefited the individual claimant. *Chadha*, that is, effectively erected the separation of powers as a shield against coercive federal action. Formally then, the causation and redressibility requirements were satisfied.

Nevertheless, the legislative veto decision is not the victory for structural constitutional principles that it first appears to be. Although Mr. Chadha obtained relief, a similarly situated litigant pressing an identical claim (or even another Mr. Chadha in a hypothetical later stage of his litigation) might not.[189] Post-*Chadha* studies demonstrate that Congress continued to include legislative vetoes in the text of federal legislation, and to employ them through informal means such as hearings and meetings with agency officials in order to influence those agencies.[190] Hence,

tained). The holding in *MWAA* is problematic insofar as it relies on unsupported supposition about the likely future actions of nonparties. Unlike *Free Enterprise Fund*, the *MWAA* Court cannot be condemned for eliding the standing question entirely.

[186] The same point can be made about *Morrison v. Olsen*, in which the Court considered the constitutionality of the Independent Counsel statute under the Ethics in Government Act at the behest of an individual under investigation. 487 U.S. 654, 654–55 (1988). What warrant did the *Morrison* Court have, one might query, for presuming, even arguendo, that invalidation of the Independent Counsel statute would have led to abandonment, rather than reassignment, of the investigation? This surely depended on the decision of then-Attorney General Reno, another third party.

[187] 462 U.S. 919, 930−31 (1983).

[188] Id. at 924–59 (discussing application of 8 U.S.C. § 1254(c)(1) to Mr. Chadha's case).

[189] Given the posture of Mr. Chadha's immigration proceeding when it reached the Supreme Court, it appears that no further proceedings were available in which Congress could renew its objection through informal channels.

[190] See Louis Fisher, The Legislative Veto: Invalidated, It Survives, 56 Law & Contemp. Probs. 273, 275, 288 (1993); accord Jessica Korn, The Power of Separation: American Con-

Congress maintained effectual power after *Chadha* to secure precisely the same outcomes, albeit through informal channels. By failing to attend to the broader institutional context and in particular to ongoing interactions between the immigration service and Congress, the Court scored a largely illusory victory for structural constitutionalism, and thus for individuals facing liberty deprivations analogous to Mr. Chadha's. By focusing narrowly on the interaction between Mr. Chadha and the agency—one interrupted by the illicit operation of the legislative veto—the Court failed to account for the myriad other entanglements between Congress and the immigration agency that complicate and neutralize *Chadha*'s holding beyond the four walls of the litigation.[191] Due to this inattention, a gap opens between the consequences of the decision for the individual plaintiff, and the consequences for the structural constitutional principle putatively at stake. What benefits the individual litigant, in short, need not yield reinforcement of the structural constitution.[192]

stitutionalism and the Myth of the Legislative Veto 13 (1996) (arguing that "the legislative veto shortcut was inconsequential to congressional control of the policymaking process").

[191] Another way of making the same point is by noticing that the immigration judge's decision respecting Mr. Chadha's case was already partially caused by an anticipation of congressional exercise of the legislative veto. The judge acted within a clearly defined and sequenced institutional context. In that context, the specter of a legislative veto necessarily factored into that judge's reasoning. His or her use of discretion must have accounted for that downstream possibility. See William N. Eskridge Jr., Reneging on History? Playing the Court/Congress/President Civil Rights Game, 79 Calif. L. Rev. 613, 643−64 (1991) (describing the dynamic of anticipatory responses in a sequential game); see also Barry R. Weingast & Mark. J. Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. Pol. Econ. 765, 765 (1983). A rational judge would, in expectation, grant relief more of the time if he or she knows that some of those orders will be reversed. It follows that in the absence of the legislative veto, we cannot be certain that Mr. Chadha's initial immigration benefit would even have been granted. The Court, in other words, eliminated both a potent cause of, as well as a potential barrier to, the discretionary boon that was the basis of Mr. Chadha's injury in fact. The Court does not, to be sure, account for such counterfactual causal considerations in standing doctrine, but that makes them no less practically significant. To see this, imagine a fixed class of immigrants situated similarly to Mr. Chadha. Say that under the legislative veto regime, one-third obtain discretionary relief, whereas without it one-sixth obtain such relief, even though Congress's use of the veto is in fact sporadic. After the Court's intervention, fewer individual litigants situated similarly to Mr. Chadha will secure the benefit. The class as a whole, that is, may well be worse off than before the judicial intervention.

[192] Another example of the complex and unintended effects of judicial intervention concerns the line-item veto, which was invalidated in *Clinton v. City of New York*, 524 U.S. at 438–39. A dynamic model of interbranch bargaining suggests that a veto "designed to reduce the bargaining incentives that lead to pork barrel legislation . . . is more likely simply to change the players in that process" by making the President a more influential participant in

The causal fragility I have identified here is perhaps an inevitable consequence of the shift achieved in *Data Processing* from a "legal right" test to an "injury-in-fact" inquiry in structural constitutional cases. In the latter cases, remedies for institutional problems will be conceptually orthogonal to the specific harms being mustered for Article III purposes. The problem is less likely to arise in the individual rights context, where the remedy and the harm will typically arise out of the same tightly defined set of circumstances. The net result is a line of structural constitutional precedent resting on strained or implausible accounts of Article III causation and redressibility.

C. Structural Constitutional Litigation as a Means to Promote Individual Liberty

The final doctrinal argument against individual standing for structural constitutional flaws draws on the putative link between federalism and the separation of powers on the one hand, and individual liberty on the other. Somewhat ironically, given the spillover-limiting aspirations of standing doctrine, it is an instance of the Court relying upon a positive externality—the production of liberty—to warrant Article III standing. Here, my argument is that the Court's claim about positive externalities fails to withstand scrutiny. Even if Article III standing could be sustained on a doctrinally novel theory of positive externalities, the underlying causal claim here fails.

In *Bond*, Justice Kennedy asserted that "[f]ederalism secures the freedom of the individual," such that all individuals have "a direct interest in objecting to laws that upset the constitutional balance."[193] Kennedy thus implied a strong, monotonic relationship between structural constitutionalism and individual liberty, here conceived as a positive spillover, sufficient to satisfy Article III standing criteria. There are two reasons, however, for thinking this assertion cannot redeem individual standing for the structural constitution. The first accepts the notion that structural constitutionalism promotes liberty whereas the second challenges it.

initial budget negotiations. Maxwell L. Stearns, The Public Choice Case Against the Item Veto, 49 Wash. & Lee L. Rev. 385, 417 (1992).

[193] Bond v. United States, 131 S. Ct. 2355, 2364 (2011).

1. Indirect Beneficiaries and Standing

As an initial matter, the Court has consistently resisted the idea that indirect beneficiaries of the exercise of a legal right have access to a federal forum.[194] A quarter century ago, now-Judge William Fletcher invoked the "numbingly familiar" idea that standing "ensur[es] that the people *most* directly concerned are able to litigate the questions at issue."[195] Judicial resistance to third-party standing means that some persons with arguable injuries in fact are not allowed access to the courts on the ground that it is not their interest at stake,[196] despite having what, in lay terms, seems a sharply defined, personally immediate interest. Consider *Whitmore v. Arkansas*, in which the Court held that a death row inmate lacked standing to challenge the execution of another inmate because the killing would affect the outcome of his own case under the state's "system of comparative review in death penalty cases."[197] A mere change in the "odds" of relief, Chief Justice Rehnquist insisted, did not suffice for standing purposes for an individual only indirectly affected by the challenged act.[198]

The rule against third-party standing has historical form. In a 1912 case involving the Yazoo Railroad, the Court denied standing to railroads challenging a state statute when the allegedly unconstitutional applications of the statute were not before the Court.[199] The Court has justified this permutation on the third-party standing bar as a way to "avoi[d] . . . the adjudication of rights which those not before the Court

[194] See, e.g., Craig v. Boren, 429 U.S. 190, 193 (1976) (describing "limitations on a litigant's assertion of *jus tertii*" but noting they are not "constitutionally mandated").

[195] Fletcher, supra note 1, at 222 (emphasis added); id. at 243–47 (criticizing the "apparent lawlessness" of third-party standing).

[196] That is, the bar to third-party standing can be understood as a residue of the pre-*Data Processing* "legal right" regime. Not only must a litigant show they have been harmed, they must also identify a legal interest linked to that harm. See Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

[197] 495 U.S. 149, 156 (1990). The Arkansas Supreme Court engages in a comparative review of each capital penalty against earlier death penalty cases to assure itself of a sentence's proportionality. See, e.g., Whitmore v. State, 756 S.W.2d 890, 895 (Ark. 1988). Arkansas is one of a handful of states that "regularly impose[s] death sentences and carr[ies] out executions." David Garland, Peculiar Institution: America's Death Penalty in an Age of Abolition 42 (2010).

[198] *Whitmore*, 495 U.S. at 157. In other instances, probabilistic gains have sufficed for standing purposes. See, e.g., Gen. Contractors v. Jacksonville, 508 U.S. 656, 666 (1993) (holding that loss of mere opportunity to compete on equal terms, without any guarantee of concrete gain, suffices for standing).

[199] Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219–20 (1912).

may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them."[200] Constraining third-party standing also serves to further the goals of the injury-in-fact rule and the bar on generalized grievances—thereby sorting disputes according to their amenability to resolution via judicial or political process.[201]

Well aware of this jurisprudence, the *Bond* Court characterized individuals as "direct" beneficiaries of the structural constitution.[202] This is, of course, not literally the case. Without reiterating the arguments aired in Section I.B, it suffices here to note how much of a linguistic and analytic stretch it is to say that vertical and horizontal disaggregations of authority between branches and governments *directly* vest individuals with something akin to a right homologous to the First or Fourth Amendment. Neither ordinary English usage nor familiar legal custom supports such an undifferentiated, lumpy view of our constitutional system. In his canonical account of the separation of powers, Madison hence speaks of the need to "oblige [government] to control itself," through the "divi[sion] and arrange[ment] [of] the several officers in such a manner, as that each may be a check on the other."[203] It is the branches (and the states) that are the legally empowered agents in Madison's account, not the general citizenry.[204]

Instead, Justice Kennedy's undernourished assertion might perhaps be glossed as a supposition about the intent of the Framers of the Constitution. Consistent with this view, Kennedy began his *Bond* analysis by

[200] Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 80 (1978); accord Singleton v. Wulff, 428 U.S. 106, 113–14 (1976). The Court has also expressed concern about the need to "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation" and the bar on advisory opinions. United States v. Raines, 362 U.S. 17, 21–22 (1960) (quoting Barrows v. Jackson, 346 U.S. 249, 256 (1953)).

[201] Professor Monaghan has argued that "[m]any third party standing cases ought to be understood in first party terms: the litigant is simply asserting a violation of his [or her] own right to be regulated in accordance with a constitutionally valid rule." Monaghan, Third-Party Standing, supra note 70, at 282. As Part I explained, I am skeptical of the elucidating power of the valid rule doctrine.

[202] *Bond*, 131 S. Ct. at 2364.

[203] The Federalist No. 51, at 286–87 (James Madison) (E.H. Scott ed., Chicago, Scott, Foresman & Co. 1898) (internal quotation marks omitted). I do not claim that this is Madison's only strategy for vindicating individual rights, but it is the only one at stake here.

[204] Indeed, Madison was famously cautious about the efficacy of individual rights. See Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 325–26 (1996) (discussing Madison's and the Federalists' skepticism of bills of rights).

stating that the "Framers concluded that allocation of powers between the National Government and the States enhances freedom."[205] He then identified individuals as "*intended* beneficiaries" of structural constitutionalism.[206] Elaborating the range of benefits that flow to citizens, Justice Kennedy identified federalism's consequences for democracy, innovation, and government responsiveness.[207] But this does little to address the problem: Justice Kennedy markedly did not assert that individuals themselves are invested with powers, rights, or privileges by the structural constitution.[208] Nor could he with any plausibility. Rather, the touchstone for Justice Kennedy seems to be the intended beneficiaries of the Constitution's drafting, not the textual allocation of interests in the document.

But why should this sort of intended but indirect benefit be sufficient for standing purposes? Standing is not a function of the aspirations entertained by a legal text's drafters. To say that an individual is an intended indirect beneficiary of a particular regulatory scheme is not at all the same as saying that this person is a direct and primary beneficiary of that scheme. It is perfectly possible to imagine regulatory schemes, constitutional or otherwise, which empower some individuals or institutions as a way of collaterally benefiting others.[209] And it has long been federal courts' practice not to grant standing to intended indirect beneficiaries.[210] Hence, both the death penalty inmate in *Whitmore* and the railroad denied standing in the Yazoo case were *intended* beneficiaries without being *direct* beneficiaries of the legal principle they invoked. In neither case was the litigant endowed with affirmative powers or rights, even though the inevitable and expected effect of the principle's rigorous enforcement might have been to promote their interests.[211] Both were thus

[205] *Bond*, 131 S. Ct. at 2364.

[206] Id. (emphasis added).

[207] Id.

[208] Id.

[209] Consider a common law rule that gives parents certain forms of disciplinary authority over their children. It benefits parents directly, but also benefits indirectly friends, family, and neighbors who are not exposed to unruly offspring.

[210] See, e.g., *Whitmore*, 495 U.S. at 156. By contrast, assignees can obtain standing. See Sprint Commc'ns Co. v. APCC Servs., 554 U.S. 269, 288–89 (2008).

[211] In *City of Los Angeles v. Lyons*, the Court held that a plaintiff who had previously been illegally choked by police lacked standing to secure injunctive relief because he failed to "establish a real and immediate threat that he would again be stopped . . . by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on this part." 461 U.S. 95, 105 (1983). There is at least some tension between

closely situated to Ms. Bond. Yet both were denied standing. Drafting intentions are, in short, typically insufficient to transform a third-party beneficiary into a first-party plaintiff.[212] *Bond* supplies no reason to abandon that Article III dictate.

2. The Weak Structural Constitutionalism-Liberty Linkage

The second problem with Justice Kennedy's logic adheres in his claim that there is a strong and monotonic relationship between structural constitutional litigation and individual liberty.[213] No such strong correlation exists; it cannot be assumed that vindicating a structural constitutional value will also entail vindicating a liberty interest.

Even a crude comparative empiricism suggests that any simplistic equation of attainment of a structural constitutional principle such as federalism or the separation of powers and individual liberty is misleading.[214] If structural design decisions do not correlate in a stable, predictable way with individual liberty, it is hard to see why judicial enforcement of the structural constitution would inevitably expand such liberty. At a very gross level, brute comparison of the United States with countries that lack either the separation of powers or federalism reveals no such relationship. There is no reason to think that merely because a country such as Israel or the United Kingdom lacks either kind of formal disaggregation of government authority, its nationals lack individual liberty as a day-to-day matter. To be sure, there remains a vigorous and not wholly resolved debate in the political science literature as to whether presidentialism or parliamentary government is a more effective bulwark against dictatorship in the long term.[215] Recent studies of constitutional

Lyons's unwillingness to entertain a probabilistic conception of standing and *Bond*'s focus on the intentions of a legal instrument's drafters. Surely it is the case that Mr. Lyons was the intended beneficiary of the Due Process Clause, and surely an injunction of the kind he sought would have provided tangible security to a person who had been subjected to unjustified chokeholds by police on multiple occasions. *Bond* lends force to Professor Hessick's insightful and compelling argument that "Article III does not impose a minimum-risk requirement." F. Andrew Hessick, Probabilistic Standing, 106 Nw. U. L. Rev. 55, 58 (2012).

[212] And if they were, the bar to jus tertii is almost a nullity: The intended beneficiaries of a law often comprise a very large and amorphous class.

[213] *Bond*, 131 S. Ct. at 2364 (contending that "individual liberty secured by federalism [or the separation of powers] is not simply derivative of the rights of the States [or branches]").

[214] I do not address here any claims of a collective right of self-government; such a right has never been judicially vindicated in the United States.

[215] For a skeptical look at the case for distinguishing the two kinds of systems, see José Antonio Cheibub, Presidentialism, Parliamentarism, and Democracy 22–23 (2007).

adoption and change globally suggest that other nations do not see individual liberty as necessarily residing in American ideals of the separation of powers or federalism.[216] The claim that the American ideals of structural constitutionalism are uniquely tied to liberty may sell patriotism long and analytic rigor short.[217]

Further, it is hardly clear that any judicial promotion of a given structural principle will always and necessarily increase even the most foundational species of individual liberty. Consider the obvious example of race relations and federalism. To call the relationship between federalism and African Americans' freedom complex and fraught is an understatement. On the one hand, it is possible to identify instances in which political actors have preserved state regulatory autonomy in ways that conduced to individual liberty interests for African Americans.[218] But for the overwhelming portion of post-Civil War history, claims of "states' rights" were plainly "associated with white supremacy and massive resistance to *Brown* [*v. Board of Education*]."[219] Claims on behalf of the right federal balance were all too often a "stalking horse" for assertions of racial hierarchy.[220] In the wake of *Brown*, moreover, the Court's acceptance of federalism-inspired concerns about local political control imposed a fatal constraint on judicial efforts at school desegregation.[221] Even beyond the school desegregation context, the post-*Brown* Court

[216] See David S. Law & Mila Versteeg, The Declining Influence of the United States Constitution, 87 N.Y.U. L. Rev. 762, 785–91 (2012) (presenting evidence that "the most distinctive and celebrated structural features of the U.S. Constitution have also fallen out of vogue"). Indeed, there is some reason to think that other nations' parliamentary systems are more desirable models for designers of new constitutions. See, e.g., Bruce Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 633, 634 (2000) (opposing "the export of the American system [of separation of powers as a model for constitutions of other countries] in favor of an approach based on the constitutional practice of . . . many other nations").

[217] For a recent analysis rejecting institutional design explanations for tyranny and dictatorship in favor of demographic ones, see Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 189–92 (2010).

[218] See, e.g., Barbara Holden-Smith, Lords of Lash, Loom, and Law: Justice Story, Slavery, and *Prigg v. Pennsylvania*, 78 Cornell L. Rev. 1086, 1119–20 (1993) (discussing Philadelphia's liberty law, used to protect runaway slaves in the 1800s); see also Earl M. Maltz, Slavery, Federalism, and the Structure of the Constitution, 36 Am. J. Legal Hist. 466, 471 (1992) (noting that the Fugitive Slave Clause of Article IV, Clause 3, was both proslavery and pro-national power).

[219] Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 39 n.157 (1996).

[220] Frank B. Cross, Realism About Federalism, 74 N.Y.U. L. Rev. 1304, 1306–07 (1999).

[221] See Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) (barring interdistrict busing remedies in school segregation cases out of a concern for "local autonomy").

frequently invoked the federal balance as a reason to refuse judicial vindication of an individual liberty interest.[222] At any given moment, the example of racial discrimination suggests, the relationship between the federal balance and individual freedom is contingent and fragile.[223]

Justice Kennedy, of course, was not praising federalism's contributions to Jim Crow, and I do not mean to suggest otherwise. In *Bond*, he instead identified a correlation between the federal balance and the realization of the "diverse needs of a heterogeneous society" and "greater citizen involvement in the democratic processes."[224] Picking up the same theme a year later, Chief Justice Roberts in *National Federation of Independent Business v. Sebelius* postulated that derogation from "the two-government system established by the Framers" leads to "a system that vests power in one central government, and individual liberty would suffer."[225]

This version of the structural constitutionalism-liberty argument rests on two moves. First, in order to trace a thread between federalism and liberty, both Kennedy and Roberts appeal to one particular aspect of the federal balance—that is, its decentralizing strand. Second, their arguments implicitly disaggregate the general concept of "liberty" and appeal to distinct and different conceptions of liberty. Whereas Kennedy appeals to the positive liberty of political participation, Roberts invokes a negative liberty lodged against the specter of a potentially tyrannical central regulatory state.

Does this approach suffice to establish a causal link between the judicial promotion of the federal balance and individual liberty robust enough to justify Article III standing? It is hard to see how. To begin with, the analysis suffers a selection bias problem. That is, Justice Kennedy and Chief Justice Roberts each pick out one of numerous aspects of

[222] See, e.g., Rizzo v. Goode, 423 U.S. 362, 377–80 (1976); Hills v. Gautreaux, 425 U.S. 284, 293 (1976); Younger v. Harris, 401 U.S. 37, 43–46 (1971).

[223] Can the claim that federalism promotes individual liberty from racial discrimination be redeemed by claiming that federalism, properly understood, promotes such liberty, but courts often err? It is hard to see how. A central axiom of judicially enforced federalism has been the preservation of some quantum of state autonomy. Sometimes, this promotes liberty from discrimination—and sometimes it does not.

[224] *Bond*, 131 S. Ct. at 2364 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)) (quotation marks omitted).

[225] 132 S. Ct. 2566, 2602 (2012). The connection between federalism and individual liberty reoccurred in both public debates and judicial opinions respecting the individual mandate in a fashion "more redolent of Due Process Clause arguments" than Commerce Clause arguments. Seven-Sky v. Holder, 661 F.3d 1, 19 (D.C. Cir. 2011).

a structural principle (federalism), and then select one of several possible species of liberty (which comes in positive and negative flavors) in order to assert a stable connection between federalism *generally* and liberty *writ large*. But such a global conclusion simply cannot be inferred from the local observation that *one* aspect of structural constitutionalism applied in the specific context of *one* policy domain promotes *one* species of liberty. As international comparison has shown, the global claim is not obviously true.

Even Kennedy's and Roberts's mooted decentralization-liberty linkages rely on contestable empirical and normative foundations. On the empirical front, it is quite possible that expanding respect for states' rights, as Ms. Bond sought to do, will on some occasions shift policy authority from actors who are likely to attend to individual liberty to those who will not do so. This possibility is most apparent with respect to the positive liberties of the economically disadvantaged, who are typically better served by the national government.[226] By enabling interstate competition and thus increasing the expected flow of citizens from one state to another, Ms. Bond effectively sought to undermine state governments' capacity to collect taxes and engage in welfare-enhancing redistribution.[227] The connection between decentralization and individual liberty (however conceived) thus depends on the particulars of a given policy domain, and there is no general reason to think that any one judicial conception of federalism will always or necessarily lead to more libertarian outcomes.[228]

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[226] See, e.g., Katherine S. Newman & Rourke O'Brien, Taxing the Poor: Doing Damage to the Truly Disadvantaged 159–60 (2011) (discussing national welfare policy, and concluding that "the basic principle, that all American families are entitled to safety nets of equivalent value, should be made real by taking states out of the equation"); Sheryll D. Cashin, Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities, 99 Colum. L. Rev. 552, 554 (1999) (arguing that "for an identical set of underlying voter preferences with respect to redistribution, a different policy outcome will be reached depending on the level of government at which a decision is made"); Craig Volden, The Politics of Competitive Federalism: A Race to the Bottom in Welfare Benefits?, 46 Am. J. Pol. Sci. 352, 360 (2002) (finding that competitive pressures prevent states from increasing welfare benefits until surrounding states do the same).

[227] See Paul E. Peterson & Daniel Nadler, Freedom to Fail: The Keystone of American Federalism, 79 U. Chi. L. Rev. 251, 256 (2012).

[228] For exemplary studies of the complex relationship between decentralization and policy outcomes in corporation law and environmental law, see Michel Barzuza, Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction, 98 Va. L. Rev. 935, 935–36 (2012) (identifying reasons for concern about the effect of interstate competition over corporate regulation); Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-

The same, moreover, holds true of claims about the libertarian effects of nationalizing policy control. Consider expansions of national power to create a common economic market. This will expand free trade between the states, thereby increasing one kind of negative liberty. But it is likely to have winners and losers. The former will not necessarily compensate the latter. Ex ante, it may be quite reasonable to resist such expansion, even if you believed it to be Kaldor-Hicks efficient, if you think that you are likely to be an uncompensated loser.

A parallel concern applies in the separation of powers domain. It is easy to assume that there is some clear link between constraining presidential power and preserving individual liberty.[229] But expansions of presidential power can either enlarge or contract observed respect for individual liberties depending upon whether the executive is displacing a Congress with either more authoritarian or more libertarian preferences.[230] The effect of separation of powers principles on liberty, therefore, depends on the fickle intricacies of partisan political circumstances. Hence, it is likely that greater presidential control over the military detentions at the Guantánamo Naval Base was correlated with a higher volume of releases than periods of more substantial congressional control.[231] Further, the expansion of presidential control over an administrative agency caused by a decision such as *Free Enterprise Fund* might expand the discretionary freedom of accounting firms, but it may also instigate *more* enforcement actions. Or alternatively, it may compel those relying on the latter for services to expend more time and resources on precautions against fraud or misconduct. The net effect on

to-the-Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1210 (1992) (questioning operation of race-to-the-bottom dynamics in the environmental context).

[229] In previous nonacademic writing, I have made the broader claim that fidelity to the separation of powers necessarily promotes certain fundamental liberties. See Frederick A.O. Schwarz Jr. & Aziz Z. Huq, Unchecked and Unbalanced: Presidential Power in a Time of Terror 8 (2007). That claim, I think, had traction in the specific institutional and historical context in which it was made. Separation of powers "talk" certainly seemed to have more traction with legal and policy elites at the time than claims about the basic rights of terrorism suspects, who tend to be members of disparaged ethnic and religious formations. But I am now more cautious in thinking that the claim can be universalized, even if it had utility and force in a given historical and political context.

[230] Aziz Z. Huq, Structural Constitutionalism as Counterterrorism, 100 Calif. L. Rev. 887, 923 (2012) (developing this point in the context of national security policymaking).

[231] See Aziz Z. Huq, What Good is Habeas?, 26 Const. Comment. 385, 401–05 (2010) (presenting data to this effect).

"individual liberty" is ex ante uncertain. Alternatively, consider whether expanding federal authority to seize and shut down too-big-to-fail financial institutions[232] would conduce to expansion or contraction of liberty. How recalibration of horizontal, interbranch relations influences individual liberties, in short, is contingent on both the momentary dynamics of partisan politics and also the background distribution of interest group interactions. As with federalism, the simple positive correlation offered by the *Bond* Court obscures more than it illuminates.

The nexus between liberty-related outcomes and federalism is thus fraught. From either a global or a local perspective, there is no stable relation between judicial vindication of structural constitutionalism and liberty. Claims to the contrary rely on impermissibly selective examples that do not necessarily reflect larger causal trends, and cannot suffice to anchor Article III standing.

My aim in this Part has been to measure the doctrinal justifications for individual standing to raise structural constitutional objections against a synthetic account of Article III that hinges on avoidance of large externalities, or spillovers, to unrepresented third parties. Conscious of the limits of judicial competence in that regard, the Court has limned a common law template for federal litigation and insisted on winnowing doctrinal constraints such as strict causation and redressibility rules. Individual standing for the structural constitution is in sharp tension with that template for Article III. It persistently produces unmanageable spillover effects. The Court's alternative justification, which relies on positive libertarian externalities, is not in my view convincing. Individual suits on behalf of the structural constitution, it follows, are not well suited to the institutional capacity constraints of Article III courts. We cannot without radical institutional surgery alter those constraints. We can, however, repudiate a precedential tradition that flies in their face.

[232] See Simon Johnson & James Kwak, 13 Bankers: The Wall Street Takeover and the Next Financial Meltdown 80 (2010). The recent Dodd-Frank Act permits cases to be transferred out of bankruptcy proceedings if their size presents an obstacle. 12 U.S.C. § 5383 (2012). See also Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 208, 124 Stat. 1376, 1459–60 (2010) (codified at 12 U.S.C. § 5388 (2012)) (authorizing removal of case from bankruptcy to Dodd-Frank resolution); U.S. Dep't of Treasury, Financial Regulatory Reform: A New Foundation 76–79 (2009), available at http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf ("Bankruptcy is and will remain the dominant tool for handling the failure of a [bank holding company], unless the special resolution regime is triggered because of concerns about financial stability.").

IV. THE POLITICAL ECONOMY OF STANDING FOR THE STRUCTURAL CONSTITUTION

This Part turns from an internal to an external perspective. It switches from doctrine to political economy. Individual and institutional plaintiffs, I will suggest, are motivated by distinctively different incentives and institutional contexts. To gauge the effect of such differences upon structural constitutional litigation, I develop here an extended comparison between individual and institutional representatives of the structural constitution. The resulting analysis suggests that, whereas separation of powers and federalism values are adequately (albeit not perfectly) promoted by institutional plaintiffs, the marginal addition of individual plaintiffs risks imperiling constitutional goods. Somewhat counterintuitively, I conclude that more litigation may well not always be better.

The analysis has two strands. First, I examine individual opportunities and incentives to trigger structural constitutional litigation. The distribution of those opportunities, I suggest, does not conduce to optimal enforcement of the structural constitution. Drawing inter alia on public choice insights, I posit that interest groups will tend to deploy judicial review to obtain private goods they cannot secure in the political process in ways that do not necessarily conduce to constitutional goals.[233] Second, I consider institutional incentives to defend the structural constitution. This analysis draws on the "new-separation-of-powers approach," which posits that "we cannot fully understand the behavior of one institution without understanding it *in the context* of the othe[r institutions with which it coexists]."[234] No less than legislatures and agencies—the typical focus of the new separation of powers approach—federal courts are embedded in sequential interactions with other government institu-

[233] See Maxwell L. Stearns & Todd J. Zywicki, Public Choice Concepts and Applications in Law 471–73 (2009) (describing potential theories of interest group influence on the courts); see also Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 66–68 (1991) (noting consequences of interest group influence on the courts). For an example of how outcomes can be achieved through litigation when legislation is not an option, see, e.g., Paul Frymer, Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85, 97 Am. Pol. Sci. Rev. 483, 483 (2003) (exploring how advocates secured desegregation of unions through the courts despite the absence of political branch support).

[234] Rui J.P. de Figueiredo, Jr., et al., The New Separation-of-Powers Approach to American Politics, *in* The Oxford Handbook of Political Economy 200 (Barry R. Weingast & Donald Wittman, eds., 2006) (quotation marks omitted).

tions animated by distinctive strategic goals.[235] This dynamic and contextual perspective yields a relatively optimistic view of institutional plaintiffs in contrast to the bleak prospects for individual litigants. To the extent courts properly consider structural constitutional questions at all, it makes sense to close the door to all but institutional litigants.

At the threshold, I should stress that my argument here is comparative in nature. I do not make the (implausible) claim that institutions have perfectly tailored incentives. Rather, I argue more modestly that comparison of individual and institutional incentives suggests that more desirable results will fall out from a circumscription of standing to institutions alone in structural constitutional litigation.

A. The Political Economy of Individual Standing for the Structural Constitution

On first inspection, permitting individual standing for the structural constitution seems obviously sound. Enlarging the pool of plaintiffs, one might think, means that federal judges will have, *ceteris paribus*, more frequent occasion to evaluate laws and practices that might trench on the structural constitution. More adjudicative opportunities mean that judges are more likely to alight upon the correct constitutional rule. More accurate adjudication and greater fidelity to the structural constitution ensue. More litigation, in short, is better for the Constitution.

My aim in this Section is to challenge that intuition from two directions. Both arguments focus on unanticipated side effects of a deeper litigant pool that undermine the accuracy-promoting effect. First, allowing individuals as well as institutions to vindicate the structural constitution does not simply enlarge the litigant pool but also changes its composition. At least pursuant to current justiciability doctrine, inflation in the array of potential plaintiffs will be uneven, with unequal numbers of plaintiffs arrayed behind otherwise complementary and offsetting provisions of the structural constitution. Under plausible assumptions—developed at length below—this imbalance will engender skewed enforcement of structural constitutional rules. Rather than promoting desirable interbranch equilibria or an optimal "federal balance,"[236] judicial results will accordingly diverge from structural constitutional aspirations. Second, an analysis using public choice tools shows that the inter-

[235] Id. at 207–08.

[236] United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

play of interest groups likely yields results out of step with constitutionally desirable goals. Together, these arguments seek to undermine the intuition that opening the courthouse door wider to private litigants conduces to greater fidelity to the Constitution.

1. The Divergent Goals of Rights and Structural Litigation

The intuition that increasing the number of plaintiffs leads to better constitutional compliance is plausibly motivated by analogies from the individual rights context. Accordingly, I begin the analysis by working up an example from the individual rights context to identify the mechanisms underpinning the intuition. I then develop reasons why those mechanisms will not translate into the structural constitutional context.

Consider a (slightly) counterfactual world in which a constitutional value—say, the Establishment Clause—can only be enforced by litigants who cannot choose to opt out of the challenged government institution.[237] School children can challenge graduation prayers. But citizens cannot challenge religious displays in public buildings or public ceremonies, or lodge Establishment Clause challenges against state tax rules. In these conditions, judges receive only weak signals of the frequency of impermissible establishments. They are ill-informed about the causes and consequences of such violations. Litigation yields incomplete opportunities to formulate prophylactic rules. A patchwork of protections ensues, as judges have scant opportunities to develop precisely tailored rules that prevent circumvention or to devise effective make-whole remedies.

By contrast, imagine another counterfactual world with more generous Establishment Clause standing. Here, plaintiffs could challenge the plenary range of establishments in schools, government buildings, official practices, and even coinage. Judges not only have more opportunities to reach the right rule. They also have more information about violations and about the state's attempted camouflaging of violations. They have more opportunities to fine-tune rules to prevent circumvention, and more chances to fashion effective remedies. Cause lawyers can find more sympathetic plaintiffs and respond to new precedent by strategically selecting new cases and raising new issues. Broader standing also means the shadow of judicial intervention is more likely to have a gen-

[237] See, e.g., Lee v. Weisman, 505 U.S. 577, 598–99 (1992) (holding that clergy-delivered prayers at public school graduations violate the Establishment Clause).

eral deterrence as well as a specific deterrence effect. "The availability of private suits [will] increase the likelihood that enforcement actions will occur and, as a result, [will] cause more potential defendants to refrain from conduct in which they would otherwise engage."[238] In short, more ample vindication of the Establishment Clause follows not solely because judges have more bites at the apple but also because of epistemic gains, litigation-related learning about both rights and remedies, and general deterrence effects.[239]

The mechanisms that yield improved constitutional compliance in the rights context do not, though, translate unmodified to the structural constitutional context. Rather, those same mechanisms—especially when they interact with Article III standing doctrine—are likely to yield pied patterns of litigation that poorly serve structural ambitions. In the rights context, an increasing volume of litigation better vindicates a constitutional norm regardless of the precise distribution of plaintiffs. If the federal courts vigorously enforce the Establishment Clause in schools but not prisons, its uneven approach is not *intrinsically* in tension with constitutional goods. It just means that some enjoy the right while others do not. There are, to be sure, a class of cases in which increasing enforcement of one entitlement (for example, the Establishment Clause) might trench on another (for example, the Free Exercise Clause). But these cases are few and far between, and the Court has developed strategies to account for them.[240]

In the structural constitutionalism context, by contrast, it is not sufficient to increase the pool of litigants to vindicate the Constitution more

[238] See Richard H. Fallon Jr., The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights, 92 Va. L. Rev. 633, 667 (2006). Hence, in the 1960s and 1970s, environmental and consumer groups "made an end run [around Congress] to the courts, where they have skillfully exploited and magnified limited legislative gains." Karen Orren, Standing to Sue: Interest Group Conflict in the Federal Courts, 70 Am. Pol. Sci. Rev. 723, 724 (1976).

[239] I do not mean to ignore the possibility that litigants will pick flawed strategies, going for broke when they should proceed incrementally—as may currently be the case with litigation respecting same-sex marriage. See Scott Baker & Gary Biglaiser, A Model of Cause Lawyering (Oct. 29, 2012) (unpublished manuscript) (on file with author).

[240] See, e.g., Locke v. Davey, 540 U.S. 712, 718–19 (2004) (discussing competing demands of the Establishment Clause and the Free Exercise Clause). But cf. Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009) (reading the disparate impact standard of Title VII narrowly to avoid conflict with the colorblindness norm of the Equal Protection Clause). If rights-rights conflicts were sufficiently pervasive, the case for "more is better" in the rights litigation context would also be properly cast into doubt.

effectively. Unlike rights, federalism and the separation of powers implicate complex *institutional balancings*. Plural constitutional values are arrayed in tension with each other. Each value is vested in a different constitutional entity. In both the interbranch and the intergovernmental contexts, judges insist on the metaphor of "balance"[241] between such institutions to capture the constitutional desideratum. This sort of institutional equilibrium is distinct from the ad hoc and localized "balancing" of policy values that characterizes rights adjudication.[242] In lieu of the granular, local calibrations of individual and social interests observed in rights adjudication, balancing in the structural constitutional context entails a molar effort to stabilize a durable relationship between plural right-bearing entities so as to ensure that their ongoing interactions yield socially desirable outcomes.[243] This striving toward a stable equilibrium will be fruitless if the judiciary constantly prioritizes one entity over others by dint of standing rules. If courts protect one branch but not others, or the federal government over the states, there is a risk that judicial action will careen toward an undesirable disequilibrium. Simply put, the uneven enforcement of structural constitutional values, unlike uneven enforcement of constitutional rights, can undermine constitutional goals.

In a counterfactual world in which only branches and states have standing for the structural constitution, the risk of such asymmetrical outcomes is low. This is so not least for the simple reason that the number of plaintiffs is relatively small. Moreover, as I develop in Section IV.B, there is some reason to expect institutional actors to behave with restraint when it comes to litigation.

The same does not hold for individual litigants. For individual standing to produce desirable results, the expected stream of individual liti-

[241] See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156 (2010) (separation of powers); *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) (federalism).

[242] See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 945 (1987) (describing balancing as an analysis that "identif[ies] interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests"). For an alternative (and insightful) formulation of what is at stake in rights-related balancing, see Frederick Schauer, A Comment on the Structure of Rights, 27 Ga. L. Rev. 415, 430 (1993) ("[T]he [constitutional] right . . . just *is* the right to demand [a] higher level of justification, and the right is satisfied when that higher level of justification is respected.").

[243] I assume for the purposes of this Article that there is a connection between intergovernmental or interbranch balance and socially desirable outcomes. But see sources collected in supra note 13 (doubting that claim).

gants for the structural constitution would have to be distributed in such a way as to generate desirable interbranch or intergovernmental balances. To frame the argument most starkly, consider a (hypothetical) world in which individual plaintiffs defended only violations of Article I but not violations of Article II. This would likely generate lopsided outcomes out of kilter with the interbranch balance. As an initial matter, the greater number of opportunities on one side of the interbranch balance would entail that federal judges would be better informed about Congress's side of the separation of powers. As well as being aware of one species of constitutional infringement, judges would also have more chances to intervene to protect Congress. Over time, substantive rules would become more precisely tailored to preclude circumvention by the executive, remedies better suited to make the legislature whole. Plaintiffs wielding Article I as a sword would also devise new litigation strategies to leverage emerging precedent. Moreover, assuming a non-zero rate of false positives, judges may enforce Article I in some instances where there is no cause to do so. For all these reasons, skewed distributions of litigants will not yield greater fidelity to the separation of powers writ large because judges will be asymmetrically updated by litigants about the underlying state of the world, because an imbalanced set of litigation opportunities will conduce to imbalanced enforcement patterns, and because false positives are inevitable.

The same disequilibriating dynamic will emerge under conditions in which there is any substantially asymmetric distribution of plaintiffs across different sides of the interbranch or intergovernmental balance. Poorly proportioned litigant pools will increase the frequency of litigation opportunities to vindicate one aspect of the structural constitution via asymmetrical distributions of judgments, epistemic and learning effects on judges, litigants' strategic behavior, and judicial error. The result is increased enforcement of *one* structural value, not the separation of powers more generally. Avoiding that undesirable outcome in separation of powers cases would demand a population of claimants distributed so as to avoid lopsided imbalances in favor of one branch or another. In the federalism context, the claimant pool should have the correct proportions of litigants pressing states' rights and trumpeting the national government's interests.

The challenge of building an adequate litigant pool is further complicated by the possibility of nondoctrinal distortions to the interbranch or intergovernmental balance. Such distortions would require offsetting ad-

justments to the composition of the plaintiff population. Federal judges, for example, may tend to err unevenly. In separation of powers cases, it might be hypothesized, presidential selection of judges will typically generate a pro-executive bench. And in federalism cases, the national nature of the appointment process might yield a corresponding tilt. Further, courts operate against whatever exogenously determined backdrop of interbranch or intergovernmental relations emerges from contingent, path-dependent patterns of historical development. Mottled spurts of institutional expansion over the past two centuries may have already thrown institutional equilibria out of joint.[244] To honor the structural constitution, that is, federal judges must not only cultivate balanced pools of claimants, they must also account for exogenous mutations to the constitutional baseline and recalibrate accordingly.

But there is no reason to believe we possess the good fortune of having such precisely composed litigant pools in the structural constitutional context. There is no providential invisible hand assuring the correct distribution and number of litigants of each side of the federalism balance or separation of powers. As Professor Adrian Vermeule has explained in these pages recently, an invisible hand argument is one in which "some good arises as an unintended byproduct of decentralized action"[245] through the operation of a clearly specified causal mechanism. Its standard form resides in "the operation of the price system in perfectly competitive markets [that is claimed to] produce long-run allocative and productive efficiency in which net social benefits are maximized."[246]

It is simply unclear what the causal mechanism is that would produce optimally balanced pools of litigants in the structural constitutional context. Private litigants' incentives—discussed at length below[247]—do not

[244] For contrasting assessments of twentieth-century institutional developments at the national level, compare Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L.J. 453, 459 (1989) (generally approbatory), with Richard A. Epstein, The Mistakes of 1937, 11 Geo. Mason L. Rev. 5, 5 (1988) (generally critical).

[245] Adrian Vermeule, The Invisible Hand in Legal and Political Theory, 96 Va. L. Rev. 1417, 1422 (2010); cf. Adrian Vermeule, The System of the Constitution 70 (2011) [hereinafter, Vermeule, System of the Constitution] (suggesting that invisible hand mechanisms rest on (1) an explanation, (2) a value theory, and (3) a mechanism).

[246] Vermeule, System of the Constitution, supra note 245, at 73. Whether the price mechanism satisfies these conditions is a much controverted question outside my ambit here.

[247] See infra Subsection IV.A.2.

obviously net out so as to produce optimal distributions of litigation.[248] The fact that some institutions are likely to have vigorous defenders is not a virtue here, but an accomplice to error, helping to enlarge the distance from the constitutional optimum.[249] And judges are unlikely to have the necessary epistemic resources and long-range planning capacity to estimate how a given standing rule will translate into structural constitutional outcomes. And in any event, Article III doctrine is framed in transubstantive terms that apply equally to all kinds of litigation. Its bundled character makes tailoring for structural constitutional law's ends all the more infeasible, absent some categorical exclusion of such cases of the kind advanced here.

Hopes for a beneficent invisible hand operating through the courts become even more remote when we account for how judges have limned current standing doctrine. Elements of the latter make it close to inevitable that some structural constitutional values will be enforced more aggressively than others without regard to underlying need. Instead, complementary institutional design safeguards are treated in radically different ways for justiciability purposes. Given these categorical blind spots in judicial enforcement of the structural constitution, an inflationary account of justiciability rules is all the more prone to producing skew-whiff outcomes.

Four elements of standing doctrine are especially problematic here. First, consider the interaction between the rule against generalized grievances and Article I's structural regulation. The Framers included provisions in Article I to prevent the executive from "seducing congressmen with government sinecures" or bribing them with "double salaries or make-work jobs."[250] The Court, however, has treated these "anti-

[248] Cf. Vermeule, System of the Constitution, supra note 245, at 75 (criticizing arguments when there is "no mechanism to explain why the relevant groups would move toward the efficient regime").

[249] Could this therefore be a "special case of the general theory of second best"? Id. at 87; see R.G. Lipsey & K. Lancaster, The General Theory of Second Best, 24 Rev. Econ. Stud. 11, 11 (1956) (identifying the possibility that when exogenous, fixed constraints prevent the attainment of any one first-best condition, "the other Paretian conditions, although still attainable, are, in general, no longer desirable"); see also Huq, supra note 230, at 904–05 (describing theory). I am not sanguine about the predictive capacities of the Lipsey-Lancaster theorem, which does not specify the conditions under which more piecemeal adjustments from the optimal are better than fewer such adjustments. Nevertheless, it is the case here that partial availability of litigation opportunities may produce less desirable outcomes than no litigation opportunities.

[250] Akhil Reed Amar, America's Constitution: A Biography 63, 78, 182 (2005).

entanglement" rules as nonjusticiable. In consequence, violations of the Emoluments Clause's rule against interbranch appointments[251] generate no actionable injury,[252] and violations of the same Clause's rule against salary increases for certain new appointees also creates no individual Article III plaintiffs.[253] In each line of cases, the bar to generalized grievances curtails enforcement of elements in the structural constitution designed to prevent excessive interbranch overlap.[254] As a result, the institutional design principle of restricting impermissible interbranch entanglements will be systematically underenforced because of a consistent undersupply of eligible plaintiffs.[255] At the same time, other elements of the Constitution that have a checking effect through *mandatory* interbranch entanglements—for example, bicameralism and the veto as the lawmaking process—operate with judicial enforcement. The net result is quantitative unevenness in judicial vindication of the structural constitution as interbranch checks are enforced, but limits on interbranch entanglements are not.

Second, skewed enforcement also arises in respect to rules allocating lawmaking power between the branches. With the exception of two seemingly "aberration[al]" outliers in the 1930s, the Court has declined to enforce any strong constraint on the quantum of delegation from Congress to the executive branch.[256] At the same time, the Court has also

[251] U.S. Const. art. I, § 6, cl. 2.

[252] See Ex parte Levitt, 302 U.S. 633, 633–34 (1937) (rejecting Emoluments Clause challenge to Justice Black's appointment); see also Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215–16 (1974) (denying standing in a challenge to the eligibility of members of Congress to hold commissions in the Armed Forces Reserves during their continuance in office).

[253] Congress routinely works around the Emoluments Clause through the Saxbe fix, "through which Congress removes [a representative's] ineligibility by reducing an office's salary." Note, The Ineligibility Clause's Lost History: Presidential Patronage and Congress, 1787–1850, 123 Harv. L. Rev. 1727, 1727 (2010).

[254] Furthermore, lower courts have held that Congress is precluded from granting standing to challenge unconstitutional interbranch entanglements because of the absence of Article III standing. See Rodearmel v. Clinton, 666 F. Supp. 2d 123, 128–29 (D.D.C. 2009) (holding that the Secretary of State Emoluments Act, S.J. Res. 46, Pub. L. No. 110-455, § 1(b)(1)(3)(A), 122 Stat. 5036 (2008), creating individual standing to challenge Secretary of State Hillary Clinton's appointment, did not overcome Article III standing hurdles), appeal dismissed for lack of jurisdiction, 130 S. Ct. 3384, 3384 (2010).

[255] It is hard to see how the Court could "compensate" for this gap by over-enforcing in justiciable cases.

[256] See Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1722 (2002). Some conservative jurists have called recently for reinvigoration of the nondelegation doctrine. See, e.g., Mich. Gambling Opposition v. Kempthorne,

continued to allow plaintiffs to challenge legislative efforts to regulate delegations post hoc.[257] As a result of these rules, the Court evinces large deference to political branches' institutional choices along one margin, but then, along another diametrically opposed margin, "prevents . . . compensating adjustment from being made by any institution, short of obtaining a constitutional amendment."[258]

Third, consider the asymmetric judicial treatment of complementary federalism safeguards. The Court has thus treated numerous national governmental obligations toward the state as nullities on justiciability grounds. Individuals seeking to invoke states' interests created by the Elections Clause of Article I, Section 4, for instance, have been turned away at the courthouse door.[259] Similarly, efforts to invoke the federal obligation to maintain states' "republican form of government" have been blocked on political question grounds.[260] So even as the Court has assiduously cultivated one aspect of the federalism dynamic, it has left ungardened the positive duties owed by the national government to the states. In the end, these asymmetries mean the federal courts will slight some aspects of the interbranch or intergovernmental balance, even as other aspects secure plenary vindication. Perhaps this can be justified by positing some deformity in the extant federal-state balance, but the Court has not rested its standing rulings on this controversial ground.

Fourth, contemporary formulations of the injury-of-fact, causation, and redressibility rules tend to generate discordant outcomes out of indi-

525 F.3d 23, 34–40 (D.C. Cir. 2008) (Brown, J., dissenting) (castigating majority for thin nondelegation analysis and arguing that no standard was provided to guide the delegate in acquiring land in trust for "whichever Indians he chooses, for whatever reasons"). Note that I am not denying that courts can effectuate antidelegation values via statutory interpretation. See Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 315–16 (2000). But, as I elaborate in Part IV, that practice rests on acoustically separate foundations not implicated by my main argument.

[257] See INS v. Chadha, 462 U.S. 919, 930−31 (1983). For a development of the imbalance point, see Peter B. McCutchen, Mistakes, Precedent, and the Rise of the Administrative State; Toward a Constitutional Theory of the Second Best, 80 Cornell L. Rev. 1, 37–38 (1994).

[258] Adrian Vermeule, Hume's Second-Best Constitutionalism, 70 U. Chi. L. Rev. 421, 436 (2003) (arguing that judges might engage in "systematic deference [or] systematic *seriatim* enforcement of local constitutional provisions," but that "judges should [not] evaluate global consequences on a case-by-case basis"). My point here is that judges should not take different strategies to related design questions.

[259] See Lance v. Coffman, 549 U.S. 437, 442 (2007) (denying individual standing to bring claims under U.S. Const. art. I, § 4, cl. 1).

[260] See Luther v. Borden, 48 U.S. (7 How.) 1, 20–21, 39–42 (1849).

vidual standing for the structural constitution. The legislative veto invalidated in 1983 in *INS v. Chadha*[261] is a useful threshold example here. Congress had been using simple resolutions to direct cabinet secretaries to engage in investigations and issue reports since at least 1903.[262] A first legislative veto was enacted in 1932—more than fifty years before the *Chadha* opinion.[263] It is surely worth inquiring as to why there was an absence of constitutional challenges to the legislative veto for about half a century.[264] One possible explanation is that Congress did not need to use the legislative veto frequently in order to influence executive branch behavior—the mere shadow of congressional responses was sufficient to induce desired agency policies.[265] If legislative vetoes were largely anticipated by agencies unwilling to antagonize their congressional paymasters, we would expect to see less agency slack and fewer instances in which Congress in fact deployed the veto. Anticipated responsiveness on the executive's part, however, would drain the pool of individuals who could satisfy the injury-in-fact, causation, and redressibility requirements of Article III standing.[266] At the same time, Congress would still obtain roughly the results it would have obtained via active use of the veto.

The injury-in-fact rule further means that structural constitutional violations may generate no litigants with Article III standing for those violations that generate solely immediate "winners." For instance, the White House might accept an unconstitutional restriction upon its appointment or directive authority because it is in the short-term political interest of an Oval Office incumbent. Or states might accept an imper-

[261] 462 U.S. at 930–31.

[262] See, e.g., Act of Feb. 14, 1903, Pub. L. No. 87, § 8, 32 Stat. 825, 829 (1903); see also Act of Mar. 3, 1905, Pub. L. No. 215, § 2, 33 Stat. 1117, 1147 (1905) (directing investigation via concurrent resolution).

[263] See Act of June 30, 1932, Pub. L. No. 212, § 407, 47 Stat. 382, 414 (1932).

[264] One reason is not relevant here: Congress's use of legislative vetoes tended to fall off in the absence of political conflict between the branches. The 1940s and the 1970s were thus periods of increased employment of legislative vetoes. See David A. Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253, 258–59 (1982). Of course, in the 1950s and 1960s, the earlier statutes with legislative vetoes remained on the books and in use.

[265] And when Congress did use it, standing bars sometimes precluded adjudication. See McCorkle v. United States, 559 F.2d 1258, 1261–62 (4th Cir. 1977) (denying challenge to legislative veto provision in the Salary Act on standing grounds).

[266] This account finds vindication in the persistent post-*Chadha* use of the legislative veto as a signaling device between Congress and the federal administrative state. See supra text accompanying note 190.

missible intrusion on their regulatory jurisdiction to gain cost savings. The Constitution may be violated in both cases, but all those directly affected are beneficiaries of the violation. And beneficiaries cannot sue. This problem is somewhat parallel to the concern with "givings" identified by property scholars as the hidden corollary of the takings problem. Roughly speaking, a "givings" arises when "the value of . . . property increases as a result of the government action" even if the government does not act directly on the property.[267] Like takings, givings implicate fairness, efficiency, and anti-rent-seeking concerns.[268] Yet givings are largely off the judicial radar. The result is a skewed jurisprudence that often gives a free pass to rent-seeking and other foibles supposedly parried by the Taking Clause.[269] The same concerns, *mutatis mutandi*, arise in the structural constitutional context, when constitutional violations produce an immediate social welfare surplus that can be used to buy off all relevant parties.

Even when a constitutional violation has more deleterious consequences, affected parties may still not have an adequate injury in fact. In some instances, a violation of the separation of powers results in only an epistemic loss for the public. Absent a statutory basis for suit, however, no individual plaintiff has standing. Thus, in *United States v. Richardson*,[270] the Court held that a member of the public could not challenge violations of the Accounts Clause of Article I, Section 9,[271] based on the federal government's failure to publish a budget for the Central Intelligence Agency.

In sum, current standing and justiciability doctrines are not well tempered for generating optimal litigant flows to vindicate the structural constitution. Rather than operating as a benevolent invisible hand, constitutional doctrine invites a motley and incongruous pool of litigants. Given that pool, some elements of the intergovernmental or interbranch

[267] See, e.g., Abraham Bell & Gideon Parchomovsky, Givings, 111 Yale L.J. 547, 551 (2001).

[268] Id. at 577–89. Moreover, as Professors Bell and Parchomovsky compellingly argue, givings and takings are functionally entangled. Id. at 552.

[269] Id. at 615–16 (proposing changes to policy and doctrine).

[270] 418 U.S. 166, 176–77 (1974) (rejecting Richardson's complaint as a "generalized grievance"). The Court also distinguished cases in which the plaintiff had a basis for standing. Id. at 176 n.9; see also McDonnell v. United States, 4 F.3d 1227, 1236–39 (3d Cir. 1993) (finding no standing to seek informational production from the government absent the filing of a Freedom of Information Act request as defined by statute).

[271] U.S. Const. art. I, § 9, cl. 7.

balance will inevitably be emphasized to the detriment of others. Absent any convincing account of how this haphazard approach to structural constitutional litigation can result in desirable institutional outcomes either in the short- or long-term, skepticism about individual standing in this domain seems all the more appropriate.

2. Public Choice and Structural Constitutional Litigation

To redeem institutional standing for the structural constitution, we might lean in another way on the idea that individual litigants will tend to sue in lock-step with constitutional need, yielding a docket well suited for vindicating structural values. To that end, this Subsection focuses on individual litigants' likely incentives. Incentives matter because litigation is costly. Not all potential litigants will therefore file suit. To understand the consequences of granting individuals standing to litigate the structural constitution, it is therefore useful to model the reasons individuals have recourse to the courts.

Public choice theory furnishes a basis for such predictions. Exploited by legal scholars first in the 1980s, public choice involves application of economic models to political institutions.[272] Scholars identified the relative cost of collective action for interest groups of varying size as a basis for predictions about the kind of legislative consequences (if any) the clash of interest groups would generate.[273] Drawing on Mancur Olson's pioneering work, which emphasized the high transaction costs encumbering large organizations,[274] this first generation of public choice scholars predicted that smaller, more concentrated groups would be the more effective lobbyists.[275] To be sure, public choice's elegant predictions have been complicated and qualified by evidence that different policies generate different patterns of enactment costs,[276] and that interest group

[272] For an introduction to the field see Daniel A. Farber & Philip P. Frickey, Law and Public Choice (1991).

[273] Stearns & Zywicki, supra note 233, at 69–72 (outlining the simple model offered by Professors James Wilson and Michael Hayes).

[274] Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups 2 (1965) (identifying a negative correlation between group size and efficacy); see also Stearns & Zywicki, supra note 233, at 55–56 (drawing on Olson's work).

[275] See Sam Peltzman, Toward a More General Theory of Regulation, 19 J.L. & Econ. 211, 213 (1976).

[276] Voter distaste for a policy can drive up the "price" of that policy. See Arthur T. Denzau & Michael C. Munger, Legislators and Interest Groups: How Unorganized Interests Get Represented, 80 Am. Pol. Sci. Rev. 89, 99 (1986). Group size may also be uncorrelated to

coalitions tend to be complex and not easily reducible to a "small group" or "large group."[277] But the theory's core insight—that public policy is the product of competition between private interest groups for legislative influence—remains illuminating.

Public choice insights apply equally to the judicial domain. Courts, no less than legislatures, are arenas for interest group mobilization. Therefore, public choice tools can be used to predict which private actors will invest in litigation to secure policy change via the courts.[278] To be sure, interest groups do not influence federal judges in the same way that they obtain leverage over legislators. Federal judges do not stand for reelection.[279] They also operate under tight "institutional constraints," cabining their capacity to respond to interest group entreaties.[280] Interest groups may nonetheless seek to influence appointments on the theory that judicial ideology predicts voting behavior after appointment.[281] And even

interest groups' ability to supply information, which is argued to be the principal currency of lobbying. See Richard L. Hall & Alan V. Deardorff, Lobbying as a Legislative Subsidy, 100 Am. Pol. Sci. Rev. 69, 69 (2006).

[277] Frank R. Baumgartner et al., Lobbying and Policy Change: Who Wins, Who Loses, and Why 26 (2009) (noting "a surprising tendency for sides to be heterogeneous").

[278] William F. Shughart II & Robert D. Tollison, Interest Groups and the Courts, 6 Geo. Mason L. Rev. 953, 967 (1998) ("While the judiciary is more independent of the ordinary political processes than the legislature or the executive branches, this independence does not place judges above the fray of interest-group politics . . . ."). For formal models, see John M. de Figueiredo & Rui J.P. de Figueiredo, Jr., The Allocation of Resources by Interest Groups: Lobbying, Litigation and Administrative Regulation, 4 Bus. & Pol. 161, 163 (2002) (modeling how "competing interest groups with differential resources configure their nonmarket spending over lobbying and litigation to maximize the possibility of a favourable policy outcome"); see also Paul H. Rubin, Christopher Curran & John F. Curran, Litigation Versus Legislation: Forum Shopping by Rent Seekers, 107 Pub. Choice 295, 297–302 (2001) (modeling interest group choice to use litigation rather than lobbying in respect to private law rules).

[279] But see Elhauge, supra note 233, at 82–83 (doubting the efficacy of ex post electoral controls).

[280] Richard A. Epstein, The Independence of Judges: The Uses and Limitations of Public Choice Theory, 1990 BYU L. Rev. 827, 827 (1990). Professor Elhauge has persuasively argued that many constraints on interest group influence on the judiciary are inefficacious. Elhauge, supra note 233, at 81–83.

[281] David R. Stras, Understanding the New Politics of Judicial Appointments, 86 Tex. L. Rev. 1033, 1033, 1056 (2008) (reviewing Benjamin Wittes, Confirmation Wars: Preserving Independent Courts in Angry Times (2006) & Jan Crawford Greenburg, Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court (2007)) (noting "the proliferation of interest groups" involved in the judicial confirmation process); see also Elhauge, supra note 233, at 81–82 (discussing, in more nuanced terms, the mixed evidence on this score). Interest groups are not unwise to see judicial selection as pivotal to outcomes. See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal

after a judge is confirmed, interest groups can influence the sequence and type of cases lodged before tribunals as a way of molding the path of the law. After all, without a litigant well resourced and motivated enough to challenge a law, no court will likely discover a given constitutional flaw.

Standing doctrine plays a gatekeeping function in this political economy of interest group competition. All else being equal, a more permissive version of standing, vesting individuals, as well as institutions, with courthouse access, will generate a greater volume of strategic litigation. Narrowing the courthouse door by limiting the class of constitutionally permissible plaintiffs chokes off interest group incentives to invoke judicial review, and so slows the rate of judicially driven policy change.

Once the courthouse door is open, however, the play of incentives and interests will determine the net effect of litigation. Given permissible standing rules, public choice theory predicts that it will most likely be interest groups with relatively large incentives and small collective action costs who will invoke federal court jurisdiction in the name of the structural constitution.[282] All other things being equal, the standard public choice account suggests that it will be "regulated industries [that are sufficiently] well financed and well organized, especially when compared to the general public and public interest groups" that file suit.[283] Such:

> "[s]mall intensely interested groups are . . . likely to spend more on their litigation efforts than any large diffuse groups opposing them . . . [and] will on balance be able to hire more skilled lawyers and thus have more influence on the information presented to the court about

Model 316–26 (1993) (describing evidence of the influence of Justices' political attitudes on their voting patterns); William M. Landes & Richard A. Posner, Rational Judicial Behavior: A Statistical Study, 1 J. Legal Analysis 775 (2009) (identifying a link between appointing coalition's ideology and judicial votes).

[282] Todd J. Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 Nw. U. L. Rev. 1551, 1579 (2003) (describing the manner in which a system of precedent creates an "incentive to engage in rent-seeking litigation" on the part of interest groups); see also Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 Calif. L. Rev. 1309, 1329–51 (1995) (developing a similar concern about interest group manipulation and suggesting that standing doctrine provides a way of limiting such manipulation).

[283] Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 22 (2010). For a recent and powerful empirical demonstration of this point, see Kay Lehman Schlozman et al., The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy 19–20, 263–443 (2012).

> the social desirability of the parties' conduct and any legal rule under consideration."[284]

By comparison, widely diffused and weakly organized sections of the public sharing an interest in vindicating a certain vision of the Constitution will often not be able to muster the resources to support costly, time-consuming, and uncertain federal court litigation.[285] Even ideological litigants, that is, need to find a sponsor with adequate funds to support their case. With the important exception of criminal cases such as *Bond* and *Lopez*, ideologically inspired individual litigants will often lack the incentives and resources to pursue a lonely, seemingly quixotic, crusade through the federal judicial hierarchy.[286]

This play of interest groups will interact with an important aspect of justiciability doctrine that until this point has played no role in the argument: Plaintiffs can challenge government action but cannot typically challenge government inaction.[287] Certainly, there is no case that I am aware of in which a federal court has awarded relief simply because of Congress's failure to enact a law. This means that judicial review avails the losers in the legislative process when a bill does become law, but not when a bill is defeated.[288] Public choice dynamics intersect with standing doctrine's asymmetric treatment of challenges to government action and inaction. Regulated industries and entities, all else being equal, often tend to seek a lighter rather than a heavier governmental hand (except, to be sure, in instances where regulation preserves a monopoly against new entrants). They therefore can use structural constitutional litigation to challenge successfully enacted regulation. Representatives of more diffuse groups, such as consumers and other advocates of greater regulation, will often tend to seek regulation. If they lose in the legislative pro-

[284] Elhauge, supra note 233, at 77.

[285] Cf. id. at 67 ("Large diffuse groups unable to organize effective efforts to influence the political branches, where they at least have the advantage of more votes, are also likely to be unable to organize effective efforts to influence the litigation process.").

[286] The public record does not reveal what prompted Carol Bond's lawyers to raise the constitutional issue before the district court, and then to plead before trial, reserving the right to raise the issue on appeal. United States v. Bond, 581 F.3d 128, 132–33 (3d Cir. 2009).

[287] See, e.g., Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

[288] To be sure, the winners in the legislative process might seek to install their victory in the form of an agency rather than a policy directive. See Rui J.P. de Figueiredo, Jr., Electoral Competition, Political Uncertainty, and Policy Insulation, 96 Am. Pol. Sci. Rev. 321, 331 (2002) (observing that groups that are electorally weak are more likely to insulate their preferred policies by designing independent agencies). But then, the organic statute of the agency can be challenged.

cess, there is frequently no substitute in the courts. As a result, the consequent flow of litigation is not evenly distributed across structural constitutional values. Further, there is little reason to expect that federal judges, no matter how familiar with the possibility of "unseen" collateral effects, will be able to compensate for asymmetrical case selection effects.[289]

A deregulatory slant can be observed in recent developments in the scope of both the Commerce Clause[290] and the emerging corpus of removal-power jurisprudence.[291] In both domains, major challenges to federal laws, such as the Sarbanes-Oxley Act and the federal healthcare law, have pursued an anti-regulation agenda that interest groups had previously pressed, unsuccessfully, in Congress.[292] By contrast, it is difficult to think of *any* instance in which a consumer group or other advocate of greater regulation has been able to leverage the structural constitution in its favor. These examples suggest that it is indeed precisely in those rare instances in which a legislative coalition is assembled out of the diffuse public and is able to overcome a well-organized, well-heeled interest group,[293] that structural constitutional litigation in federal court is likely to be harnessed as yet another veto-gate to delay or defenestrate new regulation. To the extent then that the federal legislative process already favors the well resourced and organized—as public choice theory

[289] The problem of the seen and unseen was famously outlined by the economist Frederic Bastiat. See Frederic Bastiat, What Is Seen and What Is Not Seen, *in* Selected Essays on Political Economy 1 (George B. de Huszar ed., Seymor Cain trans., Irvington-on-Hudson 1964) (1848) ("In the economic sphere an act, a habit, an institution, a law produces not only one effect, but a series of effects. Of these effects, the first alone is immediate; it appears simultaneously with its cause; *it is seen*. The other effects emerge only subsequently; *they are not seen*; we are fortunate if we *foresee* them."). Bastiat suggests that seen/unseen effects are pervasive. That may be so, but when we notice them, there is no reason to leave them unremediated. I am grateful to Professor Todd Henderson for this reference and relevant discussion.

[290] See, e.g., United States v. Morrison, 529 U.S. 598, 612 (2000); *Lopez*, 514 U.S. at 551.

[291] *Free Enter. Fund*, 130 S. Ct. at 3147. For an analysis of how *Free Enterprise Fund* may be generative of further jurisprudence, see Huq, supra note 161.

[292] In a challenge filed in the District of Columbia District Court, Article II has also been invoked to challenge new financial consumer protection laws. See Complaint at 3, 25–27, State Nat'l Bank of Big Spring v. Geithner, No. 1:12-CV-01032 (D.D.C. June 21, 2012).

[293] Public choice theory counsels for a skeptical view of legislative work product as more often than not an acquiescence to rent-seeking minorities. See Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 243 (1986) ("In the legislative arena, interest group pressures are likely to prevail in a struggle to implement constraints on the efficacy of rent-seeking.").

predicts—judicial review will "only exacerbate the influence of interest groups."[294]

It follows from the deregulatory slant to interest group litigation that the overall influence of individual standing doctrine is unlikely to align with the equilibrating goal of structural constitutionalism. If interest groups that litigate the structural constitution are motivated by a deregulatory agenda, there is no reason to expect that they will cease enforcement of a structural constitutional value when it has reached its optimal level. To the contrary, they will keep pressing their claims until they can squeeze no more private value out of litigation.[295] Further complicating matters, interest groups might use an incremental approach to policy change as a way to carve out potential opponents into manageable subcoalitions that can more easily be picked off, while also gradually assembling a larger and larger coalition that is increasingly unstoppable.[296] This piecemeal approach not only enables a divide-and-conquer strategy by litigating interest groups, it also conforms to an observed judicial preference for minimalism on the Supreme Court.[297] Due to these entwined dynamics, individual standing can induce larger shifts in structural constitutionalism than what may be compelled by the Constitution or socially desirable because "advocates can nudge the law to that end step-by-step."[298] In this fashion, the incentives of interest groups will lead to highly imperfect enforcement of structural constitutional values.

It follows from this analysis—as well as from the more doctrinal arguments developed in Part III—that allowing institutions to participate as amicus in individually initiated litigation is no answer to the concerns aired in this paper. Such participation may not cure flaws in causation or redressibility. It certainly will not redress asymmetrical case selection

[294] Elhauge, supra note 233, at 67–68 (noting that "the same interest groups that have an organizational advantage in collecting resources to influence legislators and agencies generally also have an organizational advantage in collecting resources to influence the courts").

[295] It is no response to say that judges can simply cease enforcing structural constitutional rules when the optimum is reached. Judges have imperfect information and are prone to errors. It is quite unclear how they know whether some optimal level of enforcement has been reached. They likely use the volume of litigation as a signal of how serious underlying constitutional problems are, and will sometimes grant relief by mistake when it is unwarranted.

[296] The argument here is motivated by Saul Levmore, Interest Groups and the Problem with Incrementalism, 158 U. Pa. L. Rev. 815, 823–24 (2010) (describing a similar dynamic in interest group conflict over regulation).

[297] See Barry Friedman, The Wages of Stealth Overruling (With Particular Attention to *Miranda v. Arizona*), 99 Geo. L.J. 1, 3–4 (2010).

[298] Levmore, supra note 296, at 822.

effects, which are perhaps even more important. In any event, empirical evidence of amicus briefs' efficacy at the Supreme Court is mixed.[299] For the institutions concerned, moreover, amicus participation in the High Court may be cold comfort. By that time, they will have lost control over the choice of litigation vehicle to press a claim, the development of a factual record upon which to render that claim, and the sifting of legal questions for appeal. Only inattention to the litigation process that precedes Supreme Court review, that is, can redeem the notion that amicus participation suffices to cure the Article III and political economy concerns aired here.

No invisible hand mechanism, in short, can be discerned in the incentives of individual litigants lodging structural complaints. And nothing should come of nothing: Because the division of constitutional power between institutions at the beck and call of individual litigants risks large harm to the structural constitution, it should be eschewed.

To summarize, conventional wisdom posits that opening the courthouse door wider necessarily conduces to more, and hence better, judicial enforcement of the Constitution. This truism does not hold, however, in respect to structural constitutionalism. Instead, asymmetries and gaps in the distribution of individual plaintiffs with structural constitutional pleas will generate patchwork distributions of judicial enforcement. Analysis of the interest group determinants of structural constitutional litigation compounds the case for skepticism by identifying a further cause of imbalance. Rather than promoting constitutional equilibriums, individual standing for the structural constitution therefore reposes the basic law in untrustworthy hands.

B. The Political Economy of Institutional Standing for the Structural Constitution

This Section deploys the "new separation-of-powers"[300] approach to inquire whether institutions such as states and branches fare better than individuals as defenders of the structural constitution. A new separation of powers approach usefully draws attention to how courts are embedded in a larger context of repeated interactions with other branches or

[299] See, e.g., Ryan J. Owens & Lee Epstein, Amici Curiae During the Rehnquist Years, 89 Judicature 127, 129–32 (2005) (reporting evidence that is consistent with amicus briefs having either considerable or no effect).

[300] See de Figueiredo et al., supra note 234, at 200.

the several states—all of whom anticipate and respond strategically to each other. Application of this strategic, dynamic lens to standing doctrine surfaces grounds for thinking that institutional litigants pressing structural constitutional claims will do a *better* job than their individual counterparts. That said, the claim developed here has but limited reach: It is not that institutions have perfect incentives, only that they might do sufficiently better than individuals such that the structural constitution is better left in their hands alone.[301]

As a threshold matter, institutional incentives over structural litigation must be situated in the context of how structural values are maintained over time in the context of historical and institutional change. More specifically, the separation, checking, and equilibrating functions of structural constitutionalism must be realized through a fluid and evolving constellation of federal and state governmental instruments that are separated by two centuries from the Framers' presumptions.[302] Elected officials need to reach difficult, context-sensitive decisions about how best to create stable institutional arrangements and to honor structural constitutional principles in novel and mutable conditions.[303] Today's safeguard of liberty can be tomorrow's catalyst of catastrophe.[304] In pursuing this complex task, elected actors must constantly account for nettlesome problems of translating the institutional aspirations of 1787 to the considerably different economic, social, and geopolitical circumstances of

[301] Again, I should emphasize how I am bracketing here the question of whether the structural constitution should be completely taken out of judicial hands.

[302] On federalism, see Lawrence Lessig, Translating Federalism: *United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 132 (describing the effect of "changed circumstances" on the federal balance). On the separation of powers, see Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 453–72 (1995); see also Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 129 (1994) (contending that "although we must adhere to the framers' basic principles, the proper application of these principles sometimes looks quite different today than it would have looked two hundred years ago").

[303] Even those who assert their adherence to the Constitution's original meaning must attend to this problem. For example, adjudication of the line-item veto in *Clinton v. City of New York*, 524 U.S. 417 (1998), entailed a determination as to how to understand the Presentment Clause in an age of omnibus legislation—a question to which there is no obvious originalist answer, and which divided the Court's two originalists, Justice Thomas and Justice Scalia.

[304] Commandeering doctrine, for example, may have different valences pre- and post-September 11. See Ernest A. Young, Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror, 69 Brook. L. Rev. 1277, 1285–91 (2004).

today.[305] Mere mechanical transposition of structural ideals will likely be a bootless exercise in vacuous formalism. The ensuing deals will reflect empirical and normative judgments about how best to update institutional facts to match contemporaneous environments in ways that honor best structural values. Such deals will also reflect the institutional interests of branches and subnational actors who play roles in the legislative and institutional design processes.[306] To characterize the task as daunting is to shade on understatement.

This account of structural constitutionalism's vindication provides a reason for resisting an expansive standing regime: More generous standing rules open the door to a larger number of post hoc challenges to structural arrangement by losers in the design process.[307] The shadow of such a challenge renders necessary institutional experimentation more vulnerable to ex post challenges, and hence less valuable in expectation. At a very minimum, therefore, adding individual to institutional standing creates a new source of friction on efforts to solve emergent policy puzzles through institutional innovation.[308] All else being equal, more litigation will constrain the ability of political actors to adapt institutions to evolving circumstances in ways that vindicate underlying structural values—particularly where the litigants have no stake in the original deal.

What, though, are the specific effects of institutional standing against this same institutional and doctrinal backdrop? The latter's effect will likely diverge from the effect of individual standing because of the distinct litigation incentives of individuals and institutions. The incentives of institutional litigants furnish some comfort that granting standing to them alone will yield neither public choice pathologies nor needless frictions on institutional evolution.

To begin with, institutions such as states and branches already have some quantum of motivation to defend their own prerogatives, if only

[305] See generally Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165 (1993) (presenting general theory of translation as a key term in constitutional interpretation).

[306] This is true for federalism as much as separation of powers issues. There is ample evidence that states play a vigorous and meaningful role in the national political process. See John D. Nugent, Safeguarding Federalism: How States Protect Their Interests in National Policymaking 215 (2009) (concluding, on the basis of several case studies, that "state officials have numerous means at their disposal for resisting perceived federal encroachment on their interests").

[307] Cf. de Figueiredo & de Figueiredo, supra note 278, at 168–69 (modeling legislation and litigation as a unified, two-stage sequence).

[308] Given the strong status quo bias of Article I, Section 7's bicameralism and presentment process, it is hard to see why this friction is warranted.

sporadically.[309] To be sure, it is surely the case that officeholders are not *always* motivated by the best interests of their institutions.[310] But this concern is easy to overdo. There is ample evidence that participants in the American political system take seriously values of legality and constitutionality, including conceptions of institutional fidelity.[311] Government litigators, in particular, may be especially attentive to structural constitutional values. If their careers can turn upon litigation success, moreover, they may have some incentive to rifle through their quiver of structural claims with particular care in ways that offset other shortfalls in institutional-minded incentives.

More importantly, the new separation of powers theory teaches that states and branches are necessarily repeat players. They have many interactions with each other dispersed over time. Even if influenced by interest group dynamics, states and branches still have a powerful incentive not shared by most individual litigants to maintain their reputation as reliable interlocutors and bargaining partners. This incentive arises because they wish to preserve the possibility of beneficial cooperation with other governmental entities in later periods.[312] Institutional actors hence have some incentive to invoke the judicial process if and only if a given law violates some exogenously determined structural rule.[313] This

[309] The claim that Congress and the courts in particular lack any incentive to resist executive initiatives is usefully complicated by William G. Howell, Thinking About the Presidency: The Primacy of Power 16–17 (2013) ("Congress and the courts have the wherewithal to stall, even halt, the president's quest for power [but sometimes fail to do so].").

[310] See Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 Harv. L. Rev. 915, 920 (2005) (arguing that officials often act based on personal and political incentives that do not entail defending institutional powers and prerogatives of the branch that employs them). For a skeptical view of Congress on this score, see Abner J. Mikva, How Well Does Congress Support and Defend the Constitution?, 61 N.C. L. Rev. 587, 597–606 (1983).

[311] See, e.g., Aziz Z. Huq, Enforcing (But Not Defending) 'Unconstitutional' Laws, 98 Va. L. Rev. 1001, 1031–34 (2012) (discussing various kinds of "administrative constitutionalism," which evince an executive branch commitment to take seriously legal rules); Aziz Z. Huq, Binding the Executive (by Law or by Politics), 79 U. Chi. L. Rev. 777, 781–83 (2012) (reviewing Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2010)) (arguing that elected federal officials are motivated by a preference for legality and constitutionality).

[312] On the evolution of cooperative strategy in situations of repeated play, see Robert Axelrod, The Evolution of Cooperation 54 (1984); Elinor Ostrom, Collective Action and the Evolution of Social Norms, 14 J. Econ. Persp. 137, 139–41 (2000).

[313] This is so even if officials' actions partly reflect the play of interest group forces in Congress. It is reasonable to assume there is some dampening effect as a consequence of professional and bureaucratic norms.

is evidenced by the Solicitor General's practice of "tak[ing] the position that reflects his best judgment of what the law is."[314] Something similar may also be true of states' attorneys general, albeit to a lesser degree.[315] Institutional actors also have less incentive than their individual counterparts to invoke judicial review if it means unraveling a deal in which they have participated. Even if institutions have standing to lodge structural constitutional challenges, in other words, they have some incentive to refrain from doing so and instead to accept the accommodations and innovations necessary for preserving basic aspects of the constitutional architecture against shifting political, social, and economic trends.[316] Litigation initiated by an institutional plaintiff is accordingly likely to be an infrequent occurrence, observed only when an arrangement strays far from the constitutionally plausible.

The contrast here with individual standing is clear: Individual litigants' incentives are unconstrained by the allure of potential gains from repeated interactions and the compulsion to preserve reputation. Instead, they tend to be one-shot players, or at best representatives of interest groups pursing self-interested strategies orthogonal to the goals of preserving structural constitutional principles or maximizing overall social welfare. Unlike institutional actors, they have an incentive to file suit whenever an institutional novation impedes their interests, whether or not that new law violates a structural constitutional principle. Provided that expected litigation costs are sufficiently low, interest groups have an incentive to challenge valid arrangements in the hope that a federal judge will err and invalidate the arrangement.[317] Nor is it likely that individual litigants will make up for shortfalls in institutional incentives. To the contrary, it is odd to suppose that when officeholders are distract-

[314] David A. Strauss, The Solicitor General and the Interests of the United States, 61 L. & Contemp. Probs. 165, 168, 172 (1998). To be clear, Professor Strauss is making a normative claim here, albeit one that he sees as having some resonance in practice.

[315] For accounts of the influence of states' attorneys' general, see Cornell W. Clayton, Law, Politics and the New Federalism: State Attorneys General as National Policymakers, 56 Rev. Pol. 525 (1994); Colin Provost, When to Befriend the Court? Examining State Amici Curiae Participation Before the U.S. Supreme Court, 11 St. Pol. & Pol'y Q. 4, 5–6 (2011).

[316] By no stretch of the imagination is this tendency universal. One might fairly criticize the state litigant in *New York v. United States*, 505 U.S. 144 (1992), for being willing to renege on a complex deal it had reached with other states to resolve an intractable interstate commerce problem.

[317] Would injury-in-fact doctrine as it currently exists prevent this kind of strategic litigation? I doubt it. Cf. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1305 (1976) ("[I]t is never hard to find [a] . . . plaintiff to raise the issues.").

ed from the pursuit of structural constitutional values by parochial political concerns, the very interest groups driving those narrow, political goals should be authorized to take up the baton of institutional interests in federal court. In comparison to individuals, therefore, institutions seem valuable defenders of the structural constitutional order.

To be clear, institutional standing is not without its own concerns. The constraining effect of iterative interactions may be loosened under conditions of heightened partisan polarization, for example, if elected actors value short-term ideological goals more highly than long-term cooperation.[318] Variances in collective action costs between Congress and the executive, or between the federal government and the several states, may also generate lopsided distributions of litigation.[319] Or a minority of states might raise a federalism claim that a majority of states oppose.[320] It may well be that these forces in combination sufficiently offset the beneficial effects of repeated institutional interaction, and so alter the valance of institutional standing. It suffices for my purposes to note that it has historically not been the case that institutions have resorted to the federal courts often to vindicate structural constitutional entitlements, and that there is at least a plausible case for viewing a thin stream of such litigation as a safety valve in case of substantial deviation from the constitutional norm. Should institutions move away from an equilibrium in which litigation is infrequent as a result of increasing political polarization or deliquescence of their internal institutional norms, a reconsideration of institutional standing for the structural constitution may be warranted. For now at least, it seems to me that institutions are not implausible champions of the structural constitution.

In short, whereas there are powerful arguments against individual standing for the structural constitution, there are at least colorable argu-

[318] For an analysis of the causes of recent ideological polarization at a national level, see Nolan McCarty, Does Gerrymandering Cause Polarization?, 53 Am. J. Pol. Sci. 666, 672–73 (2009); cf. Alan I. Abramowitz, The Disappearing Center: Engaged Citizens, Polarization, and American Democracy 34–57 (2010) (arguing that party-level polarization does not reflect polarization within the population).

[319] See Bradley & Morrison, supra note 53, at 441–44 (summarizing literature on Congress-executive asymmetries).

[320] For example, the civil damages provision of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902–55 (codified at 42 U.S.C. § 13701 (2006)), had the support of thirty-eight states' attorneys general, yet was opposed by other states, and was eventually invalidated on federalism grounds. Philip P. Frickey and Steven S. Smith, Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique, 111 Yale L.J. 1707, 1729 (2002).

ments that institutional standing alone will do an adequate (but far from perfect) job. Individual standing in this context will tend to destabilize the federal-state and interbranch balances. By contrast once more, states and the political branches will often be motivated by more desirable incentives than individual litigants because they are more deeply embedded in institutional cultures and iterative interactions. Comparative analysis in sum suggests that individual standing should be discarded in favor of institutional standing alone in structural constitutional cases.

V. RECALIBRATING STANDING FOR THE STRUCTURAL CONSTITUTION

If the doctrinal and institutional consequences of allowing individuals access to the federal courts to pursue structural constitutional arguments are unwelcome, how should constitutional law change? This Part proposes a new gloss on standing doctrine. Consistent with that proposed modification of standing doctrine, I then address a series of questions about the boundaries of its jurisdiction-displacing consequences.

The aim of my proposed doctrinal reform is narrowly drawn. I do not propose to render structural constitutional litigation wholly nonjusticiable. Perhaps that result is justified on other grounds. But I have not argued for that much larger shift in the judicial role here. Eschewing any such "bait and switch," the proposal detailed here would mitigate the deleterious effects of individual standing for the structural constitution without wholly removing the courts from the business of structural constitutional enforcement.

The proposed new rule for standing in respect to the structural constitution goes as follows: *When an individual litigant seeks to enforce a structural constitutional principle redounding to the benefit of an official institution, and there is no reason the latter could not enforce that interest itself, a federal court should not permit the individual litigant to allege and obtain relief on the basis of the separation of powers or federalism*. In the mine run of cases, it is the case that the branch, the state, or an official of one of these governmental entities will have standing to raise a claim. Congress or the executive, that is, can and do sue to protect Article I or Article II prerogatives. States can challenge laws that exceed Congress's Commerce Clause authority—as the recent healthcare litigation shows—or its authority under Section Five of the Fourteenth Amendment. In most cases, therefore, this categorical rule bars individual standing. Even when a litigant is hauled into court as a criminal or a civil defendant, so that a structural constitutional issue

seems available as a defensive shield, I would submit that no standing ought to be allowed—or, by way of alternative doctrinal formulation, that the individual has no entitlement to a cause of action for either injunctive relief or damages for violations of the structural constitution *tout court*.[321] In a subset of cases, however, this rule would permit third-party standing on behalf of the structural constitution when there is no institutional litigant available to defend a constitutional value in court.

As a threshold matter, it is important to concede that this rule is at odds with *Bond* as well as with the recognition of individual standing in Commerce Clause cases such as *Lopez* and *Morrison*. I make no claim to find support in that line of precedent. Nevertheless, my proposed rule fits more comfortably with current standing doctrine than *Bond*. In particular, it conforms closely to the elements in standing doctrine that assign judicial enforcement of an interest solely to the entity that formally holds and directly benefits from that interest. States and the federal branches already defend federalism and separation of powers interests respectively. Indeed, there is historical precedent for a state intervening in an individual's prosecution by the federal government and taking an appeal precisely to press and secure vindication of federal values.[322] Further, future Courts should be generous in the construction of states' access to federal court if there is a move to limit individual standing.[323] The proposed rule also coheres well with the prudential resistance to granting third-party standing and the otherwise applicable rule against generalized grievances. In effect, the proposal would harmonize standing in respect to structural constitutional values so that it is no longer at war with the balance of justiciability doctrine. As an added benefit, the

[321] To my mind, nothing particularly significant seems to rest on the formulation of the issue as one of standing rather than a cause of action. I thus continue to speak of standing for the balance of this Part without constantly having resort to cause-of-action language.

[322] An early example is *Ex parte Virginia*, 100 U.S. 339, 340–41 (1880), in which both the defendant in a federal criminal prosecution (who was a state court judge) and also the state of Virginia filed habeas petitions challenging the constitutionality of the underlying federal criminal statute.

[323] The precise delineation of state standing raises complex issues beyond the scope of this Article. See generally Ann Woolhandler & Michael G. Collins, State Standing, 81 Va. L. Rev. 387 (1995). It suffices here to say that there have long been many instances in which states clearly have standing to vindicate their sovereign interests. See, e.g., Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 522–24 (1851) (granting standing to Pennsylvania to sue to prevent a violation of the dormant commerce clause); see also 13B Charles Alan Wright et al., Federal Practice and Procedure § 3531.11.1 (3d ed. 2008) ("It is accepted that states . . . have standing to protect proprietary and sovereign interests . . . .").

proposed rule abandons *Bond*'s reliance on the unsupportable assertion that there is a positive, monotonic relationship between structural constitutional principles and individual liberty. In lieu of this implausible folk wisdom, courts would acknowledge the more complex relationship between rights and government structure.

Enforcement of structural values would also no longer be in the hands of litigants motivated by exogenous policy goals untethered to the federal or interbranch balances. Institutional litigants, as repeat players in the national political process that forges new arrangements to vindicate structural constitutional values, are more likely to file suit only when such an arrangement diverges from a desirable status quo. No doubt, institutional litigants' interests are also impure. But so long as elected officials are somewhat animated by constitutional norms and institutional loyalties, there is little reason to think their aims will be as wholly decoupled from structural constitutional values, or that private individual litigants will do any better.

Congruent with my rejection of the valid rule doctrine as a coherent principle, the proposed new rule would mean that criminal defendants such as Mr. Lopez or Ms. Bond would not be able to resist their prosecution on the ground that the criminal statute invoked exceeded Congress's enumerated powers and thus trenched on states' authorities. To many readers' eyes, I suspect, this limitation upon criminal defendants' ability to raise ultra vires challenges will seem undesirable. But they should recall that we already dramatically curtail criminal defendants' ability to challenge their convictions. Defendants cannot challenge errors in bicameralism and presentment.[324] Their ability to challenge impermissible prosecutorial motives is also highly constrained, notwithstanding its immediate bearing on the fairness of a given conviction.[325] And if defendants cannot currently resist conviction on the ground that unconstitutional motives have played a role in their own prosecution, how can it be odd to preclude them from raising the interests of third-party institutions? In my view, the anomaly here is the current willingness to adjudicate multidimensional questions of national policy at all in the narrow confines of criminal prosecutions. In any case, the infrequency of suc-

[324] See Pub. Citizen v. U.S. Dist. Court for D.C., 486 F.3d 1342, 1351 (D.C. Cir. 2007).

[325] See United States v. Armstrong, 517 U.S. 456, 464 (1996) ("[A] presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." (citation and internal quotation marks omitted)).

cessful challenges to federal criminal statutes on federalism or separation of powers grounds suggests that elimination of this tool from the criminal defendant's arsenal hardly achieves a meaningful change to the odds of conviction.

The proposed new rule does not, however, eliminate any and all individual reliance upon the structural constitution. Three exceptions, which follow in straightforward fashion from the rule's verbal formulation, need to be identified and clarified. Each envisages some adjudication of structural questions at the behest of individual plaintiffs rather than institutional actors.

First, I do not rule out the possibility that a defendant could challenge a coercive federal statute that plainly lacks any warrant in law under the Due Process Clause.[326] The idea that coercive action based on assertions of legal authority that are *manifestly* unreasonable might compromise due process in ways that *simply* unconstitutional actions do not has a long pedigree. In early glosses on the Suspension Clause, the Court suggested that the remedy of habeas corpus extended to postconviction only if the "judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."[327] The Court hence distinguished two species of constitutional er-

[326] I should emphasize again that my argument does not reach arguments that an agency or government entity has erroneously construed a statute that allows government enforcement. See supra text accompanying note 43. In addition, habeas review of executive branch detention decisions operates like judicial review of an agency insofar as the claim that a coercive action is not authorized by statute plainly falls within the writ's ambit. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006) (invalidating, on habeas, the application of an executive order envisaging trial by military commission). A criminal defendant can clearly state that her conduct did not fall within the reach of a statute.

This sort of "ultra vires simplicter" objection to some sort of agency action, be it a quotidian rule (in the case of APA review), an immigration or national security detention (in the case of habeas), or a criminal prosecution, ranks differently from the more free-ranging species of structural constitutional challenge because it is not primarily concerned with constitutional law, but rather with defining the metes and bounds of statutory authority. Hence, it does not raise all of the same problems of multipolarity as standing for the structural constitution. Stated otherwise, my objections to *constitutional* review on behalf of individual litigants is not intended to oust all *statutory* interpretation in the administrative agency context from federal court purview.

[327] Ex parte Watkins, 28 U.S. (3 Pet.) 193, 203 (1830); see also Ex parte Lange, 85 U.S. (18 Wall.) 163, 178 (1873) (invalidating sentence, where the sentencing court had already imposed the maximum available penalty). Over time, *Watkins*'s definition of jurisdictional errors expanded to include challenges to the constitutionality of an underlying statute. See Ex parte Siebold, 100 U.S. 371, 376–77 (1879). The *Watkins* rule developed in complex, al-

rors: particularly serious "jurisdictional" flaws and mere constitutional error.[328] An echo of that distinction can be heard in the federal habeas statute today, which ties relief to "unreasonable application[s] of[] clearly established Federal law, as determined by the Supreme Court of the United States."[329] Similarly, constitutional tort damages are available today when a coercive state action was not merely unconstitutional, but unreasonably so.[330]

Building on these models, it might be argued that coercive action that no reasonable official could believe to be consistent with the Constitution should be a ground for judicial action under the Due Process Clause. In effect, this is to extend what Professor John Jeffries has recently and cogently described in these pages as "a fault-based standard as the general liability rule for constitutional torts."[331] It vests individuals with a reasonable measure of protection from wholly arbitrary action, a promise that state action will fall within reliable and predictable bounds, and a commitment to some reasonable notice before penalties are imposed—but it does so without making individual litigation a license for adjudicating more generally the separation of powers. Such a defense could also be deployed in state criminal proceedings against statutes that allegedly violated some structural principle—a move that would bring the legal standard of review deployed in those proceedings in line with that used in postconviction and post hoc damages proceedings. Judicial experience with both qualified immunity and the habeas statute further suggests that this sort of fault-based trigger for judicial action is workable in practice.

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beit not wholly analytically satisfying ways. The best available reconstruction of the doctrine is Ann Woolhandler, Demodeling Habeas, 45 Stan. L. Rev. 575, 597–601 (1993).

[328] See Wright v. West, 505 U.S. 277, 285 (1992) ("Absent an alleged jurisdictional defect, 'habeas corpus would not lie for a [state] prisoner . . . if he had been given an adequate opportunity to obtain full and fair consideration of his federal claim in the state courts.'" (quoting Fay v. Noia, 372 U.S. 391, 459–60 (1963) (Harlan, J., dissenting))).

[329] 28 U.S.C. § 2254(d)(1) (2006); see also Williams v. Taylor, 529 U.S. 362, 407 (2000) (glossing § 2254(d)(1)). Note that this provision is only one ground of postconviction habeas relief, compare 28 U.S.C. § 2254(d)(2), and does not always provide the relevant standard of judicial review. See, e.g., Panetti v. Quarterman, 551 U.S. 930, 945 (2007).

[330] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that executive officers are generally shielded from liability so long as their conduct does not violate "clearly established . . . rights of which a reasonable person would have known").

[331] John C. Jeffries, Jr., The Liability Rule for Constitutional Torts, 99 Va. L. Rev. 207, 209 (2013).

Second, neither the doctrinal nor the institutional arguments I have developed bear on individuals' standing to raise arguments pursuant to Article III of the Constitution concerning the appropriate and necessary scope of judicial authority. Indeed, such claims differ from the other federalism and separation of powers values along two important margins.[332] As an initial matter, litigants objecting to a proposed government action on Article III grounds often have a personal stake in the exercise in federal judicial power without analog in other structural constitutional litigation.[333] There is no incongruence between their injury and the offense to the structural constitution, as is the case in other litigation concerning the separation of powers or federalism values. Consider, for example, litigants who invoke Article III limitations on Congress's power to overturn or otherwise modify final judgments.[334] Once he or she has a judgment in hand, a litigant has a property interest that itself is protected by the Constitution.[335] Vindicating that property interest can only be done by vindicating an Article III value. There is substantial overlap, therefore, between the litigant's defense of the divisible individual interest and the defense of Article III values.

Consistent with this view, Professors Nathan Chapman and Michael McConnell have recently offered an account of the Due Process Clause

[332] A potential objection is that states will lack standing to challenge federal statutes on Commerce Clause grounds. Many federal statutes, however, will have fiscal consequences for states, enabling a challenge. For those that do not, a federal court may wish to permit standing based on a sovereign interest in exclusive regulatory jurisdiction.

[333] This interest can be understood in due process terms. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) ("Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." (citation and quotation marks omitted)).

[334] See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225–27 (1995) (forbidding Congress from directing reopening of decided cases); Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); United States v. O'Grady, 89 U.S. (22 Wall.) 641, 647–48 (1874) ("Judicial jurisdiction implies the power to hear and determine a cause, and . . . Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal . . . .").

[335] See Jung v. Ass'n of Am. Med. Colls., 339 F. Supp. 2d 26, 43 (D.D.C. 2004) ("Causes of actions only become actionable property interests upon the entry of final judgment." (citing Adams v. Hinchman, 154 F.3d 420, 424 (D.C. Cir. 1998))); accord Grimesy v. Huff, 876 F.2d 738, 744 (9th Cir. 1989) ("[A] party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." (citation and emphasis omitted)).

pursuant to which "government may not interfere with established rights without legal authorization and according to law, with 'law' meaning the common law as customarily applied by courts and retrospectively declared by Parliament."[336] Like the Chapman-McConnell account, my argument here focuses on the entitlement to procedural protections in an Article III forum. Unlike them, however, I would resist a rule cabined to "established" or "vested" rights, which may have undesirably regressive distributive effects. Whether an interest is of common law pedigree or a product of regulatory action,[337] it should in my view trigger due process protection.

Similarly, litigants can vindicate Article III interests when they assert a right of access to that forum along with the procedural protections distinctively aligned with the federal courts. In the 2010 decision *Stern v. Marshall*, for example, the Court held that an Article I bankruptcy court lacked authority to adjudicate a state-law counterclaim lodged by an estate.[338] Citing *Bond*, Chief Justice Roberts linked the separation of powers to the promotion of "liberty."[339] Unlike *Bond*, however, the tendered structure-liberty question in *Stern* was neither ethereal nor abstract.[340] Litigants, explained Chief Justice Roberts, have a specific interest in "the defining characteristics of Article III judges," such as tenure protection and salary insulation, which conduce to decisional independence.[341] The protections of Article III were part and parcel of the asserted individual interest in fair adjudication. Unlike *Bond*, *Stern* thus adumbrated

[336] Chapman & McConnell, supra note 21, at 1679.

[337] Whatever force the distinction between vested private rights and public rights once had, I am skeptical that it has much normative weight in our more positivist era, when the distinction between ongoing regulatory action and the boundaries of private contract and property entitlements is far more uncertain.

[338] 131 S. Ct. 2594, 2608–20 (2011). *Stern* was not the first time the Court has invalidated applications of bankruptcy court jurisdiction on the ground that it infringed Article III. See also N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982).

[339] *Stern*, 131 S. Ct. at 2609.

[340] I take no position on whether *Stern* was rightly decided. For a very helpful discussion placing both the decision in historical perspective and also exploring its consequences, see Douglas G. Baird, Blue Collar Constitutional Law, 86 Am. Bankr. L.J. 3, 22 (2012) ("*Stern* has potentially far-reaching consequences that might unsettle the ability of the bankruptcy judge to control her docket.").

[341] *Stern*, 131 S. Ct. at 2609; accord Troy A. McKenzie, Getting to the Core of *Stern v. Marshall*: History, Expertise, and the Separation of Powers, 86 Am. Bankr. L.J. 23, 34 (2012) ("More than a view of the platonic ideal of government form, the argument from separation of powers has been grounded by the Court in a concern about individual liberty.").

an alignment of specific individual interests (in neutral and fair adjudication) and constitutional structure. It is this convergence that distinguishes cases in which individuals seek to vindicate Article III claims from other structural constitutional litigation.[342]

The other reason to distinguish Article III cases is this: Unlike presidents, agency heads, federal legislators, or states' elected officials, federal judges do not have access to litigation as a way of vindicating their constitutional prerogatives. Judges, simply stated, do not often sue. They depend instead on individual litigators' filings for opportunities to create cases and controversies in which they are able to vindicate institutional interests pursuant to Article III.[343]

Third, a final exception to the general rule articulated above concerns the now common practice of invoking structural constitutional principles as default canons of interpretation in the course of liquidating an ambiguous federal statute. The Court has invoked canons reflecting both federalism values[344] and separation of powers ideals[345] in the course of interpreting federal statutes and regulations. Substantive canons of this sort have the effect of pushing the Court toward a view of an ambiguous statute or regulation that is more harmonious with the relevant constitutional principle. For example, in the 2000 case of *Jones v. United States*, the Court read the federal arson statute narrowly not to reach arson of an owner-occupied private home so as to "avoid the constitutional question" raised by the federal criminalization of such quintessentially local activity.[346] Without application of any constitutional decision rule, the *Jones* Court vindicated a federalism value by shading the arson statute and thereby narrowing its reach.

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[342] Other cases implicate substantially parallel claims. See Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 426 (1995); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 50 (1989); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847–49 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 576 (1985).

[343] Can judges use the fact that they adjudicate otherwise properly presented cases to vindicate Article III? Judges surely do attend to Article III concerns—the rebarbative bramble bush of standing doctrine shows as much—but do not control the flow of litigants. It seems more straightforward to allow plaintiffs to raise Article III complaints plainly, rather than resorting to underhanded sub rosa protection of the relevant values.

[344] See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 467–70 (1991) (using a clear statement rule to shield states' ability to determine the forms of their own government structures, a federalism value not directly enforced by the Court); cf. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001).

[345] See, e.g., Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 443 (1989).

[346] 529 U.S. 848, 858–59 (2000).

From one perspective, the defendant in *Jones* secured the benefit of a constitutional ruling (that is, acquittal) without the cost of full-court argument for that ruling. As such, the decision raises the same concerns as cases such as *Lopez* and *Morrison*. Such a perspective on the case would seem to suggest that constitutional avoidance canons tethered to structural constitutional principles should be abandoned. After all, it might seem to make little sense to allow via statutory interpretation what is forbidden as a matter of direct enforcement. That negative conclusion, however, is premature. The relevant avoidance canons can be justified on normative grounds independent of any Article III standing analysis, and therefore rest on quite separate foundations from direct enforcement of structural constitutional values. For example, federal courts' employment of structural constitutional avoidance canons can be explained by positing that the Court is using the clarity of a statutory text as a proxy for the probability that Congress intended to "pres[s] the envelope of constitutional validity."[347] Only when Congress is especially textually clear should the Court be sufficiently confident that legislators truly intended the Justices to face and resolve a constitutional question.[348] In a similar vein, avoidance canons can also be understood as efficient mechanisms for enforcing norms that would otherwise go underenforced for justiciability reasons,[349] that is, as "resistance norms" that raise the cost of enactment for constitutionally troubling statutes and thereby elicit legislative work product that is closer to constitutional ideals.[350] Any one of these justifications provides an independent basis for continuing to use avoidance canons, whatever happens to individual standing for the structural constitution.

Moreover, avoidance canons are relevant only when there is an ambiguity in federal statutes that needs to be resolved. Their use does not

[347] Rapanos v. United States, 547 U.S. 715, 738 (2006) (Scalia, J., plurality opinion); see also Clark v. Martinez, 543 U.S. 371, 382 (2005) ("The canon is thus a means of giving effect to congressional intent, not of subverting it."). For an effective and recent articulation in these pages of the countervailing view, see Jonathan D. Urick, Note, *Chevron* and Constitutional Doubt, 99 Va. L. Rev. 375, 412 (2013).

[348] See Aziz Z. Huq, The Institution Matching Canon, 106 Nw. U. L. Rev. 417, 428 (2012).

[349] See William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 597 (1992).

[350] Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 Tex. L. Rev. 1549, 1985–87 (2000). For a similar idea, see Matthew C. Stephenson, The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs, 118 Yale L.J. 2, 41–42 (2008).

necessarily increase the expected volume of private litigation to distorting effect.[351] Absent some inflationary effect on the pool of structural constitutional litigants, the reasons developed in this Article for resisting individual standing do not extend to undermine deployment of avoidance canons. At the same time, this is not to suggest that the use of constitutional avoidance is invulnerable to criticism. For instance, some commentators have condemned constitutional avoidance canons as implicating the illicit extension of antidemocratic penumbras radiating beyond a constitutional rule's limited orbit.[352] I do not mean to take sides in that dispute. The relevant point here is that standard justifications for the avoidance canons stand or fall independently of one's evaluation of individual standing for the structural constitution. Their continued usage, consequently, rests on a calculus that stands independent of the analysis presented in this Article.

CONCLUSION

Central among the concerns that animated the Framers' conception of Article III was the proposition "that the control of public rights should remain in the hands of public officials."[353] Over time, the Court has slipped incrementally, incautiously, and perhaps by inattention into the practice of permitting private litigants to raise and obtain binding judgments on the basis of structural constitutional principles. That practice is in tension with our Article III heritage and at war with many longstanding practices from other domains of standing doctrine. At minimum, I have strived to show in this Article that the *Bond* Court gave too short shrift to concerns animating the bar on private vindication of public values. More ambitiously, I have argued the Court erred by affixing its stamp approvingly to the concededly longstanding practice of individual standing for the structural constitution. Both doctrine and political theory counsel strongly against that move. Little would be lost now, I have suggested, were the Court to reconsider now that undertheorized, weakly supported conclusion. Much would be gained by a pivot to a narrower Article III strait gate—a reconstruction of standing doctrine in which

[351] To be sure, they may have an indirect effect because they increase the probability of a victory for some plaintiffs, who are therefore more likely to bring suit ab initio. This inflationary effect, however, is likely to be small. In my view, it is not sufficient to trigger the concerns aired in Parts II and III.

[352] See Frederick Schauer, *Ashwander* Revisited, 1995 Sup. Ct. Rev. 71, 88.

[353] Woolhandler & Nelson, supra note 106, at 712.

solely the institutions created by the Constitution could invoke federal court jurisdiction to vindicate their own institutional interests.

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