WHAT STANDING IS GOOD FOR

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INTRODUCTION

THIS Article explains two related functions served by the standing doctrine in public law. It uses economic analysis to show that standing restrictions prevent the inefficient disposition of constitutional entitlements that can result when many people's rights are affected by a single government policy. Standing also protects individuals' choices in how their rights should be exercised and thus promotes the autonomy of rights-holders.

Standing has been subject to voluminous and sustained criticism over the past forty years.[1] Articles on standing routinely begin with

[1] Louis L. Jaffe, Standing Again, 84 Harv. L. Rev. 633, 633 (1971) (describing literature as "enormous"); see Erwin Chemerinsky, Constitutional Law: Principles and Policies 60 (3d ed. 2006) (observing that standing doctrine is perceived as "incoheren[t]" and has been "frequently attacked" in an "extensive" corpus of scholarship); 1 Laurence H. Tribe, American Constitutional Law 390 (3d ed. 2000) ("[T]he law of standing has for some time been one of the most criticized aspects of constitu-

a recitation of the subject's vast "comment, criticism, and doctrinal confusion."[2] Scholars almost unanimously[3] regard it as pointless and incoherent at best,[4] a veil for ideological manipulations at worst.[5] In a view that has "acquired the status of folk wisdom," standing decisions are simply "concealed judgments on the merits" made without the benefit of a full factual record.[6] Not surprisingly, leading scholars have called for significantly liberalizing or even abolishing the doctrine.[7] Academic disillusionment with standing has accompanied dwindling enthusiasm on the Supreme Court,

tional law."); see also Nancy C. Staudt, Modeling Standing, 79 N.Y.U. L. Rev. 612, 614 (2004) (noting "countless" analyses of standing). For a small sampling of the literature criticizing standing, see Martin H. Redish, The Federal Courts and the Political Order: Judicial Jurisdiction and American Political Theory 88–103 (1991); William Fletcher, The Structure of Standing, 98 Yale L.J. 221 (1998); David A. Logan, Standing to Sue: A Proposed Separation of Powers Analysis, 1984 Wisc. L. Rev. 37; and Stephen L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371 (1988).

[2] See Logan, supra note 1, at 37.

[3] For some rare exceptions, see Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 307–09 (1979) (arguing that standing promotes individual autonomy), and Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 881 (1983). See also infra note 31.

[4] Mark V. Tushnet, The "Case Or Controversy" Controversy: The Sociology of Article III: A Response to Professor Brilmayer, 93 Harv. L. Rev. 1698, 1705 (1980) (arguing that standing law "serves no useful purpose"); see Fletcher, supra note 1, at 221. ("[S]tanding law . . . has long been criticized as incoherent.").

[5] Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. Rev. 1741, 1786 (1999) ("Modern standing law is closer to a part of the political system than to a part of the legal system. It is characterized by numerous malleable doctrines and numerous inconsistent precedents. Judges regularly manipulate the doctrines and rely on selective citation of precedents to further their own political preferences.").

[6] See Richard H. Fallon, Jr., The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights, 92 Va. L. Rev. 633, 635 (2006).

[7] See, e.g., Richard A. Epstein, Bargaining with the State 216–17 (1993) (arguing against standing limitations for constitutional challenges to government action); David R. Dow, Standing and Rights, 36 Emory L.J. 1195, 1197 (1987) (arguing for a reformulation of standing doctrine when "societal rights" are implicated); Fletcher, supra note 1, at 223 (urging courts to "abandon" standing requirements); Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 167 (1992) (arguing that "the very notion of 'injury-in-fact' is not merely a misinterpretation of . . . Article III but also a large-scale conceptual mistake" similar to early twentieth-century substantive due process); Mark V. Tushnet, The New Law of Standing: A Plea for Abandonment, 62 Cornell L. Rev. 663, 664 (1977) (arguing that "the Court should refrain from disposing of cases on standing grounds").

which has somewhat loosened standing restrictions over the last several decades.[8] The next few paragraphs outline the functions of standing. Then, before proceeding into the exposition of these ideas, a few words will be said about the scope and structure of the Article.

The central claim is that standing can prevent inefficient dispositions of constitutional entitlements. In a distinct but related point, standing protects people's ability to individually determine the best use of their rights. Constitutional rights can usually be waived or bargained away by their individual bearers. This is crucial to their being put to their highest value use. For example, a newspaper editor has a First Amendment right to be free of censorship. She is approached by Pentagon officials and told that the publication of a certain story will hurt national security. The editor can seek an injunction against prior restraint or she can waive her right by voluntarily spiking the story. She can waive for public-minded reasons such as national security, or for entirely selfish ones like good relations with potential Pentagon sources. In cases like this, individuals make separate and discrete decisions about the optimal use of rights—exercise or alienation.

Sometimes circumstances make individual rights effectively inalienable—not as a result of any explicit policy choice, but simply because of the transaction-cost structure of the situation. This happens when a single governmental action infringes on the rights of many people who have conflicting preferences about how to use their rights. In such a situation, when a single person gets injunctive

[8] See Richard A. Posner, The Federal Courts: Challenge and Reform 195 (1996); Michael C. Jensen et al., Analysis of Alternate Standing Doctrines, 6 Int'l Rev. L. & Econ. 205, 209 (1986) (noting that "there is virtual unanimity" that the Supreme Court liberalized standing doctrine in the 1960s and 1970s); Pierce, supra note 5, at 1788–89 (arguing that *FEC v. Akins* represented a major liberalization of standing doctrine); Cass R. Sunstein, Informational Regulation and Informational Standing: *Akins* and Beyond, 147 U. Pa. L. Rev. 613, 645 (1999) (same). The inconsistency of the Court's standing decisions, however, makes it difficult to chart the direction of its jurisprudence. Most recently, the Court restricted standing in Establishment Clause cases, apparently limiting—and questioning—a liberalizing precedent that had made the First Amendment perhaps the least restrictive field of constitutional standing. See Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 2568–70 (2007) (holding that taxpayers do not have standing to challenge the executive branch's expenditure of discretionary funds on faith-based initiatives because those funds had not been appropriated by Congress).

relief he unilaterally determines how everyone in the affected class exercises their rights. It is impossible to negotiate an efficient solution with the single rights-holder because, in the absence of standing restrictions, anyone in a large class can be that person. Every individual rights-holder would have veto power over a government action that affects the rights of many. This veto power makes strategic holdout likely. Massive social welfare losses can result in such circumstances. Standing allows courts to bypass the problems of high transaction costs and strategic behavior by attempting to replicate the outcome of the bargaining that would have taken place in a low transaction-cost environment.

This Article shows that contrary to conventional wisdom, standing has significant, autonomous, and public-regarding functions. The analysis presented here also helps explain many of the mysteries of standing: Why should inchoate injuries be less justiciable than tangible ones? Isn't it paradoxical that justiciability exists when a few people are harmed, but not when a great many are harmed? Why should standing be a greater barrier when plaintiffs allege violations of the structural constitution rather than individual rights provisions, given that the restrictions of the former ultimately exist to protect individuals?

Furthermore, recognizing the economic and rights-protecting functions of standing is crucial for an assessment of proposals to liberalize the doctrine. Such suggestions must take into account the potentially large social welfare costs and individual rights interferences that would exist in the absence of standing restrictions. Moreover, the economic approach to standing helps define clearly the situations in which standing problems arise. This can promote a more coherent application of the doctrine.

This Article only seeks to explain standing doctrine, not to champion it. While standing solves real social problems, it has its costs. These include the delay or preclusion of judicial review of government activity and the foregone production of precedent. Whether these costs exceed the benefits are questions separate and subsequent to understanding the problems to which standing responds. Furthermore, while this Article shows that standing may

serve useful purposes,[9] like any other doctrine requiring judgment and discretion, standing can be incorrectly applied or purposefully abused. This Article does not claim to explain the Supreme Court's standing jurisprudence, which is largely but not entirely consistent with the account presented here.

This Article confines its analysis to the central, and most controversial, component of Article III standing—the requirement of a justiciable injury, also known as an "injury in fact." Furthermore, this Article focuses on standing to assert constitutional rather than statutory rights. While much of the analysis applies equally to congressionally created rights, there are important normative differences which will be explored at the end of the Article.[10]

Perhaps the major criticism of standing is that it obscures the real issue, which is simply whether substantive law gives the plaintiff a cause of action.[11] This Article agrees that standing should not be used as a proxy for the existence of a cause of action. Nevertheless, it identifies autonomous and socially valuable functions for the doctrine. To clearly distinguish these functions from the question of whether the plaintiff has a legal entitlement, it shall be assumed throughout that all plaintiffs have meritorious claims—that the challenged governmental conduct violates their rights. Taking plaintiffs' legal claims as true prevents confusing the standing inquiry with merits questions.

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

[9] This Article also does not claim to exhaust the potentially positive functions of standing. Professor Stearns has shown that standing prevents the manipulation of intransitive preferences among Justices by strategic litigants. See Maxwell L. Stearns, Standing and Social Choice: Historical Evidence, 144 U. Pa. L. Rev. 309 (1995) [hereinafter Stearns, Historical Evidence]; Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 Cal. L. Rev. 1309, 1325 n.58 (1995) [hereinafter Stearns, Standing Back].

[10] See Section V.D.

[11] See Stearns, Standing Back, supra note 9, at 1325 n.58 and accompanying text (noting the dominance of the cause-of-action theory); see also infra note 31.

Article speaks simply of *standing,* it refers to the robust, restrictive vision of the doctrine.

This Article will proceed as follows. Part I briefly sketches the standing doctrine and particularly the injury requirement. It discusses efforts to understand the purpose of standing restrictions and the major criticisms of the existing rationales. The two major functions of standing are presented in Parts II and III respectively. Part II sets out the transaction-cost function of standing and shows how this understanding is entirely different from the dominant accounts of the doctrine. Part III presents a related but noneconomic function of standing—protecting individual autonomy over the exercise of rights, an autonomy that is threatened when rights overlap. Both Parts II and III respond in different ways to criticism of the economic approach to constitutional rights. Section II.E defends the economic approach on its own terms, while Part III shows that even if rights cannot be reduced to welfarist terms, standing still serves a positive function by forcing the least rights-destructive solution when there is a conflict between different people's rights.

Part IV considers whether the function of standing can be better served through other means. It concludes that while various expedients would solve some of the problems to which standing responds, none would solve all of them, and the solutions would themselves have significant drawbacks. All of this may explain why courts in fact use the standing doctrine. Part V ties up some loose ends, such as the applicability of the analysis to standing under congressionally created rights, its relation to class actions, and to non-common law rights.

I. THE DOCTRINE AND THE CRITICS

A. Constitutional Basis

Article III of the Constitution enumerates the three types of "Cases" and six types of "Controversies" that fall within the jurisdiction of the federal courts.[12] To be heard by an Article III court, suits must not only fall within one of these nine categories, but they must also be presented in the proper package—namely, a case or

[12] U.S. Const. art. III, § 2.

controversy.[13] On one level, this seems obvious. Courts resolve *cases,* not philosophical disputes, beauty contests, or questions of foreign policy.[14] The "case" is to the courts what the "bill" is to Congress—the basic unit of operation. Specifying the outer bounds of a "case or controversy," however, proves exceedingly difficult.

The various Article III justiciability doctrines—standing, ripeness, mootness, political question, advisory opinions—all try to define the contours of the case-or-controversy limitation. Standing, the "most important of these doctrines,"[15] focuses on whether a plaintiff is the right person to bring a given issue before the court. This is what makes standing jurisdictional—the inquiry is not about the existence of a wrong, but whether the court can respond at the request of *this* plaintiff.

The Court has framed the standing inquiry as having three components: whether the plaintiff alleges an "injury in fact," whether that alleged injury "fairly can be traced to the challenged action," and finally, whether a favorable ruling would probably end the injury.[16] Beyond this constitutional "core" of standing are "prudential" standing rules invented by the courts themselves. Congress can presumably override these "self-imposed limits."[17] This Article focuses only on the Article III limitations on standing.

B. Defining an Injury

The standing inquiry focuses on whether the plaintiff has a justiciable injury, or an "injury in fact." The Court itself has admitted

[13] The extent to which standing and related rules truly stem from the express or implicit command of Article III has been a subject of some debate. Compare Sunstein, supra note 7, at 169 (arguing that standing is a twentieth-century invention with value-laden goals), with Ann Woolhander & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689 (2004) (defending the historical basis of standing).

[14] See Letter from John Jay, Chief Justice, U.S. Supreme Court, to George Washington, President, United States of America (July 20, 1793), *reprinted in* Richard H. Fallon, Jr. et al., The Federal Courts and the Federal System 79 (5th ed. 2003) (declining to answer questions from Secretary of State Thomas Jefferson on proper relations toward Britain and France during the Napoleonic Wars).

[15] Allen v. Wright, 468 U.S. 737, 750 (1984).

[16] See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982).

[17] See *Allen*, 468 U.S. at 750–51. The most important prudential rule prevents litigants from asserting the rights of others (jus tertii). See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961).

that this concept is "not susceptible of precise definition."[18] Most commentators amplify that view.[19] Still, some basic concerns can be teased out. One concern is the avoidance of "abstract" injuries. Standing demands that courts respond only to "distinct and palpable" harms. This limitation most often has bite in ideological litigation by public interest groups, or when the alleged conduct causes inchoate harms, such as stigma. Related to abstractness is a concern about "general" rather than "particular" injuries. When government action harms many people in the same way, none will have standing to assert the "undifferentiated" injury. In such cases the Court will say that redress for the constitutional violation can only be had through the political branches—a position many see as an abdication of judicial review.

None of these attempts to define standing have been convincing, even to the Court.[20] The abstractness argument is used to rebuff groups with a programmatic or ideological interest in the constitutional violation. It is true that their sense of injury is a "psychological consequence . . . produced by observation of conduct with which one disagrees."[21] But if the conduct also violates the plaintiff's constitutional rights—the merits question—it is hard to see why a psychological injury should be insufficient. Certainly psychological harms are treated as concrete and justiciable in many ordinary tort contexts, such as negligent infliction of emotional distress and defamation. Indeed, if everyone's rights are violated and only some are offended (due to differing ideological views), this seems no different from an "eggshell skull" situation where a particular precondition of the plaintiff (such as a concern for the environment) makes him more prone to suffer severe harm from an otherwise de minimus injury.

Denying standing because the injury is too "general" or "undifferentiated" begs the question. Usually when a single course of governmental conduct violates the rights of many people, all can

[18] *Allen,* 468 U.S. at 751.

[19] A quarter-century ago, it was already "customary in writing on standing to warn the reader" of its amorphous character. Karen Orren, Standing to Sue: Interest Group Conflict in the Federal Courts, 70 Am. Pol. Sci. Rev. 723, 723 n.1 (1979).

[20] See *Valley Forge*, 454 U.S. at 475.

[21] Id. at 485.

sue.[22] This is true even if each person's injury is identical, as is the case with most large-scale instances of racial discrimination. Yet the Court has gone so far as to suggest that when the government violates the constitutional rights of all citizens, none have standing.[23]

C. Purposes and Criticisms

Two related purposes are commonly adduced for the standing doctrine. Standing is often said to track the purposes of the rule against advisory opinions—to ensure a concrete, adversarial presentation of the issues.[24] The "abstract" injury shunned by standing doctrine may lead to an "abstract" presentation of the issues involved, while courts are better suited to make incremental, fact-specific determinations. And a plaintiff without a true Article III "injury in fact" may not have enough at stake to invest the right amount of resources in the litigation and thus fail to properly play his role in the adversary system.

Few find these justifications convincing. In particular, scholars argue that the injury-in-fact requirement overstates the degree of concreteness needed to satisfy the interests of the adversary system.[25] In practice, the injury requirement bars ideological or "public interest" plaintiffs. These plaintiffs are often represented, however, by well-financed, skilled, and committed organizations. Ideological plaintiffs may in fact care much more than anyone else

[22] See David P. Currie, Federal Jurisdiction in a Nutshell 26 (4th ed. 1999) ("It hardly seems an appropriate reason for denying relief . . . that the Government has harmed many citizens rather than only a few."); James E. Pfander, Principles of Federal Jurisdiction 34 (2006) (observing that wrongful conduct often inflicts cognizable injuries on large classes of people).

[23] See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

[24] See generally Martin H. Redish & Andrianna D. Kastanek, Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545 (2006) (arguing that the Article III case-or-controversy requirement demands genuine adversity between parties).

[25] See Fletcher, supra note 1, at 247–48; Akhil Reed Amar, Law Story, 102 Harv. L. Rev. 688, 718 n.154 (1989) (reviewing Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System (3d ed. 1988)) (arguing that "[a]ny legitimate interest in guaranteeing adverse presentation of issues can easily be handled" without the standing doctrine).

about the question.[26] Nor does it appear that the attorneys for such plaintiffs fail to raise relevant considerations sharply enough.[27]

In other words, ideological injuries are real and "in fact." Indeed, one might fairly say that any injuries that prompt the plaintiff to invest in litigation are sufficiently real (especially given that the relief sought is often purely injunctive).[28] As Judge Fletcher has written, to say that a plaintiff who feels injured does not have a cognizable injury in fact is to call him a liar.[29] The maintenance of an action by a private party who is sincerely aggrieved should be enough to remove any nonadversity/advisory opinion concerns.

More recently, the Court has begun to argue that standing reinforces the separation of powers, in particular the division between the judiciary and the executive. The latter is charged with ensuring that the laws are "faithfully executed." Given limited resources, this necessarily entails some degree of discretion. A regime in which *anyone* could challenge the legality of government action would excessively curtail or interfere with the President's "Take Care" power.[30] This argument is much stronger in the context of congressionally conferred standing, which might be a legislative

[26] See Richard A. Epstein, Standing and Spending—The Role of Legal and Equitable Principles, 4 Chap. L. Rev. 1, 47 (2001) ("[I]deological plaintiffs . . . will address the issues of principle raised in litigation precisely because they care as much about the structure of American government independent of the impact on their own pocketbooks."); William M. Landes & Richard A. Posner, The Economics of Anticipatory Adjudication, 23 J. Legal Stud. 683, 718 (1994) (arguing that ideological plaintiffs have "both the desire and the resources to mount a vigorous defense of their position").

[27] See Epstein, supra note 26, at 46; Louis L. Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033, 1038 (1968) ("[I]nvesting money in a lawsuit from which one is to acquire no further monetary profit argues . . . a quite exceptional kind of interest . . . . From this I would conclude that, insofar as the argument for a traditional plaintiff runs in terms of the need for effective advocacy, the argument is not persuasive.").

[28] See Kenneth C. Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 674 (1973) ("If plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation.").

[29] See Fletcher, supra note 1, at 231.

[30] See Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws are faithfully executed.").

end-run around executive management and enforcement of statutes. The Court also says that standing protects the separation of powers in a broader sense by preventing judges from sitting as a Council of Revision.

Given its doctrinal problems, it is not surprising that the entire Article III standing requirement has been assailed by commentators. The classic and persistent criticism is that the only proper "standing" inquiry is whether the plaintiff has a cause of action.[31] If some source of law allows him to sue in response to certain conduct, a plaintiff has the requisite injury in fact. In this view, standing is at best a misnamed inquiry into whether the relevant law gives the plaintiff an entitlement against the kind of harm he alleges. At worst, standing is a way of raising barriers to certain kinds of injuries disfavored by the courts.

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

Only a few scholars have examined standing from an economic perspective.[32] One brief and unnoticed paper anticipates some of

[31] See Amar, supra note 25, at 718 n.154 ("[A] properly framed case in which a plaintiff has 'standing' is simply one in which she has a cause of action."); David P. Currie, Misunderstanding Standing, 1981 S. Ct. Rev. 41, 43 ("Whether . . . labeled 'standing' or 'cause of action,' the question is whether the statute or Constitution implicitly authorizes the plaintiff to sue."); Cass R. Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432 (1988); Sunstein, supra note 7, at 166 ("The relevant question is . . . whether the law . . . has conferred on the plaintiffs a cause of action."); see also Fletcher, supra note 1, at 223 n.18 (citing numerous commentators concurring in this view).

[32] See Clifford G. Holderness, Standing, *in* 3 New Palgrave Dictionary of Economics and the Law 505–06 (Peter Newman ed., 1998); Michael C. Jensen et al., Analysis of Alternate Standing Doctrines, 6 Int'l Rev. L. & Econ. 205 (1986); Scott, supra note 28, at 669–78; Stearns, Historical Evidence, supra note 9 (showing how modern standing case law and its development is consistent with what social choice theory would predict); Stearns, Standing Back, supra note 9, at 1349–62; Vikramaditya S. Khanna, Towards a Functional Analysis of Standing (Harvard Law & Econ. Discussion Paper No. 335, 2002), available at http://ssrn.com/abstract=304390 (discussing paucity of "functional analysis" of standing law).

the analysis of this Article by observing that broad standing makes entitlements inalienable and thus generates inefficiencies.[33] That work, however, does not deal with standing to assert constitutional or public rights. Rather, it focuses on the classic law and economics scenario of private nuisance litigation and acknowledges that extending the analysis to public law involves additional complications.[34]

II. STANDING AND EFFICIENCY

This Part shows how broad standing to challenge certain types of government action could result in inefficient outcomes because of high transaction costs and the possibility of strategic behavior.[35] Standing doctrine has long been unable to formulate coherent rules for principled identification of cases where it should apply. Understanding the problem standing responds to allows one to distinguish situations that pose genuine standing problems from those that do not.

A very brief discussion of prudential standing rules can also be found in William M. Landes & Richard A. Posner, The Economics of Anticipatory Adjudication, 23 J. Legal Stud. 683, 718–19 (1994) (discussing economic rationales for barring jus tertii suits and noting that allowing third parties to have standing makes it difficult to "allocate property rights to legal claims"). This Article shows that what Landes and Posner noted about jus tertii suits can be true even when primarily affected parties sue, and that standing doctrine can be a response to this problem.

Political scientists have also devoted little attention to the doctrine. For some rare exceptions, see Gregory J. Rathjen & Harold J. Spaeth, Access to the Federal Courts: An Analysis of Burger Court Policy Making, 23 Am. J. Pol. Sci. 360 (1979); C.K. Rowland & Bridget Jeffrey Todd, Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts, 53 J. Pol. 175 (1991); Staudt, supra note 1 (presenting statistical analysis demonstrating that when underlying law is unclear, judges use standing doctrine to advance personal policy preferences).

[33] Jensen et al., supra note 32, at 210–11.

[34] Id. at 206–07. Jensen et al. only mention suits against the government in a single paragraph and do not differentiate between constitutional and statutory claims. Id. at 212. They correctly note that their central point carries over from private law to public, but they do not go on to explore this. See also Scott, supra note 28, at 646 (arguing that economic analysis of standing must distinguish suits against government officials from litigation between private parties because the "important considerations . . . overlap to a degree but are far from identical").

[35] "Inefficiency" is used here in the Kaldor-Hicks sense to refer to the blocking of an action whose social benefits exceed its costs.

A. Structure of Constitutional Transactions

1. Differing Valuations

In the constitutional system, most entitlements are broadly or universally held. Entitlements are generally negative, giving the holder a right to be free of certain kinds of government action. However, different individuals can attach different values to each entitlement. There can even be differences in the *sign* of the values across entitlement-holders. The value of an entitlement to a person is the difference between the welfare derived from the government action that the right entitles one to be free of (*W*, which may be positive or negative) and the cost of challenging the government action in court (*C*, which is always a negative number), or $W - C$.

A person will be better off waiving his right when $W > C$. To start with the conventional case, if the government action results in a welfare loss for the entitlement-holder such that W = -$100, he will exercise his right at any C up to -$100. If we assume that the cost of enforcement is $10 ($C$ = -$10), then this person would bargain away the entitlement for any amount greater than $90 (the net benefit of enforcement). A second case deserves attention. The same government action may have positive welfare effects for a second entitlement-holder, such that W = $100. When C is -$10, she will exercise her right to block the government action only if paid at least $110 to do so.

The first person will be better off exercising his right at certain levels of *C,* while the second person will never be better off exercising her right, regardless of *C.* The first person would demand payment to waive his right; the second person would demand payment to exercise it. In the example above, if bargaining were possible the second person would pay the first anywhere between $90 and $100 to waive his entitlement. This outcome is efficient. All of this is a result of the welfare effect of the government action being negative for the first person and positive for the second. This Article shall refer to these two cases as *negative value* and *positive value* entitlement-holders*,* referring to their respective valuation of the government action that they have a legal right to be free of.

The notion of positive value entitlement-holders may at first seem counterintuitive, so a few additional words should be said in this regard. It is important to distinguish legal injury from harm.

The former refers to the violation of protected entitlements, the latter to the value or cost of the violation. The same legal injury can cause harm or benefit depending on the person's subjective disposition. The difference between assault and affection lies largely in how the recipient feels about them. In tort law, the difference between injury and harm is subsumed by the substantive law: a consensual touch is not a permissible assault, but simply no violation at all. The situation is less clear in constitutional law. With a police search, advance consent makes it "reasonable" and thus not a violation of the underlying entitlement. But not all situations are like this. Ex ante consent is only practical on an individual level. Broad violations of the kind that give rise to standing questions are not, and perhaps cannot, be consented to in advance, at least not by all affected rights-holders.

As Professor Scott has written, in a view typical of standing critics, "[o]nce the reality of nonmonetary injuries is accepted, it follows that an individual who attaches more weight to some personal value than do most does suffer a differential injury from its transgression."[36] But it also follows that individuals can attach different values to such injuries, and that these values may be positive or negative. This has important implications. If members of the injured class all have nonpositive values, and the principal relief sought is injunctive (as will generally be the case in this kind of constitutional litigation), then a plaintiff with a greater negative value may be a fine representative of the class. If values can be either positive or negative, the ideological plaintiff's interests may be opposed to the interests of other entitlement-holders within the class. This can present problems because the ideological plaintiff is in effect determining the disposition of the entitlements of the class as a whole.

2. Highest Value Use

From a social perspective, the highest value use of an entitlement— exercise or waiver—depends on the proportion of positive and negative value entitlement-holders and the actual values they assign. If the aggregate positive value exceeds the aggregate negative value, the socially optimal use of the entitlement is waiver.

[36] Scott, supra note 28, at 691–92.

Usually none of these issues arise because in most government actions each individual can choose between exercise and waiver in a way that does not affect or limit the choices of others. However, when a single government action infringes on many entitlements at once, and injunctive remedies are available, only one choice can be made.

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

For entitlements to be put to their highest value use they must be alienable to some degree. This is because the law does not always know the highest value use. The original entitlement-holder's use may be the highest value one in the most common circumstances or under the circumstances that obtain when the entitlement is allocated—but it may not be optimal in all circumstances. The debate about the relative merits of property, liability, and inalienability rules is largely about *how* alienable entitlements must be for them to be put to their highest value use.[37] Inalienability is only desirable when there is a high degree of confidence that the original distribution of entitlements is optimal under all circumstances. This is rarely the case, and thus most entitlements are alienable to a significant degree. This is just as true of constitutional entitlements as private law ones. Sometimes circumstances make resources that are legally alienable de facto inalienable. High

[37] Compared to property rules, liability rules promote easy transfer of entitlements and thus on this score may promote efficient allocations. But there is a greater chance that the transfer price under a liability rule would not be accurate, thus encouraging either too much or too little transfer.

transaction costs are a common source of alienability limitations, and lowering them is universally regarded as a good role for law.

B. Defining the Problem

1. Jointness

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

2. Inaugural Example

The efficiency implications of broad standing can be best explained with an example, taken from a little-noted recent case that would have commanded national attention were it not dismissed on justiciability grounds. Everyone has an individual right under the First Amendment to be free of an establishment of religion. The right is personal: establishment does not violate the Constitution in some sterile sense, but rather infringes on the several anti-establishment entitlements of a multitude of people.[38]

[38] See Flast v. Cohen, 392 U.S. 83 (1968) (upholding taxpayer standing to challenge government spending on Establishment Clause grounds). Indeed, challenges to Ten Commandments displays on public land proceed without the courts making a peep

Suppose that a few months before a presidential inauguration it becomes clear that the event will involve public prayers delivered by sectarian clergy. Learning of this, a committed atheist sues in federal court to enjoin the imminent violation of his entitlement against religious establishment.[39] Unlike the plaintiff, most people are not bothered by such a public display, even though they also have a right to be free of it. Call this group the "Indifferent." A second group prefers to have public prayers at the inauguration for the sake of tradition, national unity, or any other reason. Call them the "Inaugurationists." The plaintiff belongs to a third, much smaller portion of the population (the "Dissenters") that feels aggrieved by the pending inauguration. The Inaugurationists and Dissenters correspond respectively to the positive and negative value entitlement-holders discussed above.

The Indifferent make up 30 people out of a hypothetical population of 100. Their welfare will not be affected one way or the other by the inauguration or lack thereof. The Inaugurationists consist of 69 people, who would each experience a $100 benefit from the inauguration. Their right to be free of this establishment has a negative value: for the sake of having the inauguration, they would give up their entitlement to be free of it and pay $100. (Entitlements can become liabilities, like a property interest in a junked car.) The third group consists of just one person. This Dissenter would experience a $1000 loss from the ceremony. Finally, there is no objective external indicator of what group one belongs to. Group mem-

about standing. See, e.g., McCreary County v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005). (The Court did note that the plaintiff physically "encounter[ed]" the objectionable display—an observation apparently intended to suggest the plaintiff does not have a general injury. See *Van Orden*, 545 U.S. at 682.) At the same time, there is no taxpayer or citizen standing to challenge in-kind subsidies of religious institutions, suggesting at least some tension or confusion in the Establishment Clause standing doctrine. See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 485–86 (1982).

[39] Newdow v. Bush, 355 F. Supp. 2d 265, 268 (D.D.C. 2005) (describing the plaintiff challenging the 2005 inauguration as a "well-known atheist litigant"). The court found, albeit with some difficulty, that Newdow's exposure to "offensive religious materials" constituted an injury in fact, but found he lacked the "redressability" crucial to standing because of doubts about the court's ability to enjoin the inauguration. Id. at 279–82. Newdow had brought a similar suit against the 2001 inauguration, where the court found he did not even have an injury. Id. at 268–89. The crucial difference was that in the second case Newdow had obtained a ticket to the inauguration, whereas in 2001 he had said he would watch it on television. Id. at 269, 271.

bership is open, since it depends entirely on subjective valuations. One can become religious or lose religion; one can acquire or lose an interest in inaugurations; one can become disgusted or indifferent to religious overtones at public events. A crucial consequence is that no one knows the size of their own or any other group.

The socially optimal outcome is for the inauguration to proceed. The inauguration would produce $6900 worth of social value and $1000 of social cost. And so long as the entitlements are alienable, the socially optimal outcome will triumph; the 69 Inaugurationists could settle with the one Dissenter so that he would not pursue his Establishment Clause claim. Any settlement between $1000 and $6900 would leave everyone better off.

A liberal standing regime would prevent such efficiency gains from being realized. While the original dissenter has an entitlement that would allow him to block the inauguration, so does everyone else. As a result, the Inaugurationists gain nothing from settling with the first Dissenter because, as far as they know, someone else could come along and bring the same claim, necessitating the same settlement. Assume all settlements are for $1100. In the absence of the problem caused by standing, the Inaugurationists would be willing to settle with up to six people. But unless they know that there are no more than six dissenters, it does not make sense for them to settle with even one. Thus, in an example with only one Dissenter there will be no settlement, despite its efficiency.

Moreover, given the way class membership is defined it is impossible to know the number of Dissenters because this number is likely to change. Assume now that there are initially *six* Dissenters. They all settle their claims for $1100. If they did so, however, a seventh person could become a Dissenter and bring the same claim. This is because the characteristic that creates the class—objection to the inauguration—does not create a *closed* class. The problem becomes much more severe if one introduces insincere behavior; indeed, it becomes more severe simply if the Inaugurationists *expect* insincere behavior.

Returning to the example, if a subsequent seventh dissenter is paid off, settlement costs would exceed the social value of the inauguration; if he is not, he could enjoin the inauguration, making the $6600 in payments to the first six Dissenters pure waste. The outcome either way is inefficient, and so the Inaugurationists

would not bother settling with anyone in the first place. Thus each individual's right is in effect inalienable. This benefits no one, not even the Dissenters. Were standing narrower, the Dissenter would be able to trade his right for something worth more to him.

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

3. Holdout

Even if the dissenting class were small, identifiable, and closed, strategic behavior could foil socially valuable action because any one entitlement-holder exercises veto power over a government program that involves the entitlements of many. The situation resembles one where the government needs to purchase ten adjacent lots to expand an airport runway. Each transaction is legally distinct; each property owner can only transfer his individual parcel. To realize its goal the government must purchase all the lots. It does not get ninety percent of the benefit if it buys nine houses but not the one in the middle. Rather, until it secures one hundred percent of the rights it gets no benefit from having secured some.

While each individual only owns his own parcel, the structure of the situation gives him the bargaining power that an owner of *all* the parcels would have. Because the realization of the social surplus depends on the consent of each owner, each owner can hold out for a disproportionately high share of surplus—in this example, more than one tenth. In effect, the combined parcels have ten dif-

ferent owners. This kind of strategic behavior, known as holdout, is the paradigmatic cause of transactional breakdown.[40] Satisfying the demands of all of the owners would wipe out the social surplus. Of course, a complete failure of the transaction is a lost opportunity for the owners. They might try to organize themselves to present a coordinated settlement. Here they will face all the difficulties of cartelization. But even assuming that they can come together, there will always be an incentive for one of the owners at the last minute to demand a slightly greater amount from the government. Unlike the homeowners in the above example, entitlement-holders in these situations are likely to be geographically isolated, with few or no prior interactions, united only by their common valuation of the entitlement (that is, by valuing the affirmative exercise of the entitlement more highly than its waiver). It would be difficult for such a group, lacking any means of coercion over its members, to organize itself and prevent last minute cheating.

Broad standing presents the holdout problem on a massive scale. The more open the standing doctrine, the greater the number of de facto "co-owners" of the entitlement. As the number of co-owners increases, so does the likelihood of holdout. Moreover, the possibility of coordination decreases. Indeed, in a situation like that presented by the inauguration example, when the potential plaintiffs include everyone in the country, holdout seems guaranteed.

4. Other Problems

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

[40] See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1107 (1972); A. Mitchell Polinsky, Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies, 32 Stan. L. Rev. 1075, 1078 (1980).

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

If the number of positive value entitlement-holders were high enough, one could imagine the government acting as an agent for them. This would be convenient since the government would be the defendant in any constitutional challenge and so its interests would coincide with those of the positive-valuation group. This is an imperfect solution, of course. The government's willingness to pay is an imperfect measure of the value of the entitlement. It may settle even when it is inefficient—that is, the government may offer a settlement that exceeds the surplus of the Inaugurationists simply to avoid an embarrassing court defeat.

5. The Cause-of-Action Theory Distinguished

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

In the account of standing given here, the doctrine does valuable work precisely when a plaintiff has a real injury, a genuine cause of action, but the social costs of entertaining it exceed the plaintiff's valuation of his entitlement and transaction costs block an efficient solution. This account accepts the criticism of standing doctrine that an individual who claims to be injured by a violation of his constitutional rights cannot be presumed to be a liar at the pleading stage. At the same time, it rejects the critics' view that the *sole* question is whether the plaintiff has a cause of action. One must still ask whether individuals' rights *overlap* in a way that can prevent their efficient allocation.

This analysis does not deny the importance of the academic criticism of standing. No doubt courts sometimes deny standing based on implicit judgments about whether the plaintiff can state a claim,

or from hostility to the kind of rights the plaintiff asserts.[41] Using standing to discuss substance is unjustifiable, and, in such situations, standing cannot be expected to solve jointness problems because there may be no jointness problem to solve. Standing does not serve efficiency purposes simply by being invoked by a court; it needs to be invoked in response to a particular structure of challenged conduct and distributed rights. This Article shows, however, that there is an autonomous role for standing doctrine that is entirely separate from the merits. When used in this role, standing serves broad social ends.

C. Denying Standing

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

The first inquiry, in particular, risks being impressionistic and ad hoc. Judges, especially before discovery, have little direct evidence of the plaintiff's valuation of her entitlement and even less about the valuations of the myriad absent entitlement-holders. To be sure, a court is not entirely without information about the valuations of the large number of nonlitigious entitlement-holders. That the plaintiff's preferred use differs from the majority can be inferred from the mere fact that the plaintiff, unlike everyone else, has chosen to seek judicial remedies. What a court does not know, however, is the precise valuations of the nonlitigious. Their preference for nonexercise could be very slight and potentially outweighed by the exercise preferences of a very small number of plaintiffs.

This suggests that not every case raising a standing problem requires a denial of standing solution. Rather, dismissals might be reserved for cases where the social-value calculus seems clear. Of

[41] See, e.g., Allen v. Wright, 468 U.S. 737 (1984).

course, such an approach to standing sounds more like a prudential policy rather than a strict jurisdictional bar, and were the Court to take such an approach standing doctrine would seem erratic (as it currently does) in that the same *kind* of injury would sometimes get standing and sometimes not. But one might think such pessimism is unwarranted as the endeavor is not so different from a court attempting to "reconstruct the hypothetical bargain" in contract interpretation. In both situations the court attempts to anticipate what would happen if transaction costs did not prevent an explicit agreement. Still, from an efficiency perspective, the lack of information about private valuations is the problem with using standing doctrine as a solution to jointness.[42]

Once a jointness problem is identified and the court thinks the plaintiff might not be the highest value user, a second question arises: whether the court *needs* to preempt the market because transaction costs would prevent efficient final allocations. This is the question of whether transaction costs are high enough to block efficient exchange. Jointness is a matter of degree. At the extreme end of the spectrum are single, national actions like an inauguration, a congressional prayer, or the disclosure of official information. The costs of liberal standing are at their highest in these situations. At the other end of the spectrum are actions with minimal rights overlap, such as the Fourth Amendment search rights of sole property owners. Many cases will lie in the middle—where the action affects a subset of the population. Most religious display cases will be of this variety. A Ten Commandments display in a county courthouse will affect many people, but fewer than a national inauguration.

Again, the question of when transaction costs from group size become high enough to threaten efficient bargains is an empirical one and not unique to the standing doctrine. Despite the extensive law and economics literature on large-numbers transaction costs in private law, there is almost no discussion of what might constitute "large."[43] Still, given what is considered a "large group" in the ex-

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

[43] See Elizabeth Hoffman & Matthew L. Spitzer, Experimental Tests of the Coase Theorem with Large Bargaining Groups, 15 J. Legal Stud. 149, 171 (1986) (concluding

perimental literature,[44] it seems that all assume that jointness on the scale created by even localized government action would pose significant transaction problems. (Recall also that the jointness problem is not simply one of large numbers, but also of an indefinite and open class.)

D. The Definition Applied

Having defined the identifying features of a transaction-cost based standing problem and shown the differences between this and the cause-of-action understanding of standing, this Section will show how this definition can be used to identify standing problems involving constitutional rights that all agree create individual entitlements and causes of action. The examples outlined below show how the function of standing described here can, in particular cases, produce results different from those that would be reached under the dominant understandings of the doctrine. The first example would be justiciable under standing doctrine as understood by the Court but not under the definition presented here; the second might not be justiciable under current doctrine but should be under the definition presented here.

1. The Fourth Amendment and Data Mining

The Fourth Amendment is not a font of standing controversies. Someone subject to a search can bring a constitutional challenge.[45] But this is not inherent in the Fourth Amendment, as the cause-of-action theory would argue. Rather, it is a consequence of the kinds of actions that typically raise Fourth Amendment concerns. Most searches take place one person, or one premises, at a time. Even if a single police sweep targets many homes, each person can individually seek to enjoin the search. If five out of a hundred people

from experiments with students that transaction costs of negotiating are not prohibitive when there are fewer than thirty-eight parties); see also Ward Farnsworth, Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral, 66 U. Chi. L. Rev. 373, 384 (1999) (presenting case studies suggesting that post-injunction bargaining often does not occur even when there are few parties).

[44] See Hoffman & Spitzer, supra note 43, at 171.

[45] See Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (holding that the Fourth Amendment provides a basis for judicial relief even without a congressionally created cause of action).

sue and obtain injunctions while the other ninety-five consent, ninety-five searches can take place: the action is divisible. The divisible nature of the defendant's conduct means standing questions will not arise.

Now consider a situation where standing problems could arise under the Fourth Amendment. Suppose the government uses a data mining program to sift and process massive amounts of anonymous personal information.[46] Vast databases from credit card companies, airlines, and others are fed into the program, which searches for patterns suggestive of terrorist activity. Because the information is not initially tagged with people's names and because the databases that are used must remain secret for the program to work, it is impossible to get consent to such a search. Because it is impossible to exclude opt-outs from the program, a Fourth Amendment challenge would raise a jointness problem. The assertion of Fourth Amendment rights by one person would lead to an injunction that would block the (potentially) consensual searches of a vast multitude. Though the entitlement involved is the Fourth Amendment's protection against unreasonable searches, denying standing may be appropriate.[47]

2. Legislative Standing

In the 1970s, members of Congress turned to the federal courts, and in particular the U.S. Court of Appeals for the D.C. Circuit, to

[46] See Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 988 (N.D. Cal. 2006). This hypothetical is motivated by programs like the Computer Assisted Passenger Profiling System II and the Defense Department's Total Information Awareness Program, the details of which remain classified.

[47] The U.S. Court of Appeals for the Sixth Circuit has recently denied standing in a case involving a Fourth Amendment challenge to the National Security Agency's data mining program. See ACLU v. Nat'l Sec. Agency, 493 F.3d 644 (6th Cir. 2007). Because of the program's secrecy, the plaintiffs were not permitted to know whether their information had been mined. Id. at *1. In concurrence, Judge Gibbons observed that this inability to discover the particular treatment of each plaintiff was the source of the standing problem. Id. at *34 (Gibbons, J., concurring). But see *Hepting*, 439 F. Supp. 2d. at 1000 (holding that customers of telephone company have standing to bring suit alleging that the company turned over millions of phone records to the government for data mining because while they could not show that their records were involved, they were within a "dragnet" designed to round up the communications of the company's customers).

challenge actions by the executive or even their own chamber.[48] In several cases the D.C. Circuit held that legislators had standing to challenge actions that weakened the political power of their office or branch.[49] The Supreme Court only recently entered the fray in *Raines v. Byrd*, denying standing to a few members of the House and Senate who challenged the Line Item Veto Act on separation of powers grounds.[50] In *Raines*, the plaintiffs argued that allowing the president to unbundle legislation would reduce the individual voting power of each legislator. The Court found this argument too "abstract and widely dispersed" to constitute an injury in fact.[51]

In terms of the transaction-cost function of standing, *Raines* appears unjustified. Congress consists of a relatively small number of people whose identities are known and fixed. Both individual legislators and Congress as an institution can and do negotiate with the executive branch and other legislators. There may be a concern that allowing individual legislators standing effectively creates a one-Congressman veto, far different from the majority rule envisioned by Article I. But unlike in the situations discussed above, transaction costs would not prevent effective bargaining.

E. Objections

1. Equal Protection

The idea that constitutional violations can be in effect "consented to" when it would be efficient might suggest that the function of standing doctrine described here allows its use as a tool of majoritarian oppression. There is an important difference, however, between using standing as a response to jointness and adopting a purely utilitarian conception of rights. The transaction-cost

[48] See Fallon et al., supra note 14, at 165.

[49] See, e.g., Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (holding that a Senator has standing to challenge constitutionality of pocket veto because it negates his vote for the vetoed legislation); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir 1973) (holding that Congressmen have standing to challenge the Vietnam War on separation of powers grounds but dismissing on political question grounds); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973) (finding legislative standing but no citizen standing to challenge firing of Watergate Special Prosecutor).

[50] 521 U.S. 811 (1997); see also Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999) (citing *Raines* as the reason for not following the circuit's precedents from the 1970s).

[51] *Raines*, 521 U.S. at 828–29.

account certainly does not mean that if a majority ethnic group values discriminating against a minority group more than the latter would pay to be free of the discrimination, that the minority group members should not have standing to object.

The jointness problem simply does not exist when the rights of some are violated but the same rights of others similarly situated are not. A defining feature of the injury requirement is that a government action infringes on the entitlements of a broad class of people. This would not be the case in a situation where a majority countenances the infringement of the rights of a minority. Instead, it happens where the rights of all members of the class are infringed, and the only possible difference among class members is how much they would pay to be free of the infringement.

Thus standing is protected from majoritarian abuse because for the doctrine (as described here) to apply, all must have their rights on the line. Yet the gist of the equal protection claim is that the basis by which the class of affected people was defined was in itself illegitimate. So it would be odd to deny standing on injury-in-fact grounds for an equal protection claim.[52] Equal protection violations involve singling out a particular class for inferior treatment; singling out is the antithesis of jointness, for such a class is presumably limited and defined.[53]

2. Vindicating Social Values

The discussion thus far has assumed that rights can be understood in the fundamentally utilitarian Coasean framework. Now two broad objections will be addressed. First, much of liberal constitutional theory holds that rights are "trumps" and rejects the notion that they should yield to even powerful social welfare considerations.[54] This is a radically individualistic understanding of

[52] But see Allen v. Wright, 468 U.S. 737, 757 (1984).

[53] One could imagine the opposite problem—what might be called "intentional jointness," where the government broadens the scope of a constitutionally dubious action to include a great number of people specifically to create standing difficulties. If the government ceases a challenged action to evade review, courts will entertain a challenge despite its mootness. Presumably courts could take the same approach to intentional jointness.

[54] See Ronald Dworkin, Taking Rights Seriously 184–205 (1977) ("The prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do.").

rights—each individual's exercise of her rights supersedes all communal considerations.[55] The second objection regards constitutional rights as merit goods designed to protect not only or even primarily the individual entitlement-holders, but rather broader social interests.[56] Assigning these rights to individuals is merely a convenient enforcement tool since they will have the most immediate knowledge of violations and the greatest incentive to litigate. Individuals' private valuations of their rights, however, do not reflect the social benefit of exercising these rights. In this view, there is cause to celebrate if liberal standing, by preventing settlement, blocks encroachments on constitutional entitlements. The inefficiencies that might result from liberal standing are illusory in that they are calculated solely on the parties' private valuations, disregarding the even larger merit good value of the right. Liberal standing, by making rights effectively inalienable, achieves through the backdoor the results argued for by Professor Fiss[57]—a good thing if one thinks there is no such thing as an efficient violation of constitutional rights.

The rights-as-trumps argument will be dealt with more fully in the next Part. That discussion will show that jointness implicates rights-rights tradeoffs. Both the plaintiff and the nonlitigious rights-holders have constitutional rights which they wish to use, albeit in different ways. The only question is whose rights trump. The merit good argument will be considered here. Undoubtedly the exercise of constitutional entitlements can have structural benefits, and an individual's valuation of a right may not capture all the positive externalities of its exercise. The value of a right can have both private and public components. Determining the portion of a right's value that can be attributed to private value and what is the

[55] See id. at 193–94.

[56] See Redish, supra note 1, at 93–95 (arguing that issues involved in litigation go far beyond the interests of the particular plaintiff, and thus the injury-in-fact requirement artificially limits the ability of courts to vindicate those interests); Laurence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330, 332–34 (arguing that there are some rights that are not individual but that try to structure society in particular ways, and that "individuals cannot waive them because individuals are not their sole focus").

[57] Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1084–86 (1984) (arguing against settlement of cases on the grounds that they deprive courts of an opportunity to interpret the values implicit in the law "and to bring reality into accord with them").

additional merit value is difficult, however. Saying there is some broader value not reflected in individuals' valuations does not mean the efficient level of constitutional violation is zero—yet a liberal standing regime will result in a zero level so long as one person is willing to sue. Similarly, saying private valuation captures much of the value in a right does not mean it captures all of it. Thus there could be cases where the sum of the plaintiff's private value and the merit good value exceeds the aggregate of the private valuations on the other side. This means that a denial of standing is not always the correct response to a transaction-cost based standing problem.

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

The economic function of standing does not depend on any particular philosophy about the nature of rights. Rather, in the face of prohibitive transaction costs, standing attempts to replicate as closely as possible the situation that would obtain if transaction costs were low. In all other ways, the doctrine stays constant to prevailing constitutional values. The efficiency-promoting property of standing lies in solving the problem of jointness, which is an accidental byproduct of government action lacking any value-content. When a single individual chooses to waive or settle a con-

stitutional entitlement—by agreeing to suppress a newspaper story, for example—the merit good value of asserting the constitutional right is forfeited. The ubiquity of such waivers and the general tolerance of them suggests that, at least on the individual scale, the merit good component of rights is less than their private value. Jointness simply involves the aggregation of many private and merit good values across many people; the ratio of the private to merit value does not necessarily change when many are injured. It is artificial to think individuals are the best judges of the value of their entitlements when the government violates them serially, but not when the government violates them simultaneously. Indeed, settlement is permitted in class action suits involving constitutional rights even when the settlement does not fully vindicate the interests of some class members.[58] Thus even in group litigation involving public rights, individual valuations play the leading role.

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

III. STANDING AS PROTECTION FOR RIGHTS

Understanding the jointness problem allows one to recognize another public-minded function of the injury-in-fact requirement: protecting individuals' choices about the exercise of their rights. This Part develops a new account of standing that parallels the

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

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

Id. at 1997 (quoting Armstrong v. Bd. of Sch. Dirs., 616 F.3d 305, 312–13 (7th Cir. 1980)).

transaction-cost account in Part II. Here, however, the Coasean framework is set aside in favor of a rights-based approach. As will be seen, jointness produces undesirable outcomes in a framework that treats rights as incommensurable or as trumps.

This Part should also alleviate a set of related concerns with the argument thus far. Recall the "rights-as-trumps" objection raised in Section II.E. Constitutional theory does not typically conceptualize constitutional rights as "resources" or "entitlements," so the notion that constitutional law should direct rights towards their highest value use may seem odd. Moreover, many believe that for reasons of incommensurability, constitutional rights cannot be reduced to the arithmetic of efficiency. Furthermore, constitutional rights are a response to fears of majoritarian exploitation. Individual rights lose their luster if they do not protect the unpopular activity of the few, or even the one. One might think the efficiency function of standing is illegitimate as it contemplates sacrificing the rights of a few to satisfy majoritarian preferences.[59]

This Part shows that because of the jointness phenomenon, liberal standing has consequences that can be measured purely in terms of individual rights. The rights of the plaintiff whose standing is in question conflict not merely with the *preferences* or *welfare* of others, but with their own constitutional rights. Thus standing problems represent not just a tradeoff between the vindication of constitutional rights and the maximization of social welfare; they also represent a rights-rights tradeoff.[60] The efficiency and rights-based functions of standing are isomorphic but logically and doctrinally distinct. They also have different normative implications, with the rights-based function more clearly supporting a robust standing doctrine.

[59] See Epstein, supra note 26, at 34 (arguing for taxpayer standing to check the constitutionality of legislation); Redish, supra note 1, at 93–95 (arguing that the injury-in-fact requirement interferes with the Court's function as a countermajoritarian check on the political branches).

[60] See Robert Cooter, The Strategic Constitution 258 (2000).

A. Two Sides of Rights

1. Nonexercise and Waiver

An important but often overlooked portion of a legal entitlement is the right to *not* exercise it through litigation. One need not bring all causes of action one possesses. One can waive one's rights because of distaste for litigation, a desire to maintain good relations with others, or any other reason. This is evident for standard tort or contract causes of action. As first-year students realize when reading *Vosburg v. Putney*,[61] tort causes of action accrue all the time; it is mostly the aggrieved entitlement-holders' private decisions not to exercise their rights that keeps the courts from being flooded with claims of assault.[62] Torts occur far more often than they are litigated because rights-holders choose to not assert them.

The same is true of constitutional rights. Constitutional rights give their bearers the *option* to block governmental action, but they do not require them to do so.[63] They can exercise their right, relinquish it in exchange for some consideration or to avoid social stigma, or waive it for no reason at all. In Calabresi and Melamed's terms, constitutional rights are protected by property rules rather than inalienability rules.[64] Injunctive relief is not automatically acti-

[61] 50 N.W. 403 (Wis. 1891).

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

[63] See Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. Legal Stud. 289, 317 (1983) (arguing that plea bargaining is underpinned by the "autonomy value" of rights, defined as "the right to waive one's rights as one method of exercising them"); see also Lynn A. Baker, The Prices of Rights: Toward A Positive Theory of Unconstitutional Conditions, 75 Cornell L. Rev. 1185, 1217–18 (1990) (noting that "ours is primarily a market economy and that economic structure has inescapable implications for the meaning and operation of constitutional rights," such as the fact that the exercise of rights has an explicit or implicit price).

[64] Inalienability is actually a matter of degree, and almost all rights are inalienable in some weak sense. A right is inalienable in the strongest sense if it cannot be waived or bargained away in whole or in part for any reason. Perhaps only the Thirteenth Amendment is inalienable in this sense. See Bailey v. Alabama, 219 U.S. 219, 241–43 (1911) (holding unenforceable a voluntary personal service contract that contemplates enforcement through specific performance or punitive damages); see also Eugene Kontorovich, Liability Rules for Constitutional Rights: The Case of Mass Detentions, 56 Stan. L. Rev. 755, 763–64 n.18 (2004) (describing Thirteenth Amendment's ban on "involuntary servitude" as an inalienability rule); Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1387–88 (1984). A weaker inalienability rule forbids trading the right,

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

2. Constitutional Entitlements

While constitutional entitlements are regarded as more solemn than common-law or statutory ones, they are generally waivable like ordinary tort rights.[65] This is most evident in the realm of constitutional criminal procedure.[66] To take a ubiquitous example, plea bargainers waive their Fifth Amendment right to liberty in exchange for favorable consideration from the prosecutor, to avoid the bother or embarrassment of trial, out of a desire to pay for their crime, or for no reason at all.[67] A plea bargainer also waives all constitutional trial rights, such as the right against self-incrimination, the right to a jury, and the confrontation right. All of

but allows simple waiver and abandonment. The right to vote is of this kind. One cannot sell it, but one can waive it, as most people do. (By contrast, in many Western nations, voting is obligatory because it is seen as serving primarily public purposes; the absence of such laws in the United States is due in part to the presumptive waivability of rights.)

Most constitutional rights are alienable to the same extent as common-law tort rights. One can certainly waive or "alienate" by selling a claim to the defendant through settlement. But one cannot sell the rights to third parties, or prospectively sell unmatured claims—though some state courts have begun to ease restraints on alienation of tort claims. See Michael Abramowicz, On the Alienability of Legal Claims, 114 Yale L.J. 697, 699 (2005) (presenting economic analysis regarding the effects of relaxing restrictions on alienability for torts).

[65] See Adams v. Carroll, 875 F.2d 1441, 1443 n.2 (9th Cir. 1989) (observing that "most constitutional rights are waivable"); Tribe, supra note 56, at 330 ("In our constitutional system, rights tend to be individual, alienable . . . . [and] subject to binding waiver or alienation.").

[66] See Jason Mazzone, The Waiver Paradox, 97 Nw. U. L. Rev. 801, 871 (2003) (observing that while the "waiver doctrine" generally permits forfeiting or even bargaining away criminal defense rights in exchange for some benefit from the government, the parallel doctrine of unconstitutional conditions severely restricts individuals' ability to bargain away First Amendment rights).

[67] United States v. Goodwin, 457 U.S. 368, 378 (1982) (noting legitimacy of plea bargaining).

these rights can also be waived with or without consideration from the government.

The Sixth Amendment entitles criminal defendants to a lawyer. This right is considered important enough that suspects must be informed of it upon their arrest, and the government must pay for counsel for those who cannot afford one. Defendants can, however, forgo the entitlement to counsel even for idiosyncratic or foolish reasons.[68] This is true even if waiver would not serve the broader social ends of justice, such as the search for objective truth or the restraint of governmental misconduct. The individual controls the disposition of his entitlements because he bears the immediate and most salient consequences of his choices, not because he bears all the consequences.[69]

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

Journalists have a First Amendment right to publish at least some national security related information over the government's objection. The press can waive this right by agreeing to not publish the information at the government's request. This consent might be given out of a belief that the national security interests involved trump the informational ones, even in a situation in which a court would strike this balance differently. Such a waiver of First Amendment privileges can even be granted for purely self-

[68] Faretta v. California, 422 U.S. 806, 836 (1975).

[69] Id. at 834 ("The defendant . . . will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.").

interested reasons, such as to avoid alienating readers or for promises of scoops in the future.

Mass, long-term consent to unconstitutional activity is evident from the recent cases invalidating long-standing public religious displays.[70] Presumably these displays were nominally unconstitutional since their inception, thus violating the rights of tens of thousands of individuals. That a case only emerged after several decades of ongoing violation shows that all the affected individuals chose to forgo the judicial assertion of their rights, presumably because the value they attached to the display was greater than the value they attached to their Establishment Clause rights net of litigation costs. Such long-term consent has been validated by the courts in their analysis of the Establishment issue on the merits, but there is no reason it cannot also inform standing analysis.[71]

The waiver or consent discussed here, like the bargains discussed in Part II, are usually informal and implicit—an entitlement-holder

[70] See, e.g., Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991) (holding unconstitutional cross and other Christian symbolism in city logo and seal adopted in 1902); Buono v. Norton, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002) (holding that large wooden cross in national park, originally erected in 1934 as a veterans' memorial, violates Establishment Clause), aff'd, 371 F.3d 543 (9th Cir. 2004).

[71] Indeed, the Supreme Court's recent Ten Commandments decisions adopt this approach. In two cases decided the same day, a display erected in the 1950s and that encountered no protest for decades was found constitutional, while one put up in 1999 and immediately challenged was struck down. Indeed, the Court noted in the former case that the plaintiff "apparently walked by the monument for a number of years before bringing this lawsuit." Van Orden v. Perry, 545 U.S. 677, 691 (2005). Justice Breyer placed particular reliance on the forty-year history of acquiescence. His comments suggest that the general public's acceptance of a religious display because of its nonreligious benefits can make it constitutional, despite a minority of belated dissenters feeling otherwise. See id. at 702–03 (Breyer, J., concurring) ("40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). . . . Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage."). While the Court apparently took the public consent as evidence that people did not perceive the display to endorse religion (and thus relevant to the merits), it could just as easily have meant that the public did not mind the endorsement of religion, or thought that the benefits of the display compensated for the violation of their Establishment right. See also Freethought Soc'y of Greater Phila. v. Chester County, 334 F.3d 247, 250, 265–66 (3d Cir. 2003) (upholding eighty-two-year display of Ten Commandments in courthouse in part because of long history of acquiescence, including by the plaintiff, who "noticed the plaque as early as 1960 but was apparently not bothered enough by it to complain until 2001").

simply does not bring a legal action. But constitutional entitlements can also be contracted away in a formal manner.[72] A rights-holder can bring a suit against the government and then settle it. The settlement extinguishes his right to sue in exchange for some consideration. Indeed, a settlement of a constitutional claim is simply a common-law contract.[73]

B. Rights-Rights Tradeoffs

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

A constitutional entitlement's value to its owner has two relevant components. Part of its value comes from being able to use it affirmatively (through bringing a suit), to be free of conduct that violates the entitlement. Another part of its value consists in the option to waive or trade it. This is the option value of the entitlement. Even if the entitlement-holder would never actually trade it, the power to do so in the future has some real present value. Thus an action by a third party that prevents alienability destroys part of the right's value to its holder.[74]

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[72] See Erie Telecomms. v. City of Erie, 853 F.2d 1084, 1096 (3d Cir. 1988) ("[C]onstitutional rights, like rights and privileges of lesser importance, may be contractually waived . . . .").

[73] See, e.g., Lynch, Inc. v. SamataMason Inc., 279 F.3d 487, 489 (7th Cir. 2002) ("Because the parties are not diverse, any suit to enforce the settlement agreement . . . would have to be brought in state court even though the settlement was of federal . . . claims.").

[74] See Frank H. Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information, 1981 Sup. Ct. Rev. 309, 347 (1981) ("One aspect of the value of a right—whether a constitutional right or title to land—is that it can be sold and both parties to the bargain made better off. A right that cannot be sold is worth less than an otherwise-identical right that may be sold. Those who believe in the value of constitutional rights should endorse their exercise by sale as well as their exercise by other action.").

To illustrate, consider *United States v. Richardson*, where taxpayers sought to compel the CIA to publish the names and salaries of its secret agents.[75] People have a right to such a public accounting under the Accounts Clause of Article I. In this scenario, it seems that most holders of the entitlement would strongly prefer to not use it, so as to keep the information classified. But if even one individual brings suit, everyone else can no longer exercise *their* individual option to sue or not sue, to know or not know. If part of the value of a right is the ability to not exercise it, then the Accounts Clause plaintiff diminishes the value of everyone else's right—he interferes with their ability to use their right as they see fit by rendering their waiver moot. The tension is not between one person's exercise of his constitutional entitlement and mere majoritarian preferences. The ability to waive a right is ultimately a product of the right. Thus the tension is between rights on the one hand and rights on the other.

Because one person's exercise of his right implicates everyone else's exercise of theirs, it emerges that the standing doctrine is in an important sense about third-party standing.[76] Third-party standing, or jus tertii, is a prudential doctrine that prohibits a plaintiff from litigating the rights of others, even when there is an injury in fact to the absent party. The Court has observed that a reason to deny standing when the "rights of third parties are implicated [is] the avoidance of the adjudication of *rights which those not before the Court may not wish to assert*."[77] The analysis here shows that all true injury-in-fact problems are in part third-party standing problems. In situations of jointness, a party seeking to vindicate his own rights necessarily litigates the rights of others as well.

C. Waiver as a Right

One might object that the right to waive or trade a constitutional entitlement is not of the same dimension or magnitude as the right to exercise it. The right to be free of governmental conduct might not include the right to consent to it. Of course, consent is allowed,

[75] 418 U.S. 166 (1974).

[76] See Richard A. Posner, Economic Analysis of Law 533, 598 (6th ed. 2003).

[77] Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80 (1978) (emphasis added).

but this may be for practical rather than constitutional reasons. The waiver right might be thought of as a second-order, derivative right. One might sharpen this argument and contend that the right to waive constitutional rights is not itself a constitutional right at all, but merely a consequence of having constitutional rights in a system of private litigation. The consequence is tolerated, but not protected.

Such a conception of the waiver right is plausible, but not obviously correct. The waivability of rights seems to be not an accident but a feature of the system of constitutional entitlements. Waivability of constitutional protections is the constitutional default, as evidenced by inalienability having to be a specified exception. To put it differently, if the inalienability of certain rights is a matter of constitutional law, it suggests that the alienability (through contract or waiver) of most rights is also a matter of constitutional law. Waiver is itself a constitutionally protected interest.

Finally, accepting the passive use of a right as being part of the right itself does not require believing that the passive use is as important as the affirmative use. One need only believe that both are aspects of the same right. For if the alienability right is relatively less important than the exercise right, but both have constitutional valence, then the alienability rights of many people might trump the exercise rights of a few.

There is little law or scholarship on this question, no doubt because waived rights do not give rise to cases. The few Supreme Court cases touching on this issue will now be examined closely. The cases are inconclusive, but they certainly legitimate (and the more recent ones more obviously support) the view that the nonexercise of a right is part of the protected autonomy interest conferred by the right.

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

On the two occasions when the Supreme Court has most explicitly considered these questions, it has come to different conclusions. In *Singer v. United States*, a criminal defendant wanted, against the prosecutor's wishes, to waive his right to a jury and have his case tried to the bench.[78] He premised his argument on the

[78] 380 U.S. 24 (1965).

general waivability of constitutional rights.[79] The Supreme Court upheld the trial judge's refusal to allow the waiver—not because the jury right cannot be waived, but because the Constitution does not affirmatively give anyone a right to a bench trial.[80] While the court noted that a defendant did have the "ability" to waive a jury trial if the judge and prosecutor agreed, it went on to find that the "defendant's only *constitutional* right concerning the method of trial is to an impartial trial by jury."[81] This language could suggest that the waiver right is of a lesser dimension, and perhaps different source, than the affirmative right.

Singer would lead some to think that a defendant has no right to refuse counsel,[82] yet ten years later the Court held in *Faretta v. California* that the right to counsel *does* include a right to waive the assistance of counsel.[83] The Court reconciled *Singer* by taking an implied rights approach. After examining the English and colonial roots of the right to assistance of counsel, the Court concluded that it implies a right to self-representation. This is not a waiver right per se but a substantive corollary right of its own that emerges from the "assistance" penumbra.[84] By contrast, the Court noted that nothing about the history or purposes of a public trial right suggests it needs to be supported with a right to a bench trial alternative.[85]

The Court's discussion in *Faretta* was framed not in terms of the procedural question of whether one has a right to waive rights, but rather the particular question of whether one has a right to particular outcomes sought in the cases. As a result, *Faretta* attempts to reconcile itself with *Singer* by saying that there is no general answer to the waiver question, but rather a separate inquiry for each

[79] Id. at 26 ("Petitioner further urges that since a defendant can waive other constitutional rights without the consent of the Government, he must necessarily have a similar right to waive a jury trial.").

[80] Id. at 36.

[81] Id. (emphasis added).

[82] See, e.g., People v. Sharp, 499 P.2d 489, 493 (Cal. 1972) ("[C]onstitutional language granting the right to the assistance of counsel lends no express support to a claim that an accused has the constitutional right to defend without counsel. . . . [T]he right to waive a constitutional protection is not itself necessarily a right of constitutional dimensions." (citing *Singer*, 380 U.S. 24)).

[83] 422 U.S. 806 (1975).

[84] See id. at 821–32.

[85] See id. at 820 n.15; *Singer*, 380 U.S. at 28–34.

substantive right.[86] Of course, this suggests ad hockery—a desire to limit the previous case to its facts. Indeed, the *Faretta* Court noted in dictum that a "defendant's *power* to waive [a] right" does not "mechanically" give rise to a constitutional "right" to waiver, but "the right must be independently found in the structure and history of the constitutional text."[87] This of course begs the question of where the "power" to waive comes from in the first place.

There is a better way to understand these cases. Together, *Singer* and *Faretta* show that a negative right cannot be transformed into an affirmative one. As is well known, constitutional law disfavors the creation of affirmative duties running from the government to citizens. In the typical waiver context, the individual has an entitlement to be free of certain action. Waiving the entitlement usually allows the government to take the action but does not obligate the government to do it. For example, if a citizen sees a police officer on the street and asks to be searched, the officer is not obligated by the citizen's waiver to search him. Similarly, in a plea negotiation, the defendant's desire to plead guilty does not obligate the government to accept a plea. In the trial context, however, there are two options, judge or jury, each of which must be provided by the government. Because there are only two options, waiver in effect creates an affirmative right. It obligates the government to provide the defendant with a particular thing, here, a bench trial. Given the reluctance to find affirmative governmental obligations in the Constitution, the *Singer* result is not surprising. The case does not hold that having a right does not generally come with the right to waive it, but rather that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."[88] In *Faretta,* by contrast, the defendant started with that rare creature, an affirmative constitutional entitlement, and wished to waive it. The waiver did not obligate the government to provide the entitlement-holder with anything at all, and thus the waiver was allowed.

[86] *Faretta*, 422 U.S. at 820 n.15.
[87] Id. (emphasis added).
[88] *Singer*, 380 U.S. at 34–35.

2. Elk Grove Unified School District v. Newdow

Both views of the relative value of the two aspects of an entitlement (the right to assert it offensively and the right to waive or trade it) can find support in two recent Supreme Court cases. In an overlooked part of *Elk Grove Unified School District v. Newdow*, the Court described an entitlement-holder's desire to acquiesce to a constitutional violation as a "constitutionally protectible interest[]" in its own right.[89] Regrettably, the Court did not expand on this characterization. A closer look at the facts of the case reveals a microcosm of the jointness problem, which the Court resolved by favoring the waiver interest over the exercise interest.

Newdow, whose daughter attended California public schools, brought as her next friend an Establishment and Free Exercise challenge against the mention of "G-d" in the Pledge of Allegiance recited at school. He claimed the girl was, like him, an atheist, and thus aggrieved by the state-sponsored religious reference. The girl's mother, who had joint custody, intervened to argue that the child was actually a Christian who did not mind the Pledge and would be harmed if it were repealed.[90]

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

In other words, there were two joint owners of the right to espouse the child's claims. One wished to use that right to challenge a highly colorable violation of the child's constitutional rights (and presumably those of other schoolchildren); the other wished to use the right by not using it. Thus the parents were effectively co-owners of the right to bring the Establishment challenge, but they

[89] 542 U.S. 1, 15 n.7 (2004).
[90] Id. at 9.

disagreed on the highest value use of this right.[91] Each had veto power over the other's preferred use, and it was the Solomonic scenario where the right could not be split down the middle.

The Court explained its decision in favor of the mother by noting that she seemed to have the slight preponderance of custody under state law—though the division of custody is admittedly unclear and silent on the question of legal assertion of rights.[92] A few words in a custody order is an extraordinary basis on which to decide a dispute about the highest value use of an entitlement to challenge unconstitutional government action.

What is particularly noteworthy is what the Court did *not* do. The Court could have resolved the two irreconcilable claims by throwing the tie to the side that wished to use the entitlement affirmatively. That is exactly what the court of appeals had done below:

> Banning [the mother] has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action. Newdow's assertion of his retained parental rights in this case, therefore, simply cannot be legally incompatible with any power Banning may hold pursuant to the custody order. Further, Ms. Banning may not consent to unconstitutional government action in derogation of Newdow's rights or waive Newdow's right to enforce his constitutional interests.[93]

Such reasoning finds no expression in the Court's opinion reversing the Ninth Circuit. On the contrary, for the Court, preventing violations of constitutional rights (the daughter's and others) is not an automatic trump value. The Court recognized that a party whose constitutional rights are being violated may prefer to waive those rights if they think the benefits (here, the primary benefit was avoiding social opprobrium) justify it and that such a preference is legitimate. Indeed, such a preference may dominate a con-

[91] Id. at 15 ("Newdow's rights . . . cannot be viewed in isolation. This case concerns not merely Newdow's interest in inculcating his child with his views on religion, but also the rights of the child's mother as a parent . . . .").

[92] See id. at 14 & n.6, 17.

[93] Newdow v. U.S. Congress, 313 F.3d 500, 505 (9th Cir. 2002), rev'd, 542 U.S. 1 (2004).

trary one *even when this entails preventing another party from exercising his constitutional entitlement.*[94]

3. Georgia v. Randolph

Georgia v. Randolph, on the other hand, found the Court favoring the affirmative use of an entitlement over its waiver.[95] The case began with a wife's domestic violence call. When the police asked for permission to search the house, the wife consented, but her husband vociferously objected. The Court held that the husband's veto made the search unconstitutional "as to him." The wife could consent to a search of the home, but so long as the husband was there objecting, the search could not be applied "to him." The Court was attempting to disaggregate overlapping entitlements. As Chief Justice Roberts shows in his dissent, even at the two-person level the cut was sloppy: if the search was valid "as to her," would not the plain-sight rule also allow the search to spill over to the drug paraphernalia the husband had left out?[96] Carving out opt-outs when entitlements overlap is not easy.

Here, two people had overlapping entitlements in the privacy of their home. One wished to trade the entitlement (for a police search), the other to use it affirmatively. The Court threw the tie to the affirmative use of the entitlement: "in the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches . . . the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place."[97] Here, the Court treated the affirmative use of the right as beating the waiver use. Yet it did not treat the affirmative use as a trump, however, but rather explicitly weighed it against the other side's various possible interests in con-

[94] Newdow had also raised constitutional claims in his own name, arguing that the Establishment violation harmed his ability to teach his daughter his religious views. See *Elk Grove*, 542 U.S. at 16. This claim also overlapped with the daughter's Establishment Clause right in that its successful exercise would prevent the daughter from acquiescing. The Court denied Newdow's standing to assert his own claim as well. Id. at 16–17.

[95] 547 U.S. 103 (2006).

[96] Id. at 137–38 (Roberts, C.J., dissenting).

[97] Id. at 114–15 (majority opinion).

senting. The balance in this case was struck partly by a belief that the interests of the consenting party could be served through other means that did not sacrifice the objector's right, while the opposite was not true.

Of course, the Court was dealing with a simple two-party situation where there was no ex ante reason to favor waiver over the affirmative use when they are tied (one rights-holder preferring the former use, the other the latter). The balance might look quite different with one objector out of ten thousand. After all, *Elk Grove* could be thought of as a case about three people with a rights-interest in a joint action—Newdow, the daughter, and her mother. Two out of three favored waiver, and waiver won the day.

IV. ALTERNATIVES TO STANDING: DISAGGREGATING JOINTNESS

This Part considers whether there are better solutions to the jointness problem than standing restrictions. While standing can avert massive social losses and interference with people's exercise of their rights, it is not costless. Standing cuts the transaction-cost knot by denying any relief to plaintiffs. Furthermore, to the extent that constitutional litigation is a vehicle for the vindication of broader social interests, standing restrictions frustrate this goal. Having defined the problem to which standing responds, one can analyze the potential of other solutions.

A. Liability Rules

When high transaction costs prevent effective bargaining, property rules threaten to lock in inefficient resource allocations. The jointness problem is one of high transaction costs, arising from a large number of disorganized entitlement-holders. Calabresi and Melamed famously found that the socially preferable solution in such a situation is to switch from the property rule protection that generally accompanies private law rights to liability rule protection, thus allowing a nonconsensual buy-out of the aggrieved parties' entitlements at a judicially determined price.[98] While their theory has had a limited effect on the nuisance entitlements that they took as their subject, it is descriptive of the legal response to such problems

[98] Calabresi & Melamed, supra note 40, at 1106–10.

in other areas.[99] For example, one finds a private rights example in corporate law in the form of minority shareholders' rights.[100] Likewise, in constitutional law a liability rule can be found in the Takings Clause.[101]

Instead of adopting a liability rule to deal with high transaction costs, standing doctrine adopts a rule of *zero* protection. Thus an alternative to standing in the spirit of "The Cathedral" would be to replace, in jointness situations, injunctive relief with compensatory damages. Injunctive relief is binary, while monetary relief is continuous. To the extent a court can assign a dollar value to a person's individual stake in a de facto joint entitlement, it can effectively separate the entitlement into several monetary awards.[102]

Liability rules would capture many of the benefits of restrictive standing without its downside. They avoid the potentially massive social losses that arise from property rule protection when rights are inalienable. At the same time, unlike the current standing doctrine, liability rules do not simply let losses lie where they fall, but rather grant some measure of recompense to those aggrieved by government action. Perhaps more importantly, they allow the courts to address the merits of plaintiffs' claims, giving them occasion to pass on the constitutionality of government action. This has expressive,[103] precedential,[104] and educational[105] benefits that should

[99] See Abraham Bell & Gideon Parchomovsky, Pliability Rules, 101 Mich. L. Rev. 1, 5–6 (2002).

[100] See id. at 33–39.

[101] U.S. Const. amend. V; see also Kontorovich, supra note 64, at 777 (explaining that the Takings Clause announces a liability rule for property rights).

[102] Professor Fallon has recently noted that standing doctrine seems motivated by concerns about the cost of injunctive remedies, particularly ongoing supervisory decrees, and that such concerns would fall away in a damages regime. Fallon, supra note 6, at 650–51, 665–66. While the solution may be similar, this is an entirely different remedial concern from the one discussed here.

[103] Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 69 (1996) (arguing that decisions of the Court "may well have major social effects just by virtue of their status as communication").

[104] An existing judicial determination of the issue could be used to get an injunction in subsequent cases where jointness is not a problem. Precedent has been described as a public good, see William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235, 240 (1979), though it could also be a public bad.

[105] See Christopher L. Eisgruber, Is the Supreme Court an Educative Institution?, 67 N.Y.U. L. Rev. 961, 964 (1992) (arguing that the Supreme Court has an educational role).

not be underestimated. Moreover, a judicial determination that the government is acting illegally could have reputational and electoral consequences for officials.

B. Problems with Liability Rules

This Section explores the limitations of liability rules as an alternative to standing restrictions. These limitations may explain why standing effectively eliminates the plaintiff's entitlement, rather than cashing it out with liability rules. One reason may be "injunctive essentialism"—a mistaken assumption that constitutional plaintiffs are always entitled to property rule protection. Furthermore, liability rules would create a new set of problems—valuing the entitlements and screening out opportunistic plaintiffs—that may be as serious as those under property rules.

1. Injunctive Essentialism

In private law, entitlements can be protected through either liability or property rules. Whether an entitlement will be protected with liability or property rules often turns on whether transaction costs are high enough to block efficient trade.[106] The situation is quite different for constitutional entitlements, which are commonly thought to require, by their very nature, property rule protection.[107] Those subject to an ongoing or prospective constitutional violation are presumptively entitled to an injunction.[108] Nothing in constitutional law dictates property rules as the sole protective regime. Indeed, constitutional law uses liability rules in a surprising number of situations generally characterized by high transaction costs.[109]

[106] See Calabresi & Melamed, supra note 40, at 1096–98.

[107] See 11A Charles Alan Wright et al., Federal Practice and Procedure § 2944, at 94 (2d ed. 1995) ("[I]f a constitutional violation is established, usually no further showing of irreparable injury is necessary."); id. § 2948.1 n.21 (collecting cases); Douglas Laycock, The Triumph of Equity, 56 Law & Contemp. Probs. 53, 57 (1993) ("Injunctions are routine in all civil rights and constitutional litigation . . . .").

[108] See Kontorovich, supra note 64, at 758 (demonstrating the general belief in a near-automatic right to injunctions for constitutional violations).

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

Moreover, the structure of the Bill of Rights suggests liability and property rules are equally valid options when, as is almost always the case, the Constitution specifies only the substance of the entitlement but not the remedial regime.[110] Nonetheless, many judges and scholars believe that liability rules for constitutional rights are inappropriate and perhaps unconstitutional—aside, of course, from the Takings context.

2. Valuation Difficulties

Accurately appraising a plaintiff's loss is always a problem with liability rules, which replace a market mechanism for determining price with a governmental one. The severity of the problem depends on the nature of the entitlement in question. When an entitlement is not traded in thick markets or has elements of idiosyncratic value, accurate judicial valuation becomes more difficult. The difficulty manifests in both decision costs (such as legal fees, judicial salaries, and discovery) and error costs (the incorrect incentives created through inaccurate valuations). The wide use of property rules in private law is due, in part, to a belief that valuation difficulties are so ubiquitous and intractable that legal remedies are never adequate.[111]

Yet juries do assign values to even the most inchoate injuries, such as emotional distress and loss of consortium. Such damages are controversial and are probably less accurate than damages for economic loss, which helps explain the many restrictions on recovery for nonpecuniary injuries. To be sure, constitutional entitlements are, on the whole, harder to value than private law entitlements,[112] and the inchoate rights typically at issue in standing problems are particularly troublesome. What is less clear is whether constitutional entitlements pose any greater valuation problems than inchoate entitlements in common law. The correct measure of damages is how much the plaintiff would demand to be paid to suffer the injury, and it is hard to see why this is more

[110] Id. at 1165–69.

[111] See Laycock, supra note 107, at 54–57 (arguing that equitable relief is the norm in a much broader area of private law than generally appreciated).

[112] See Kontorovich, supra note 109, at 1147–48 (discussing valuation difficulties with constitutional rights).

speculative when the injury is establishment of religion rather than intentional infliction of emotional distress.

Concerns about valuation difficulties are often put in terms of whether a damages award will capture the "full" cost of the harm—that is, the assumption is often that error will be systematically biased towards under-compensation.[113] It seems the opposite could just as easily also be true. While juries may be bad at valuing constitutional entitlements, there seems to be little reason to think they will be unduly stingy rather than unduly generous. But a jury's valuation may raise a particular problem in hard standing cases, where the great majority of entitlement-holders assign a zero or negative value to exercising the entitlement. Here a judge could not charge a jury to award damages based on how much they would need to be paid to suffer the same injury—a common way of getting at nonpecuniary damages—because most would suffer it gratis.[114]

3. Free Riders

Another problem with using liability rules instead of standing involves distinguishing those genuinely aggrieved by the governmental action—those that, unlike the majority, place a positive value on their entitlement—from possible pretenders. With the kind of entitlements and injuries that hard standing cases involve, the only observable difference between these two classes is that the former comes forth to litigate. Ideology or subjective disposition is all that separates the ideological or public-interest plaintiff—or any plaintiff in a situation where many are harmed but few sue—from everyone else. The problem for liability rules is that such internal states are easy to fake or opportunistically adopt.

In *Richardson*, imagine substituting a liability rule for the jurisdictional bar of standing. The case would proceed to the merits where the plaintiff would win. But instead of enjoining the CIA to reveal its accounts, the court would rectify Richardson's injury by awarding him compensatory damages. Under the theory behind

[113] Error is only a social problem if it is systematically biased.

[114] See Nancy C. Staudt, Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine, 52 Emory L.J. 771, 776 n.22 (2003) (noting that since judges are themselves taxpayers, one might think that every judge would have a conflict of interest in presiding over a taxpayer-standing suit).

the liability rule, all other positive value entitlement-holders should be able to recover as well. Unless the full cost to the positive-value people is internalized, there is no assurance that the government's policy has a net social benefit.[115]

Yet once the first plaintiff wins her case, it becomes difficult to determine who the other positive-value people are. Now anyone claiming that they are aggrieved by the CIA's nondisclosure could come forth and, relying on Richardson's case as precedent, demand damages. Assuming a unified and indivisible course of government conduct—which this Article treats as the predicate for standing problems—every American willing to profess the views of the original plaintiff, at least in a complaint, can be interchangeably plugged in as a subsequent plaintiff. To be sure, the Supreme Court mitigated this problem when it held that the new doctrine of nonmutual offensive collateral estoppel[116] was inapplicable to suits against the United States.[117] But this merely changes the problem from one of collateral estoppel to one of stare decisis.[118]

Nonetheless, winnowing out insincere plaintiffs would be a difficult task, requiring an individualized inquiry into the subjective beliefs of each follow-on plaintiff. In most cases the only evidence would be the individual's own testimony. Even in those rare cases where evidence of a contrary prior disposition could be found, it would be difficult to use such a fact as a bar to relief, for that would result, quite oddly, in less constitutional protection for people who change their minds than for those of long-established views.

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

[116] This is the practice where a subsequent plaintiff uses the victory of a prior plaintiff against a common defendant to conclusively establish facts or issues common to both cases. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979).

[117] United States v. Mendoza, 464 U.S. 154 (1984).

[118] If the first suit was resolved by the Supreme Court, the effect on subsequent litigation would be the same under collateral estoppel as under stare decisis. Otherwise the free-rider problem would be reduced because free riding would only be possible within appellate circuits where plaintiffs had won.

The key point is that given the inchoate nature of the protected entitlements, it would be very difficult to distinguish the sincere plaintiffs from the opportunistic ones, who would have waived—or even paid to not exercise—their entitlement under a property rule. If enough negative value entitlement-holders take advantage of a prior judgment to receive damages, the cost of compensation could exceed the social benefit of the government action, and the liability rule cure would be worse than the property rule disease.

C. Making Liability Rules Work

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

1. Liability Rule with an Event-Based Statute of Limitations

The liability rule approach could be improved by also limiting the preclusive effect of the first favorable judgment for a plaintiff challenging government action. The best way to do this would be with a statute of limitations that expires when a favorable judgment becomes final after appeal in whichever case first reaches that mark. To get within the limitations period, one would have to file before any favorable appellate judgment in any of the other suits on the matter became final. Since all potential plaintiffs are injured by the same course of government conduct, the clock would start running for everyone at the same time. In cases where this may not be true, tolling would of course be appropriate.

A statute of limitations would reduce concerns about stare decisis free riding because the limitations period would end the moment that the earlier case's preclusive effect would begin.[119] Yet this

[119] In a similar but narrower vein, as an alternative to standing doctrine, Professor Brilmayer has suggested eliminating the stare decisis and collateral estoppel effects of

scheme would have the advantage of allowing an indefinite number of genuinely aggrieved plaintiffs to receive compensation by filing promptly. Presumably it is the ideological plaintiffs, those with the greater injury, who will file first, and thus compensation will roughly track injury. Thus this solution also acts as a filter between sincere and strategic plaintiffs.

2. Taxpayer Remedies for Taxpayer Standing

The valuation difficulties caused by liability rules may be easiest to deal with in taxpayer suits, which have long been a major source of standing controversies.[120] Taxpayer suits are seen as the paradigm case of a generalized grievance.[121] The invocation of a plaintiff's status as a taxpayer ostensibly distinguishes his interest in the matter from a purely abstract or altruistic one. The plaintiff claims that it is *his* money that is being illegally spent, or that the government can only lawfully tax for lawful spending. Striking down the challenged program would reduce total expenditures and ultimately bring a reduction in taxes.

The Court has had no truck with this theory.[122] If a program were struck down the government would most likely find something else to spend the money on, rather than refund it—thus the element of "redressability" is missing.[123] With massive deficit spending, there is even less connection between being a present-day taxpayer and the financing of current government operations. Moreover, the Court recognizes that taxpayer standing cannot be understood as anything other than a fiction to disguise what is at bottom a citizen or private attorney general suit.[124] Almost everyone pays taxes. Thus any individual plaintiff's interest is indistinguishable from those of

judgments adverse to the plaintiff whose standing is in doubt. See Brilmayer, supra note 3, at 309.

[120] See, e.g., Frothingham v. Mellon, 262 U.S. 447 (1923).

[121] Tribe, supra note 1, at 421.

[122] Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 2563 (2007) ("T]he interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing.").

[123] See id. at 2574 (Scalia, J., concurring).

[124] Id. at 2563 (majority opinion) ("[T]the interests of the taxpayer are, in essence, the interests of the public-at-large.").

many others,[125] and all government actions involve money either obtained through taxation or fungible with it. The Court has therefore consistently rejected federal taxpayer status as a basis for standing despite ongoing attempts to assert it,[126] with the important exception of Establishment Clause suits challenging congressional appropriations.[127]

Understanding the problems to which standing responds—problems caused by overlapping and thus inalienable rights regarding a single course of conduct—gives a new perspective on taxpayer suits. The problem with these suits is not a lack of injury or redressability, but rather the remedy sought. Though taxpayer suits assert standing based on a purely economic injury, they do not seek monetary relief but rather to enjoin a particular spending program.[128] If an individual's interest in the legality of a program stems from his status as a taxpayer, then the relief he seeks is overbroad. Nothing about being a taxpayer should entitle him to question how his funds *and those of others* are being spent.

If the program is unitary in the sense that opt-outs cannot be excluded, than an injunction raises the problems discussed in Part II. But the theory underpinning taxpayer suits—that the plaintiff has a stake in the legality of the program by virtue of her financial contribution to it—can actually provide a basis for disaggregating otherwise unified programs. If the remedy is at law—a refund of the plaintiff's pro-rated contribution to the program—then one plaintiff's disposition of her entitlement would not affect other potential plaintiffs' disposition of theirs. While action may be unitary, money is infinitely divisible.

All of the problems with liability rules seem attenuated in the context of a taxpayer suit. Damages are easy to calculate: they equal the cost of the program multiplied by the plaintiff's fractional

[125] *Frothingham*, 262 U.S. at 487.

[126] See Staudt, supra note 114, at 784 (showing that federal courts bar federal taxpayer standing but may permit municipal taxpayer standing).

[127] See Flast v. Cohen, 392 U.S. 83 (1968). But see *Hein,* 127 S. Ct. at 2568–69 (holding that the Establishment Clause exception to taxpayer suits does not apply to discretionary spending by executive branch, and describing *Flast* as a "narrow exception" that has "largely been confined to its facts").

[128] See Staudt, supra note 114, at 776 ("[T]he goal of the lawsuit is to halt government spending or, in the alternative, to re-fashion it to ensure the spending projects comport with existing statutory or constitutional norms.").

share of the national tax revenue. Injunctions seem unnecessary, as the plaintiff merely claims to be out some money. The liability rule answers the redressability concern that hangs over taxpayer suits by ensuring that the plaintiff benefits from winning the suit. To be sure, for most taxpayers and most spending programs, the individual's share would be minute enough that it would be dwarfed by the costs of litigation and even by the administrative costs of distributing the damages. While free-rider problems could exist here too, these same administrative costs make even "free" riding generally not worthwhile, and for others, this problem can be addressed through a statute of limitations, as discussed in the previous Subsection.

D. Disaggregation with Property Rules

This Section discusses two alternatives to standing that might manage jointness problems to some extent even under a property rule system. The first focuses simply on narrowing the scope of injunctions and would represent the most modest reform discussed in this Article. It cannot be applied, however, to all or even most types of government action, thus greatly limiting its usefulness. Furthermore, it may reduce the magnitude of jointness problems, but not necessarily enough to make a difference. The second alternative—random standing—is more novel and would probably require legislative implementation. But it might serve the goals of standing better than either current doctrine or the other alternatives discussed here.

1. Narrowing Injunctions

As has been seen, a key feature of the standing problem is a single government action that infringes on the entitlements of many people, rather than many independent actions directed separately at many people. The indivisibility of the challenged action creates the holdout problem, giving any one individual veto power over the entitlement waivers of the entire class. Whether an action or program is truly unitary is not always obvious, however, and in some ways indivisibility is a function of other aspects of the law, in particular the choice of remedial regime.

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

Such disaggregation can be implemented simply by issuing narrow injunctions. Indeed, the narrower the remedy is on the back end, the less the need for narrow standing on the front end. If an individual can only challenge the recitation of the Pledge in her own classroom, the problems that standing responds to greatly diminish. The class of potential plaintiffs in each classroom would be small, definite, and difficult to manipulate. This would make bargaining between the plaintiff and people with different valuations easier. By contrast, if the question is the constitutionality of the Pledge nationally, the class of potential plaintiffs is vast, difficult to identify, and malleable.

This is not so different from what courts do when applying the standing doctrine in Establishment Clause cases. In cases challenging religious displays or symbols, standing is often limited to those with some "personal connection" or geographic nexus to the display, such as those who routinely see it "usually in the[ir] home or community."[129] Similarly, a plaintiff challenging a local religious display should not have standing to challenge a display in a distant town, even if it is otherwise identical.

The "personal connection" test serves the transaction-cost purposes of standing limitations poorly, because while it may reduce the number of people with standing, it still leaves class membership undefined and completely open.[130] A potential plaintiff can easily acquire a "personal connection" by slightly changing his routine to occasionally pass by a religious display. The potential for the class

[129] Newdow v. Bush, 355 F. Supp. 2d 265, 278 (D.D.C. 2005).

[130] The same can be said of the nexus requirements imposed on plaintiffs in statutory rights cases like *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

to expand in this way makes settlement with known members futile and holdout easy. When looking for axes along which an action can be divided, the key is to create discrete groups of potential plaintiffs corresponding to each unit. Thus it is important to try to carve out discrete plaintiff groups whose membership is *defined ex ante*, *identifiable*, and *closed*.

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

2. Random Standing

Perhaps the best way of realizing the efficiency goals of standing without the downsides of the current doctrine would be a system of random standing. Standing to litigate a given injury would be given to—and confined to—a representative sample of the allegedly injured population. The system would be triggered by the court concluding that a suit before it raised a standing problem as defined in Part II. If the disaggregation solution suggested above did not seem feasible, the court could send notice to a representative sample of the affected class. The notice would inform them of the alleged rights violation and that they were one of a certain number of people given standing to pursue equitable remedies against the violation. The sample group would be chosen using methods such as those used in polling; it should be just large enough to be statistically representative. The expenses and administration of the sampling would be, at least originally, borne by the original plaintiff and her attorneys—the system is essentially that of class action notification, except that it seeks opt-ins, not opt-outs. Anyone in the sample group could, if they wished, sue to redress the constitutional violation. If even a single member of the sample group chose to sue, they would have standing per se to challenge the entire program; the court would not be allowed to say that their injury was too abstract or general. But if none of the random group chose to challenge the government program, no one else could do so.

This random system has many advantages. Unlike current standing doctrine it would never result in a system where no one has

standing to challenge a constitutional violation that affects many. At the same time, the class of potential plaintiffs would be small, closed, and identifiable—indeed, the names of group members should be shared with the defendant to facilitate bargaining. This would prevent some of the most severe inefficiencies that could result from a liberal standing regime.

One of the greatest difficulties for standing's efficiency function is that it depends on the court making ad hoc and poorly informed judgments about the relative proportion of positive and negative value rights-holders. The existence of one plaintiff out of 300 million potential ones says very little. One out of a few thousand, however, would suggest that the negative value rights-holders are numerous enough that they still might be the highest value users of the right.

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

E. Summary

The discussion of alternative methods of avoiding the welfare losses caused by jointness help explain why the jointness problem is in reality addressed by the ungainly injury-in-fact requirement of standing doctrine. Alternative methods of avoiding the welfare losses caused by jointness appear unattractive, inadequate, or impractical. Liability rules recapitulate many of the problems of property rules. Random standing may get better results, though it only reduces, rather than eliminates, the holdout problem. It is exceedingly unlikely that random standing would ever be implemented by Congress. Making the vindication of constitutional rights explicitly depend on fortuity does not seem politically attractive. As for the narrow injunctions approach, it is easy enough to implement in situations where divisions can be made along geo-

graphic lines, but altogether impossible to implement in other important contexts. Liability rules coupled with a statute of limitations to screen out insincere plaintiffs may be the best answer, but this solution would almost certainly require some legislative authorization. While arguments can be made for the constitutionality of confining constitutional plaintiffs to legal remedies,[131] these arguments go against the grain—as does an event-based, rather than a time-based, statute of limitations. Not surprisingly, Congress has not arrived at a solution that would involve a combination of two such unusual and controversial features.

V. FURTHER IMPLICATIONS

This Part considers some further implications of the account of standing elaborated above. Section A discusses the extent to which the analysis developed above applies to congressionally created rights. While jointness causes inefficiency regardless of the source of the right, the normative implications may differ. For several reasons, it makes sense to assume constitutional entitlements have a built-in check against grossly inefficient allocation, whereas statutory ones do not. Part B discusses why standing problems typically arise in the context of so-called non-Hohfeldian or regulatory rights. Part C compares standing to class actions and finds the latter a better method of vindicating widely held entitlements.

A. Statutory Rights

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

[131] See Kontorovich, supra note 64; Kontorovich, supra note 109.

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

ing doctrine may have different normative implications for statutory rights.[133]

Both the inalienability and holdout problems discussed in Part II arise regardless of the source of the underlying entitlement. Broader standing increases the likelihood of inefficient outcomes. Even if, as Professor Sunstein points out, regulatory injuries by their nature affect a broader class of people than common-law ones, this does nothing to reduce the transaction costs that arise when a large and amorphous class of people have standing.[134] When transaction costs are high, so long as a governmental program causes *some* prohibited harm, it can be blocked regardless of its net benefits.[135] This Section will suggest that this is a weaker justification for standing limitations on the assertion of statutory rights than constitutional ones.

In contrast to statutory rights, constitutional entitlements are cut from a uniform cloth. Everyone has them in equal amounts.[136] It is in the nature of American individual rights that they protect all individuals;[137] structural provisions organize the government that governs everyone. If one wanted to limit the exercise of such entitlements in certain unusual circumstances characterized by high transaction costs, it would be difficult to incorporate such a limitation into the definition of the right. A natural way to do it would be to build into the right a notion of jurisdictional flexibility. Indeed,

[133] See ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 658 n.19 (6th Cir. 2007) (holding that the standing determination for statutory claims differs from constitutional claims in that Congress can create injury in fact for the former but not the latter); Cass R. Sunstein, Standing Injuries, 1993 S. Ct. Rev. 37, 60 (suggesting that injury-in-fact requirements may be proper in constitutional cases on constitutional avoidance grounds).

[134] See Sunstein, supra note 7.

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

[136] See Cooter, supra note 60, at 249 (describing the "equality constraint" on constitutional rights under which "one person's liberty cannot change without the same change in everyone's liberty").

[137] This is truer after the Reconstruction Amendments. Many questions remain, however, about the availability of constitutional rights abroad. Compare J. Andrew Kent, A Textual Case Against a Global Constitution, 95 Geo. L.J. 463 (2007) (arguing that aliens subject to extraterritorial U.S. government action do not enjoy constitutional protection), with Jules Lobel, The Constitution Abroad, 83 Am. J. Int'l. L. 871 (1989) (arguing that the Constitution should apply to aliens abroad).

one can imagine the "cases or controversies" limitation filling this role.

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

This is not always the case for statutory rights. Unlike constitutional entitlements, statutory and regulatory entitlements are made to order by Congress. They are often nuanced and detailed. Congress can bestow rights of action only on particular types of parties and can condition the exercise of these rights in a variety of highly particular ways. Congress can create an entitlement and vest its enforcement only in the executive, or in certain groups, or in everyone.

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

Part III showed that standing protects the exercise of rights by people other than the plaintiff. This is because almost all constitutional entitlements can be waived or traded for something of greater value. This need not be the case with statutory rights. Congress can tailor rights so as to not have a "flip side." For example, an entitlement can be given just to people "adversely affected" by

the government action, in which case there is no "negative entitlement" for others to trade and thus no autonomy problem.

Liberal standing can result in significant social losses in situations of jointness. Congress can choose to adopt inefficient statutes—there is no social surplus maximization principle constraining it. But Congress can make these choices—and unmake them—one statute at a time. It can create some rights that would be unconstrained by social welfare concerns and others that would be constrained. Because of the uniform nature of constitutional rights, the Constitution's silence as to remedies, and the extraordinary difficulty of amending it, one should be more hesitant to adopt an interpretation of the Constitution that would periodically result in large social losses. Thus it makes more sense to think that the Constitution contains a built-in safety net against such problems than it does to think that statutes are limited by an Article III injury-in-fact requirement. Indeed, the Court seems to take a more liberal view of the injury requirement in cases involving statutory rather than constitutional standing entitlements.[138]

B. Non-Hohfeldian Plaintiffs

Denials of standing usually involve non-Hohfeldian plaintiffs, that is, plaintiffs who are not seeking redress for a violation of their personal, common-law rights. Some argue that this is because judges invented the doctrine to obstruct the exercise of the new "public rights."[139] The role of standing described in this Article suggests another explanation, though of course it does not exclude sloppy or politically motivated judging. First, the amorphous and abstract nature of non-Hohfeldian interests makes it likely that they will be widely held and that it will be difficult to identify injured entitlement-holders ex ante. Second, the abstract nature of

[138] See Ronald D. Rotunda & John E. Nowak, 1 Treatise on Constitutional Law § 2.13(f)(ii)(5)–(7) (4th ed. 2007); Logan, supra note 1, at 48–49. For an example of how standing can be denied for the same type of injury when brought as a constitutional claim but granted in a suit pursuant to a statute authorizing action by "any person," compare United States v. Richardson, 418 U.S. 166 (1974) (holding that a taxpayer asserting a constitutional claim to access information on CIA spending did not have standing), with FEC v. Akins, 524 U.S. 11 (1998) (holding that voters asserting a statutory claim to access information did have standing).

[139] See, e.g., Sunstein, supra note 7, at 179. See generally Jaffe, supra note 27.

the injury makes it easy to simulate and thus prevents the plaintiff group from ever truly being closed, thereby preventing efficient settlement. Jointness problems arise more frequently with non-Hohfeldian or public-rights plaintiffs but are not limited to them.

One would thus expect to see fewer standing problems where constitutional rights track common-law rights than where they do not. Common-law entitlements were generally defined in such a way as to avoid overlapping rights. Thus one can predict that as the law moves away from using the common-law definition of property and toward "expectation of privacy" to define the scope of protection under the Fourth Amendment, standing problems will become more common. Moreover, standing problems will be most frequent in cases involving the structural provisions of the Constitution and the Establishment Clause because actions that violate them necessarily affect many people in the same way.[140]

C. Class Actions

Standing determinations involve some of the same considerations as class certification.[141] Both involve efforts by one party to get an adjudication of widely held rights. The points developed above suggest that liberal standing would result in a dysfunctional version of the class action without any of its safeguards. Broad standing makes everyone a member of what can be described as a nationwide plaintiff "class." As with class actions, a question arises as to who can determine what a fair settlement is. In a class action, the class is represented by unitary counsel; the defendant knows that settling with the named representative's counsel will transfer all of the class members' entitlements. Because this is a significant power, both named plaintiff and counsel achieve representative status only after demonstrating their fitness to the court.

Broad standing is like a class action where no one can settle the class's claims. Unlike in a formal class action, those with different preferences cannot opt out. A minority can effectively dictate the remedies for the entire class, even though the great majority might

[140] See Redish, supra note 1, at 103.

[141] See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974); Redish, supra note 1, at 101–03; Brilmayer, supra note 3, at 307–09; Epstein, supra note 26, at 29–30; Jensen et al., supra note 8, at 211–12; Scott, supra note 28, at 675.

prefer something entirely different.[142] One person can force the entire "class" to litigation while all other members might benefit from settlement or waiver.

In the class action process, the party that determines the disposition of the class's entitlements must have interests closely approximating those of all other class members. With broad standing, there are no such guarantees. The plaintiff may have interests diametrically opposed to the rest of the group whose rights are affected.[143] When the plaintiff is a poor representative or there are cleavages within the proposed class, the proper course is to deny certification and allow the suits to proceed individually or to certify subclasses. Yet jointness prevents such disaggregation. The court must then choose whose valuation of the right will prevail. Such a decision is unavoidable when conflicting claims are made to a common resource. Sometimes denying standing means no one can bring a case at all, but this is little different from denying on heterogeneity grounds class certification to a purported class whose members individually all have negative value claims. In short, liberal standing would resemble a class action that could not be settled by the plaintiff, from which absent class members could not opt out, and where the plaintiff may have interests that sharply conflict with those of the class—in other words, a class action with few of the protections required by Rule 23 and fewer advantages.

D. Why Article III?

One may wonder why the role of preventing these inefficiencies has been thrust on a jurisdictional doctrine gleaned from the "case

[142] The representation problem in class actions arises not only because the absent class members will be bound by the collateral estoppel effect of the judgment, as Professor Brilmayer has suggested, but also because of the immediate effect of an injunction. See Brilmayer, supra note 3, at 308.

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

or controversy" requirement of Article III. The answer lies in part in the lack of other alternatives, discussed in Part IV. Of course, the same jointness or efficiency inquiry could be built into the merits stage of the analysis, with the inefficiency being one factor balanced against the plaintiff. Indeed, such an approach is conceivable and is reflected in the doctrine that equity will not respond when an injunction would be against the public interest. The dominance of the Article III solution may in part be a function of historical accident and path dependence. But the jointness problem is one that cuts across substantive entitlements. Thus it makes sense to use a trans-substantive tool. The jurisprudence on the merits of various substantive rights evolves separately and often in different directions. Sometimes the cases will move in a direction that makes it hard to account for a complex interest, like the social welfare losses arising from jointness. This will be the case if a right becomes thought of as "absolute." The Article III location of the injury requirement prevents the social welfare interest protected by standing from falling victim to such developments.[144]

CONCLUSION

Standing is a pragmatic response to a real and potentially serious problem. It is not an ideal response. Purely legal relief would be preferable to a jurisdictional dismissal on a variety of grounds, both instrumental and equitable. Liability rules may not be a realistic option for both doctrinal and functional reasons, however. There may be ways around the liability rule problem and there are other solutions, such as random standing. But these are not avenues the legal system is likely to explore. Taking these alternatives off the table, the Court must choose between the default property rule paradigm and pure condemnation of the relevant entitlement. The former could lead to massive social losses, losses created not by the

[144] An interesting implication of standing's jurisdictional status—which shows the complex ways standing can interact with developments in substantive rights—is that a plaintiff challenging state action under, say, the Establishment Clause, might not have standing in federal court. He could, however, have standing to pursue the same claim in state court. As a result of the incorporation doctrine, states are bound by most of the Bill of Rights, but not by the jurisdictional limitations of Article III. If standing policies were taken into account at the merits stage, they would be "incorporated" into the state level as well as part of the substantive federal law.

perverse preferences or illegitimate tastes of the majority, but by the transaction-cost structure of the situation, one in which the government would need unanimous consent to carry out a particular policy. In a larger group unanimity is impossible. But 99.9% approval is certainly impressive and may suggest that the majority of rights-holders could efficiently buy out any dissenting plaintiffs but cannot do so simply because of high transaction costs. Standing allows the Court to ignore the difference between 99% and 100% in situations where transaction costs prevent the 99% from securing the consent of the minority. Thus standing becomes a "second-best" response to the transaction-cost problems arising out of jointness.