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## Standing and Spending—The Role of Legal *and* Equitable Principles

*Richard A. Epstein\**

### INTRODUCTION

The stated purpose of this Conference is to examine the proper scope of the spending power: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, and to pay the Debts and to provide for the common Defence and general Welfare of the United States.”<sup>1</sup> My assignment is to track the relationship, if any, between the expansion of the spending power and the articulation of the standing doctrine as a principle of American Constitutional law. The connection, between the two, displays at least historical intimacy. The rise of modern standing doctrine in American Constitutional Law can be traced with some precision to Justice Sutherland’s opinion for a unanimous Supreme Court in *Massachusetts v. Mellon*, and its companion case of *Frothingham v. Mellon*.<sup>2</sup>

The substantive dispute in those cases asked whether the so-called Maternity Act<sup>3</sup> lay within the Congress’s spending power by authorizing federal expenditures of funds to the states for the purposes of promoting maternal and infant health. The gist of the challenge, had it been heard, was whether Congress could accomplish through grants under Article I, § 8, cl. 1 what it could not

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\* Interim Dean and James Parker Hall Distinguished Service Professor of Law at the University of Chicago. This paper was prepared for a Conference on the Spending Clause held at Chapman Law School in January 2001. David Currie and Adrian Vermuele provided detailed comments on an earlier draft of this paper. I have also benefited from conversations with Jack Goldsmith, Dennis Hutchinson and Richard Pildes.

<sup>1</sup> U.S. CONST. art. I, § 8.

<sup>2</sup> 262 U.S. 447 (1923) (consolidated actions).

<sup>3</sup> Act of Nov. 23, 1921, ch. 135, 42 Stat. 224.

accomplish through direct regulation under the restrictive reading of the commerce clause as it was construed in 1923 before the Supreme Court's 1937 decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*<sup>4</sup> The serious constitutional attacks on this program were deflected on technical grounds when Justice Sutherland held that neither the state of Massachusetts nor one of its citizens, Mrs. Frothingham, had the standing to bring suit to enjoin Mellon, the Secretary of the Treasury, from distributing funds pursuant to the statutory mandate. The political impulse behind *Mellon*, or at least the political consequence of *Mellon* was at root no different from that behind *Jones & Laughlin*. In both cases, the Court's considered judgment was that no structural limitation found the Constitution blocked—or should be allowed to block—Congress from wielding the dominant oar in the formation of national policy on maternal care, or indeed on just about anything else.

To state that conclusion, however baldly, is one thing. To explain why it was mistaken to press a doctrine of standing to achieve that end is quite another. In this paper, I hope to show against the wisdom of my own teacher, Alex Bickel,<sup>5</sup> that whatever the appropriate interpretation of the spending power—and I endorse Madison's view that it does not give power to Congress to spend for ends that it could not regulate, or which were not incidental to the operation of its other powers<sup>6</sup>—the expansion of Federal power was aided by importing a standing requirement into the Constitution that often operates at cross purposes with the function of judicial review that the Court assumed in *Marbury v. Madison*.<sup>7</sup> Quite simply, the harder it is for individuals to make their way into federal court, the more difficult it is for them to challenge actions as falling beyond the scope of Congress.

In many instances, this point is surely overdrawn. Let this plaintiff be sent packing, and another plaintiff will be able to find a separate platform on which to raise the same claim. On this view, the standing requirement serves the function of seeing to it that the right cases get to the Court in the right sequence, assuming that we know what this is.<sup>8</sup> But in many cases, including *Mellon*, the follow-on charge never came because no one could get standing to challenge the Maternity Act. In other contexts, however, when a party with the standing comes, his arrival is too little

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<sup>4</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>5</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

<sup>6</sup> See *THE FEDERALIST* NO. 41 (James Madison).

<sup>7</sup> 5 U.S. 137 (1893).

<sup>8</sup> See Maxwell Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995), and Maxwell Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995), for a discussion of standing as a sequencing device.

and too late with respect to programs that have become embedded in the American political fabric. So understood, the standing doctrine operates as a partial overruling of *Marbury*. In addition, it must be remembered that the doctrine of standing does not operate, as it is sometimes assumed, only for cases that reach the Supreme Court. It also governs all cases and controversies that arise anywhere within the *federal* system as a whole. It is therefore a mistake to understand the doctrine chiefly in its relationship to the Supreme Court and the mysteries of its own docket management. Other tools, such as a simple denial of certiorari can easily accomplish that function. Rather, the doctrine of standing should be understood for what it purports to do—limit the access to federal courts when a particular plaintiff has come forward to voice a specific grievance against the named government defendant.

This dissatisfaction with the standing doctrine is not new, and has been expressed by many commentators. In most cases, the position taken is that the private law doctrines of standing cannot be used to deal with matters of the administrative state. This point is not unique to the American system, for it also frames, without any constitutional baggage, the discussion of standing under English as well as Administrative Law. In their leading treatise on the subject,<sup>9</sup> Wade and Forsyth begin their discussion by an account of the “old law of standing” which notes that the common law system of standing, with its emphasis on individualized injury, does not work in a public law context:

In private law that principle [of limited standing] can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the public interest. Where some particular person is the object of administrative action, that person is naturally entitled to dispute its legality and other persons are not. But public authorities have many powers and duties which affect the public generally rather than particular individuals. If a local authority grants planning permission improperly, or licenses indecent films for exhibition, it does a wrong to the public interest but no wrong to anyone in particular. If no one has standing to call it to account, it can disregard the law with impunity—a result that would ‘make an ass of the law’. An efficient system of administrative law must find some answer to this problem, otherwise the rule of law breaks down.<sup>10</sup>

These same sentiments have often been expressed, and rightly, about the structure of American law. The basic problem of judicial administration is more or less the same as in England, but the subject has been tied up with such matters as separation of powers, the proper interpretation of Article III, and our general

<sup>9</sup> See WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* (7th ed. 1994).

<sup>10</sup> *Id.* at 696 (footnote omitted).

constitutional legacy. The upshot is that under the current federal constitutional rules of standing, litigants are less able to challenge unconstitutionality or illegality under the American system than their English brethren can challenge illegality under their Parliamentary system. One intriguing explanation for the position, urged by my colleague Cass Sunstein, is that the Supreme Court uses the doctrine of standing to mount a covert rearguard effort to restore the virtues of the *Lochner* era.<sup>11</sup> The basic argument is that *Lochner* privileges are in some sense common law entitlements, and it is just these entitlements that give people access into federal court, so that novel claims brought on behalf of the beneficiaries of the administrative state received a chillier judicial reception than actions sought to vindicate a common law right.<sup>12</sup>

I have little doubt that the American doctrine of standing is in a sad state of disrepair, but differ with Sunstein as to how the issue should be approached. His critique shares one element with the position taken by Wade and Forsyth, namely that a distinctive doctrine of standing is needed to account for the development of public administrative law. It also seeks to locate the American reticence on this point in the rearguard effort to preserve some fragment of the *Lochner* era. I disagree with both points.

Turning to the last point first, historically, the doctrine of standing in American constitutional law was crafted by the progressives who were anxious to insure that their political initiatives, such as the Matrimony Act, and later, the Tennessee Valley Authority,<sup>13</sup> could be shielded from judicial attack.<sup>14</sup> Frankfurter and Brandeis led the initial charge, and Alexander M. Bickel, their protégé, defended their handiwork in the next generation.<sup>15</sup> The variation of the standing litigation that Sunstein attacks is one that allows the regulated party to attack the sanctions imposed while the unregulated beneficiary is not able to spur the Court into action should the regulated party succeed at an administrative level. Yet it is a mistake to assume that most, let alone all, standing cases have assumed that configuration. Equally important in the welfare state are those programs where the direct

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<sup>11</sup> See, e.g., Cass R. Sunstein, *Standing and the Privatization of American Law*, 88 COLUM. L. REV. 1432, 1434-36 (1988) [hereinafter Sunstein, *Standing*]; Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163 (1992) [hereinafter Sunstein, *After Lujan*].

<sup>12</sup> See Sunstein, *Standing*, *supra* note 11, at 1434-36. "The use of common-law notions, sharply distinguishing between statutory benefits and nineteenth century private rights, was the central mark of the jurisprudence of the *Lochner* period." *Id.* at 1436.

<sup>13</sup> See, e.g., *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) (competitive injury suffered by private power companies was *damnum absque injuria*); *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1939). See discussion *infra* note 16.

<sup>14</sup> See Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1443-52 (1988); Sunstein, *After Lujan*, *supra* note 11, at 179.

<sup>15</sup> See BICKEL, *supra* note 5.

beneficiaries of federal or state largesse are insulated from attack for the receipt of subsidies that either advance comprehensive programs of redistribution on the one hand, as in *Mellon*, or which cause great financial loss to private competitors on the other.<sup>16</sup> In addition, many cases that improperly invoke standing have nothing whatsoever to do with matters of economic liberties, but rather deal with challenges of grants or property distributions to religious organizations or with the operation of the CIA or the scope of the Endangered Species Act. It is hard to see any *Lochner*-like impulse rising up to allow these suits, even though they are clearly warranted on the general approach that I advance here.

In principle, moreover, it is possible to marry any conception of standing with any approach to substantive constitutional provisions. In this context, the modern conservative opponents of *Lochner* include the leading defenders of a restrictive standing doctrine on the Supreme Court, most notably Justice Powell and Justice Scalia.<sup>17</sup> The concerns they raise have nothing to do with a partial effort to resurrect substantive due process, but are directed to the issues that they discuss: judicial competence; separation of powers; concrete instantiation of disputes; and redressibility of grievances. Indeed a close reading of *Mellon* makes it clear that every single argument subsequently used to fortify the standing doctrine is stated with regrettable clarity in Justice Sutherland's initial judicial foray.<sup>18</sup>

Second, on the analytical front, a mistake in both the English and the American systems is to think that the modern doctrine of standing requires a uniquely public law pedigree. Quite the opposite I think that it is better understood and applied by marshaling the full resources of the private law to the task. More specifically, it becomes absolutely critical not to run together the phrases "the common law" and "the private law" as though they were synonymous, when in fact they are different.<sup>19</sup> The private law comprehends all suits between private parties and covers both the common law courts *and* the courts of equity,<sup>20</sup> which before the twentieth Century operated as distinct courts both in England

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<sup>16</sup> See, e.g., *Alabama Power*, 302 U.S. at 479, discussion *infra* note 57 and accompanying text.

<sup>17</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), for Justice Scalia's decision following his earlier views as stated in Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) [hereinafter Scalia, *Doctrine of Standing*].

<sup>18</sup> See *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

<sup>19</sup> The equivalence is found through both Sunstein articles. See, e.g., Sunstein, *After Lujan*, *supra* note 11, at 163. "In the context of standing, the reluctance to take this step has been embodied in a *private law* model of standing—that is, in the idea that standing should be reserved principally to people with *common law* interests and denied to people without such interests." *Id.* at 187 (emphasis added).

<sup>20</sup> See FREDERICK W. MAITLAND, *EQUITY* (2d ed. 1969) on the history of this subject.

and in many of the United States, and which were distinguished chiefly by the remedies that they offered for certain violations of law—specific performance, injunctions, foreclosures and the like, often on a discretionary basis. Understanding how the private law works in total requires understanding where these equitable principles reinforce common law rights and where they go still further, particularly in fashioning various kinds of structural injunctions. The modern law of standing does not require any repudiation of private law models. Rather, it calls for their faithful application to both sides of the legal/equitable divide. There is in short no need to develop a distinctive set of standing principles for the administrative state.

Stating the overall problem of standing in this fashion leads to the obvious question: wherein lies the source of this technical obstacle to the assertion of judicial power, not only in the cases involving Congress's spending power, but outside that realm. In seeking to understand the problem, it is surely worth noting at the outset the term "standing" nowhere appears in Article III, which provides that "the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority."<sup>21</sup>

In reading this language I assume that a "case" covers any case where the interest of two parties are adverse to each other—that is, that it operates as a word of limitation only insofar as it excludes the use of advisory opinions, which everyone regards as outside the scope of the federal judicial power. But I do not think that it imports any arcane meaning that recognizes only certain kinds of legal disputes count as cases for the purposes of constitutional law. Indeed the words "all" and "extend" carry with them expansive, and not restrictive, meanings. By the same token, the term "equity" refers to the Chancellor's equitable jurisdiction. To be sure, the anti-royalist sentiment of the early founding period made many people reluctant to confer equitable powers on both federal and state courts. But that movement did not win out in the end precisely because injunctions and specific performance are needed in too many ordinary disputes that come into both federal and state court. The key issue here is therefore not the existence of a dispute over the exercise of equitable jurisdiction, but the clean victory that the proponents of equity achieved, as evidence in the parity found in the expression "cases in law and equity."

This reading of course makes good sense wholly without any reference to the term standing or the ideas that it imports. The

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<sup>21</sup> U.S. CONST. art. III, § 2. The point has been duly noted in Sunstein, *After Lujan*, *supra* note 11, at 168.

want of the word “standing,” however, does not necessarily entail the death of a doctrine. By way of comparison, surely the Constitution cries out for some police power limitation on its explicit guarantees of individual rights, even though the words “police power” appear nowhere in the Constitutional text.<sup>22</sup> By the same token, however, the task of implication should never serve as an open sesame for judicial invention. Rather, implied limitations on explicit provisions should always face an uphill struggle, lest they wipe out the substantive guarantees they are supposed to restrain.

The question then arises how any putative limits should be determined and applied. In answering that question, I propose what I believe to be the *only* methodology that allows for the coherent interpretation of difficult constitutional texts. My approach derives the standard doctrines of constitutional law by examining the analogous principles of private law, comprehending both its common law and equity sides. The approach is surely not confined to the standing doctrine. The background constitutional norms—be they of freedom of speech or religion, of private property, of contractual obligation—all gain their salience from the role that freedom, property and contract play in organizing the rights and duties between ordinary private individuals. To determine what it means for the state to take property from a private person, first determine what it means for A to take the private property of B.<sup>23</sup> And so it is that we quickly understand that takings include not only outright dispossession but also lesser limitations on any of the bundle of property rights—the right to exclude, the right to use, and the right to dispose of property—but not the right to use force or commit nuisances against neighbors. Similarly, in determining how far freedom of speech and religion extends, a good place to start is with the rightful restrictions that one person can impose on the speech or religious liberty of another. So assaults, defamation, frauds, and human sacrifice do not gain constitutional protection in order to advance the cause of “freedom.” Any individual is entitled to stop these actions by his neighbors. But it is often difficult for any individual to prevent these actions before they take place, for no one knows who the robber or the reckless driver will hit. The state uses public force to coordinate the enforcement of these diverse individual interests in a systematic and disinterested fashion.

The same analytical approach carries over to the law of standing. Private law doctrines contain all sorts of rules that address

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<sup>22</sup> See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887). See ERNST FREUND, *THE POLICE POWER* (1904), for one exhaustive account of what it entails.

<sup>23</sup> See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 35-38 (1985), for a greater elaboration of this approach.



the question of *which* individuals are allowed to seek redress from what wrongs. Once these principles are understood, they supply the necessary vantage point for understanding the uses and limits of the standing doctrine in public law, both in spending clause cases and beyond. In reply, an objection is, that it is treacherous business to move from legal doctrines that govern in courts that have plenary jurisdiction to the federal courts whose jurisdiction is limited to a specific set of cases and controversies. Indeed, it is this point that moves Justice Scalia when he argues that standing, far from being an outgrowth of general private law issues, is treated as part and parcel with the doctrine of separation of powers.<sup>24</sup>

Yet it is possible to offer two strong responses to that position. First, the English courts have plenary jurisdiction and yet they also incorporate into their administrative law some doctrine of standing as a limitation on private suits.<sup>25</sup> It follows therefore that to the extent that these doctrines are at play in connection with courts of unlimited jurisdiction, then they carry over to courts whose powers are confined to specified causes. Second, the distinctive limitations on the federal judicial power do not come from the terms “case” or “controversy” but from the delineation of the three types of case so listed, which is then supplemented by the remaining types of cases so enumerated. The difference between plenary and limited jurisdiction does not need a doctrine of standing to explain it; nor does it require any special meaning be attached to the word “case.” It only requires us to read through to the end of Article III, section 2 to find which cases and controversies fall within the jurisdiction of the federal courts.

How then should one understand standing? One common view is that standing does not raise any separate problem at all, but must be understood against the backdrop of the substantive law. Thus Professor Fletcher writes: “The essence of the true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty? This question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked.”<sup>26</sup> But this formulation misses the distinctive nature of the standing claim. To see why, it is instructive to break down the issue into two separate questions. One is whether

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<sup>24</sup> See Scalia, *Doctrine of Standing*, *supra* note 17. His point derives from Sutherland’s original decision in *Massachusetts v. Mellon*, 262 U.S. 447 (1923). See discussion *supra* note 18.

<sup>25</sup> See WADE & FORSYTH, *supra* note 9, at 696-718.

<sup>26</sup> William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988). See also, David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 43 (“Whether the answer is labeled ‘standing’ or ‘cause of action,’ the question is whether the statute or Constitution implicitly authorizes the plaintiff to sue.”).

standing is a *necessary* condition for a cause of action, and the other is whether it is a *sufficient* condition for the cause of action. To the extent that one asserts an equivalence between the standing and the cause of action issues, it looks as though both of these conditions should be satisfied. But clearly it is possible to find cases where a party has standing to sue even though he does not have a cause of action. The defendant shoots the plaintiff. Surely the plaintiff has standing to sue for that injury. Yet standing is not a sufficient condition for recovery. Thus the plaintiff does not have a cause of action if the shooting was accidental, and the substantive law required proof of either negligence or intention for the action to go forward. The point here is that the plaintiff has standing in the sense that he is, as will be developed later, one person who is in the best position to urge that some relief should be granted—and remains in that position even if his case is dismissed on the merits. But the semantic equivalence at common law between standing and a cause of action is broken. Standing looks as though it were a necessary condition for a cause of action, but not a sufficient one.

At this point what establishes the standing as a general matter? One obvious answer is that the standing requirement is met when it is shown that the plaintiff has suffered “harm,” even if the other elements of the cause of action are not satisfied. For the moment, I shall put aside all the heavy freight that is attached to this term, and content myself with the observation that the Supreme Court has understood the doctrine of standing, and in good tort-like fashion tied the doctrine to the frequent cases where individuals seek *redress* for personal grievances, usually by invoking principles of corrective justice—that is, those principles, compendiously described that stress the wrong that this defendant has done to that plaintiff. But its effort to locate the doctrine of standing with tort doctrines has led to the fatal mistake in this area, which is to ignore a second class of cases, which commonly were brought in the courts of equity in which a single individual sues not for individual redress, but to preserve the *structural limitations* found in our or any other constitutional order.

The difference lies in the kinds of remedies that are sought: the common law typically awarded damage for invasion of a specific right. The courts of equity could fashion complex remedies by way of injunctions, damages, reorganization, prohibitions, and foreclosure that were designed to stabilize and recreate long-term interests among multiple parties. In some of these cases the equitable relief was designed to regulate conduct between strangers: the injunction of a nuisance for example. Such cases fit easily within the tort category by supplying remedies against strangers. But in other cases, such as derivative actions and reorganizations,

the courts of equity entered into more complex areas by intervening into the governance structure of voluntary associations and other collective entities. It takes a certain ingenuity to find in the phrase “all Cases, in Law and Equity” some magical limitation that prevents the exercise of judicial power when plaintiff asks for equitable relief in cases that fall into this second category. Quite the opposite, the Constitution created a fusion in the federal courts that took a good deal of time to implement in many of the states and in England. The grant of jurisdiction in equity thus invites the use of federal courts to use structural remedies in those cases of equitable jurisdiction that call for it, and to devise remedies to deal with the conflicts of interest that inevitably arise in dealing with these multi-dimensional matters. In this regard the ambiguity in the formulation of the problem offered by Wade and Forsyth should be now evident. It is not correct to say that “no particular person is injured” when the state grants a planning approval or allows the showing of the indecent film. Rather, it is that a great many individuals are all injured by some small but perceptible amount. The task of courts of equity was to develop rules that allowed the amalgamation of small interests. As will become clear, the rise of the standing doctrine has depended at critical junctures on the denigration of the equitable powers of the court.

It is now possible to identify the two ways in which the law of standing has veered from its correct course. The first of these has been to give a narrow and indefensible definition of “harm,” which can be traced for the false insistence that standing and cause of action are in some sense equivalent concepts. But even after that mistake is cleared away, a greater vice remains—the insistence that a plaintiff show a redressible interest for some individuated wrong in order to obtain relief from a structural wrong.<sup>27</sup> Unfortunately, the structure of current standing law applies the same requirements for both classes of claim: to the corrective justice claims and the totally different issues raised by the structural challenges. Thus the hornbook requirements of standing under current law hold that for *all* cases the plaintiff must have suffered what is termed an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical”’.<sup>28</sup> Next, in good common law style today’s hardy plaintiff must show the “causal connection between the injury and the conduct complained

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<sup>27</sup> See *e.g.*, *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 488-90 (1982).

<sup>28</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (setting out the requirements) (citations omitted).

of.”<sup>29</sup> The explication of this doctrine moves unerringly to the doctrines of causal intervention, by stipulating that “the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’ ”<sup>30</sup> And last, again in terms that echo the common law requirement for proof of damages, the harm “must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision’.”<sup>31</sup>

It is for good reason that exhaustive examinations of the early law of standing do not reveal any of these requirements.<sup>32</sup> Had they been present, then the entire tradition of equity jurisdiction would have been dismissed as irrelevant to determining the scope of constitutional powers. I think that the direct injury test—which itself has been misunderstood—wholly misunderstands how the doctrines of standing are used in private law adjudication, both at common law and in courts of equity. The simplest way to state the point is to note that the rules for issuing an injunction in equity need not track closely those for awarding damages at common law, and that this distinction turns out to be most relevant in cases that seek to obtain structural relief and not individual redress. The former necessarily depends on the *fungibility* of plaintiff’s interests with other persons similarly situated; in contrast, the latter depends on the demonstration of special or distinctive wrong. In order to show the interplay and the distinction among these various issues, I propose to look first at the full range of cases that call into question the standing doctrine—not always under that name—in private law suits both in law and equity. Accordingly, Part I of this paper begins the analysis of the private law doctrine of standing by building on four common law decisions, —*Ashby v. White*,<sup>33</sup> *Vosburg v. Putney*,<sup>34</sup> *Tarleton v. McGawley*,<sup>35</sup> and *Anonymous*,<sup>36</sup> a 1535 decision that articulated the rules for private suits against the creators of private nuisances. I shall then look at the way in which the standing doctrine plays out in contract and corporation cases.

Part II of this paper then carries over the fruits of that analysis to the public law arena in order to dissect the analysis of standing in the Supreme Court case law. I shall begin by providing a

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (alteration in original).

<sup>31</sup> *Id.* at 561.

<sup>32</sup> See, e.g., Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1443-52 (1988); Sunstein, *After Lujan*, *supra* note 11, at 167-79. See WADE & FORSYTH, *supra* note 9, at 696-718, for a short English account.

<sup>33</sup> 90 Eng. Rep. 1188 (1702-03).

<sup>34</sup> 50 N.W.2d 403 (Wis. 1891).

<sup>35</sup> 170 Eng. Rep. 153 (K.B. 1793).

<sup>36</sup> *Anonymous*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1535), *reprinted in* RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 706 (7th ed. 2000).

detailed analysis of *Massachusetts v. Mellon*, and then work forward selectively to the modern day, taking into account first those cases in which the “direct harm” requirement is relevant, but misconstrued, and then those cases that deal with structural harms. My purpose is to show the conceptual poverty of a legal approach that seeks to use the same rules to govern individual grievances and structural challenges. In light of this analysis I hope to explain the important role that citizen and/or taxpayer suits should play in determining standing under Article III. These limitations matter, for often times noncitizens, like nonshareholders, should not be entitled to bring suit. But stated in that fashion, the doctrine of standing is far simpler, and far less important, than under the current view.

Finally, in part III, I shall address in connection with the standing doctrine an issue that is implicit in equity cases but largely irrelevant in ordinary tort suits. What should be done in those cases when the individual plaintiff does *not* in fact, either as shareholder or citizen, have an interest that is in common with those of other individuals that he purports to represent. The question here is to ask how, once these equitable suits are allowed in Federal Court, the judicial powers should be exercised in ways that take into account the interests of the full range of parties who support and oppose the initial action. In this regard I shall address questions of joinder of party, choice of remedy, and the ability of Congress to confer standing on citizens and taxpayers by legislation.

#### I. THE PRIVATE LAW OF STANDING: TORTS

My first illustration is the famous English decision of *Ashby v. White*.<sup>37</sup> The issue before the Court of King’s Bench was whether Matthew Ashby stated a cause of action when he alleged that the defendants, local constables, had wrongfully excluded him from voting at Ailesbury to elect two burgesses to represent that Borough in Parliament. The decision does not say which higher-up, if any, ordered these lowly constables to exclude the plaintiff from the polls; nor does it speculate on their motivation. A majority of the King’s Bench denied the plaintiff any relief at all. Holt, C.J. dissented insisting that “it is not at all material whether the candidate, that he would have voted for, were chosen, or likely to be, for the plaintiff’s right is the same, and being hindered of that, he has injury done him, for which he ought to have remedy.”<sup>38</sup> On appeal the House of Lords sustained his judgment.<sup>39</sup>

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<sup>37</sup> 90 Eng. Rep. 1188 (1702-03).

<sup>38</sup> *Id.* at 1189.

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

*Ubi ius, ibi remedium*—where there is a right, there is a remedy. In Lord Holt’s hands the tort law shows a flexibility that allows it to move far beyond the ordinary cases of beatings and automobile accidents. Alas, it is here that the complications begin. Just what remedy does this plaintiff have? The use of the action on the case indicates that the plaintiff himself had elected to sue for damages, and did so under an all-purpose writ that is not tied to any one substantive theory. Surely, Ashby did not seek to invalidate the election or to install his preferred candidate in office. But now the questions fly thick and fast. What is the appropriate measure of damages? Does it cover only the visible displeasure of being excluded from the exercise of a right? —and to Holt it was a property right “by reason of his freehold.”<sup>40</sup> Or does it take into account the possibility that this particular vote could have altered the outcome of the election, even though that did not happen in this case? What should be done if more than one person had been excluded from the polls?

The inquiries can run wider. In thinking about the case, is it permissible to ask whether the exclusion of the plaintiff was anticipated by or known to other potential electors whose own conduct was altered, such that if all their votes had been combined together, the outcome in question would have been changed in a manner to the plaintiff’s liking. If it could have been shown that the single vote would have altered the outcome of the election, what then would have been the appropriate measure of damages? Then, there are institutional questions. Parliament (like Congress) normally has control over the admission of members to its ranks. Did the personal action brought by Ashby trench on the power of Parliament to determine who shall sit in its membership? Should other individuals, including the candidates have the power to challenge the outcome of the election even if Ashby had chosen not to sue?

*Ashby* looks quite different from an ordinary torts case such as *Vosburg v. Putney*,<sup>41</sup> in which the plaintiff brought suit for extensive damage below his knee that he claimed had resulted from a intentional kick by the defendant, albeit one that meant no harm. It raises questions about the precarious position of the extra-sensitive plaintiff, the implied license of the playground, the mental state needed to establish unlawful intention, the relationship between assault and battery, and the differences in damage rules for contract and tort. It also sports a complex sociological history about the local tensions that erupted between the plaintiff,

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<sup>40</sup> *Id.*

<sup>41</sup> 50 N.W.2d 403 (Wis. 1891).

a sickly local farm boy, and the defendant, the son of one of the most powerful families in town.<sup>42</sup>

Yet the complexities between the two cases conceal what look to be very different centers of gravity, and it is around those differences that much of the law of standing necessarily resolves. In *Vosburg* we have no difficulty—or at least we think we have no difficulty—in answering the threshold question of all lawsuits: why is this plaintiff suing this defendant, and what remedy does he hope to achieve? The obvious plaintiff is the party who sustained the physical injury; and the only remedy that makes any sense for him is damages for redress of this injury, so long as the defendant was its cause. Now that the injury is past, he does not need injunctive relief when the possibility of a recurrence is virtually nil. It looks as though this suit is a pure action for the rectification of a particular harm that falls well within the customary province of the tort law. Aristotle's model of corrective justice calling for compensation from A to B for harms inflicted fits quite well,<sup>43</sup> whether we think corrective justice is an end in itself, or a means to advance some consequentialist—that is, some utility or wealth maximizing goal of the law. The plaintiff, we might say, has *standing* to sue because he has suffered (or claims to have suffered) an injury in fact. And we can think of no plausible definition of harm inflicted that is so narrow as to exclude physical injuries that result from a direct blow.

So *Vosburg* seems to suggest the standing question solves itself in physical injury cases. But we can make the analytical problem more complicated in a perverse but instructive way, by expanding the circle of harm. Thus we can ask whether or not the parents have a separate right of action to recover their medical expenses, or perhaps even the loss of familial rights stemming from his particular injury. At this point we have to expand the doctrine of redressible injury to cover cases of loss of consortium, a move that American (but not English) courts have been prepared to do when the one spouse sues for his or her personal loss from the death or injury of a spouse.<sup>44</sup> But the cases on whether parents can sue for the loss of consortium of a child is a matter that meets divided opinion and stout judicial resistance.<sup>45</sup> Still, does

<sup>42</sup> See Zigurds Zyle, *Vosburg v. Putney: A Centennial Story*, 1 WIS. L. REV. 877 (1992).

<sup>43</sup> See ARISTOTLE, NICOMACHEAN ETHICS, Book 5, Ch. 4 reprinted in 8 GREAT BOOKS OF THE WESTERN WORLD 339, 379 (W.D. Ross trans., 2nd ed. 1990) (treating “the justice in transactions between man and man”).

<sup>44</sup> See RICHARD A. EPSTEIN, TORTS § 17.10, at 451-53 (1999) for a discussion. See also *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. 1950) (for the key decision extending the right of consortium from husbands to wives). See Administration of Justice Act, 30 & 31 Eliz. 2 § 2 (1982) (for the abolition of all actions for loss of consortium in England, and abolishing all such actions for parents, children and menial servants).

<sup>45</sup> Compare *Borer v. American Airlines*, 563 P.2d 858 (Cal. 1977) (denying action for death of children), with *Berger v. Weber*, 303 N.W.2d 424 (Mich. 1981).

*Vosburg*, or more importantly, the garden variety intentional tort pose a situation in which we can credibly deny that the aggrieved husband, wife, or parent has suffered some injury-in-fact? Certainly we cannot take the position that a husband is indifferent to the death of his wife, the wife to the death of her husband, or either to the death of the child. If there is an injury in fact, then why is there sometimes no right to claim redress for the loss in question?

If we are cleverer still, we can extend the circle one step further and ask whether any person, including those who are unrelated to the plaintiff by blood or marriage—I skip over the case of the second-cousin once removed—could recover for the disruption of friendships and associations that predated the onset of injury. There is some obvious difference between individuals in the third circle and those who inhabit the second. As a general matter, we can be confident that more people inhabit the third circle than do the second, but that each of these suffer smaller disruptions in their personal and professional lives than do putative second tier plaintiffs. But if the question is whether they are indifferent to the physical harms suffered by the person who sustained physical injury, the answer to that question is again an emphatic no. So if they have suffered an injury in fact, then why aren't they all entitled to have standing as well? We have drawn such lines in the bystander emotional distress cases.

Finally—for it hardly pays to go any further—if we are truly clever, we can ask the question of why every person who had some positive probability of forming some gainful association with the plaintiff could not recover for that lost probability. No heroic assumptions are required at least if, to paraphrase Holt, C.J., it is irrelevant that he would have enjoyed the benefits of that relationship, or was likely to enjoy that relationship. Once again, do not ask for whom the bell tolls; it tolls for thee, under the philosophical doctrine of internal relations. If all of us are diminished, why is it that only one of us, the direct victim of the loss is assured standing?

From these hypotheticals, it should be evident that the idea of “harm” associated with some wrongful act is not confined by some logical dictate to the direct physical consequences of a blow. Rather, we can arrange the individuals who suffer from these harms in concentric circles, with the physical victim at the center. The decision on whether or not to allow individuals in the outer rings to bring suit necessarily entails an interplay of social factors that are not captured in any one-dimensional definition of harm. Wholly apart from any constitutional or jurisdictional demands, the social task is to figure out what set of actions should be allowed to serve social objective, such as Guido Calabresi's claim



that the tort law is structured to minimize (the sum of) the costs of these harms, the cost of their prevention and the cost of their adjudication.<sup>46</sup> Trying to approach that question in the round is difficult to say the least since no one carries a social welfare function about in his head. But we can make progress in that direction by asking whether or not the addition of a given cause of action into the mix improves the overall situation. And when we do this, the direct harm requirements that play such a large role in standing decisions turn out to have their sensible common law equivalent.

In *Vosburg* and other physical injury cases, the sensible approach is to start from the center. Clearly a situation that allows any person to strike another person with impunity is an invitation to social chaos, anarchy and vigilante justice. It is easy therefore to make the judgment that it is worth bearing the costs of allowing the victim of the blow to have an action against the injurer, and to do so on the grounds of corrective justice that Aristotle defends. The suit involves one plaintiff against one defendant; the circumstances needed to judge the legality of the act are confined to a tight location and a short time frame. The objective of deterrence is clearly advanced, and the payment of damages helps the victim to return, at least partially, to his pre-accident state of utility. All the pieces come together in a single whole.

It is precisely because conferring on the direct victim the standing to sue is so easy that all other actions in the outer rings become problematic, at least if we take intuitive heed of the three variables in Calabresi's formula. As we move out from the center in physical injury cases, the injuries become more attenuated, the number of parties become more numerous. The cost of administration runs high, yet the *marginal* deterrence from the second suit is not likely to be great, and some of the losses to family members can be built into the basic award to the direct victim himself. In the end it is easy to see why mature legal systems could go different ways on allowing these actions for consortium, and why they are uniformly more willing to allow the action to a single spouse than to a bevy of children: I know of no case where the action for loss of consortium is granted to the children but denied to the spouse.

The balance of convenience swings sharply, however, in the opposite direction when we move to the outer circles. Now the number of parties is so numerous, the perceived damages so small, the costs of suit so great, and the possibilities of abuse so large, that we *categorically* deny that these plaintiffs have standing to sue. It is easy, too easy, to justify this conclusion by saying that people in the outer circles suffer no harm. It is more accurate

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<sup>46</sup> See GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970).

to say that their standing to sue in part because the functions of deterrence have already been well served by allowing the tort action to the immediate victim of the harm and perhaps to his close relatives. We make this judgment categorically because we know enough from the basic sketch to be certain that no particularized harm is likely to lead to any sensible exceptions to that rule in sufficient quantity (if any) to justify the high error costs of a case-by-case analysis. We therefore use the standing term to cover these categorical exclusions because it captures the social unwillingness to delve deeper into the circumstances of particular cases.

This pattern of concentric circles does not, however, describe cases like *Ashby*. To be sure, the victim suffers the direct indignity of loss, but the change in the outcome of the election, or in the behavior of voters generally, does not impact that one voter any more than it does anyone else. The idea that we should use individual tort actions to correct for structural features in the operation of elections now seems a bit forced, as a second-best alternative. Ideally, we would appoint an election commission to oversee elections. That body could order the constables to let Ashby vote if he protests before the polls close. It could add his vote to the tally after the polls close. More to the point, its remedies are not limited to the correction of injustices between the immediate parties, nor even to a showing of individual harm. The Commission could impose fines on the constables who kept Ashby out; it could investigate who gave them orders; and it could order a new election if it thought that voting irregularities were widespread. The point here, however, is that the system seems to function far better if Ashby is put in a position to protest to some independent authority so that he need not go through the bother and expense of a tort suit in the first place. Indeed in many cases the true source of uneasiness is that Ashby will not care enough about the outcome of the election to incur the costs of a suit that promises much heartache for small personal damages. The structural harms to the system seem to call for a structural solution. It would hardly seem out of place to prevent the courts from being the forum of individual suits once a workable administrative apparatus were put into place.

We have still not finished the private law side of this story, for we have yet to take into account those cases in which some individuals suffer specific harms and others suffer (not derivative losses) but the general inconveniences from the inefficient operation of some public facility. To see how that situation might be handled, it is useful to see how the common law of public nuisance furnishes yet another benchmark against which the law of standing can be measured. The origin of this doctrine is caught by an anonymous 1535 English case that deals with the right of private

actions for the obstruction of a public highway.<sup>47</sup> The situation can arise when, for example, a private party places an obstruction on a public highway that slows down traffic along the road, and which also places a barrier that makes it impossible for an adjacent landowner to reach the road at all.

The judges in that case were divided in their views on whether the adjacent landowner had standing to sue. Baldwin, C.J. held that the appropriate remedy was not a private suit for this plaintiff but an action brought by the King on his behalf: "there is no reason for a particular private person to have an action sur son cas; for if one person shall have an action for this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case."<sup>48</sup> The clear model of Baldwin's decisions is that the blocking of the highway is a structural problem for which a single administrative remedy is appropriate. The alternative private actions are too numerous; their harms are too diffuse and difficult to measure. The public action thus achieves a higher level of deterrence at a lower administrative cost. It is a model similar to that used for the public supervision of elections. What is there not to like about his solution?

Plenty, it turns out. The majority opinion of *Fitzherbert* did not take issue with Baldwin's conclusion that the King could have his action with respect to this nuisance. But it held that it did not follow that standing to sue for their harms had to be denied to all the private claimants. Rather, in language that anticipates that of the modern standing cases, the court concludes that it should be possible to carve out, from the general mass of travelers, those few individuals that have suffered "greater displeasure" and "special hurt." But who might those people be? *Fitzherbert* had two answers, one obvious, and one less so. The former is that an action for personal injury should be allowed to any individual who was hurt by crashing into the obstruction. The harder case, which he allowed, was the one before him, that of the adjacent freeholder whose access to the public lands was blocked by the obstruction. At this point, the private losses loom larger, while the number of plaintiffs shrinks. The actions look pretty much like ordinary tort suits.

Our Anonymous 1535 case raises issues that resonate in modern times; indeed the law of England has not moved an iota from this position in nearly 500 years.<sup>49</sup> Suppose now the defendant

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<sup>47</sup> Anonymous, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1535), reprinted in RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 706 (7th ed. 2000).

<sup>48</sup> *Id.*

<sup>49</sup> See WADE & FORSYTH, *supra* note 9, at 698 ("If a public right is under threat, a private person may seek an injunction in two cases: if some private right of his is interfered with at the same time (e.g. by obstruction of the highway which also obstructs access to his land); and where he suffers special damage peculiar to himself from the interference

pollutes public waters, causing massive death of the fish that live in the lake. The modern issue raises the same question as before. Do we content ourselves with administrative action against the wrongdoers—fines, clean up campaigns, and the like—or do we allow private rights of action for those parties that are specially aggrieved by the wrongs? The case is a bit more complicated than the older public nuisance, for if one commercial fisherman is allowed to sue for the loss of his catch, then why not all? The modern cases thus allow actions by the commercial fisherman,<sup>50</sup> and in some cases at least the owners of marinas, bait, tackle and boat stops.<sup>51</sup> But by the same token, standing, yes standing, is denied to folks in the next circle out, to wit various seafood wholesalers, retailers, and distributors who marketed the catch of the local commercial fisherman.

In some cases, however, the best plaintiffs may not be located in the inner circle, for this does not take into account the complex law of relational interests and its connection to the law of unfair competition. Thus suppose a defendant shoots at customers of the plaintiff to scare them away from his business or school, as happened in *Tarleton v. McGawley*,<sup>52</sup> or shoots across the bow of a boat of African natives who wished to trade with the plaintiff.<sup>53</sup> Public criminal prosecutions could of course be brought for these deliberate wrongs, but in many contexts may not. Hence we must be concerned with the interplay between public and private suits. No one questions that the direct victims of the assault are entitled to sue for their losses. But once they cut and run, individually they are unlikely to sue for their losses, given that they can go elsewhere for business or education. One way to overcome this difficulty of course is to organize a class action that combines their claims. But another, more ingenious approach, is to allow the action for (intentional) interference with prospective advantage to the business or school that was forced out of business for its overall losses. Here the combined effect of the defections of individual customers means that this firm suffers some special loss above and beyond the ordinary individuals in society, and conferring

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with the public right. In other cases it was held that only the Attorney-General could vindicate the public right.”).

<sup>50</sup> See, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

<sup>51</sup> See *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975 (E.D. Va. 1981) (for the record, in summarizing this case for my torts casebook, I used the language of standing long before this article was written. “Still another difficulty with the private action involves determining which individuals have standing to bring suit for their economic losses.” RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 711 (7th ed. 2000)).

<sup>52</sup> See, e.g., *Tarleton v. McGawley*, 170 Eng. Rep. 153 (K.B. 1793).

<sup>53</sup> Lord Holt also fits into this category as well, by allowing the action against the schoolmaster of the “antient school” who uses force to keep his young scholars from going to work for a rival. See *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 1228 (Q.B. 1706) (reported in K.B. 1809) (for his discussion).

standing to sue nicely serves the conventional tort purposes of deterrence and compensation.

At this point the difference between no standing and no cause of action becomes clear. More specifically, we can find cases of standing but no cause of action, as in the many instances where one competitor suffers harm because of the market behavior of another. After all, low prices can easily lead rational customers to defect from their prior vendors. Most of these cases properly deny on categorical grounds any relief whatsoever, given the long-term benefits to society. One great defect of John Stuart Mill's famous harm principle is that it does not purport to assess the differential welfare conditions of physical harms from economic competition.<sup>54</sup>

But even if these plaintiffs should go home empty-handed, surely they should be given an explanation in court as to why they lose, which is not because they have not been hurt unless we take the quixotic view that economic losses just do not matter. Indeed, courts in some cases, have to face the question of whether to recognize actions for predation in economic markets, and even if these are frowned upon under the antitrust laws,<sup>55</sup> the statute books have been filled with protectionist legislation designed to protect everything from labor unions and airlines, to dairy products, from ruinous competition. Those protective actions, whether by common law or statute, may be unwise as a matter of policy. But if, and perhaps because, that is the case, the refusal to supply the desired protection is defended candidly on the grounds that economic protection comes at too high a cost, and not on the ground that the injured competitor has not been harmed by his rival's action.

Indeed to say generally that competitive injury does not count leaves it unintelligible as to why a plaintiff has standing, or the tort law offers protection, against *unfair competition* when illegal means—force intimidation, defamation and the like are used.<sup>56</sup> From this point, it is only a short step to an issue that will turn out to have constitutional significance: Is one competitor entitled to enjoin the actions of a rival who has benefited from illegal subsidies or contracts with another?<sup>57</sup> Here again, the harm principle

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<sup>54</sup> See JOHN STUART MILL, ON LIBERTY (1859) reprinted in 40 GREAT BOOKS OF THE WESTERN WORLD 267, 271 (2nd ed. 1990) ("the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."); see RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY 9-39 (1998) (for my elaborate criticism).

<sup>55</sup> See *Matsushita Elec. Co. v. Zenith*, 475 U.S. 574 (1986).

<sup>56</sup> See *Mogul S.S. Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598 (1889) (Bowen, L.J.), for the classic English exposition of the difference.

<sup>57</sup> See *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938), *supra* note 13 and accompanying text for a discussion of Justice Sutherland's use of *damnum absque injuria*.

has to be supplemented with a substantive account of what behaviors should be illegal and why.

The definition of harm, moreover, for the purposes of this analysis is not necessarily tied to physical infliction of loss or competitive injury. Just to complete the picture, it is clear that some firms, e.g. common carriers, are under a duty to serve their customers, and these customers have a valid cause of action when they have not been given the service owed to them. But they also have standing to protest the refusal of any ordinary individual to provide them with service. They might well lose that action against an ordinary business at common law, even if they could succeed under the various antidiscrimination statutes. But once again the plaintiff does not have to have a valid cause of action in order to plead his case. Standing is a doctrine that allows people in the court house door to present their claim. It would be odd to see how the law could develop if the only persons who were allowed to plead their cases were those who had already survived a common law demurrer or a motion to dismiss for failure to state a claim.

Thus far the analysis of the harm principle and its relationship to the tort law has proceeded on the assumption that all these various actions were directed against the wrongful conduct of some private party. The cases, especially those devoted to public nuisance and interference with advantageous relations, show how to police the line between general and special damages, and allow the law to combine private rights of action with public administrative action. Clearly the Crown's action brought against the creator of the private nuisance includes the cost of its removal and correction.

However, what should be done when the obstruction on the public road results from an act or lapse by some public official acting within the scope of his authority? Once again the rules for private nuisance offer some useful direction. In those cases of direct harm, the action should lie against either the sovereign or the official, depending on the scope and direction of the interlocking doctrines of sovereign and official immunity. The problem of specific harms therefore does not create any problem for the doctrine of standing in private law. It should come as little or no surprise that cases that allege these harms do not raise a standing question under federal constitutional law either.

The far harder question is what, if anything, should be done in the event that the public obstruction causes widespread and diffuse harms, in circumstances where no single person can claim a discrete harm. That is the precise analogy to the voting case, where no special injury occurs. When a private party creates a public nuisance, the response is to confer an action on the Attor-

ney General. But now that the King (or any other executive) or his agents are the perpetrators, they can hardly be expected to bring actions to control their own misconduct. In order to keep alive Holt's hope of *ubi ius, ibi remedium*, the task is to position *someone* to challenge the system-wide irregularities. Where the question turns, moreover, from damages to injunction, the claims of sovereign and official immunity have to yield, for otherwise the inability to impose any restraint on the sovereign entails the end of judicial review because no one can force the President or Congress to toe the line.<sup>58</sup> It follows therefore that injunctive relief is often critical to the enforcement of the structural limitations found in the Constitution, just as it is critical to protect all citizens against voting irregularities. To a lawyer steeped in the private law tradition, the discussion thus immediately gravitates to class or representative actions in which one person champions reforms that help benefit all. At this point, the appropriate set of private analogies to the standing law has to cover more than tort-like cases to the law of contract generally and to the law of voluntary associations corporations more specifically. Here is how the story plays out.

#### A. Standing, Contracts and Corporations

A second source for the public law of standing comes from the law of contract. To see how the doctrine of standing evolves within this category, start with the simple case in which A has made a promise to B, which is then breached. The normal rule routinely allows B to sue for that breach of conduct. Indeed, we can take the matter one step further. In the typical case, *only* B is entitled to maintain that action against A. Thus suppose that some party C has entered into a contract with B that B can only perform if A first performs her contract with B. Can C maintain an action for breach of promise against A, even though not a party to the A-B contract? The invariable answer to that question is in the negative, except today in those cases in which C can show that he was an intended third-party beneficiary of the original contract. The basic impulse is that B has a direct stake in his relationships with A and that he should have the right to decide whether to enforce any obligations owing to him, or to waive or to compromise them. In the usual case B will act out of his self-interest in dealing with A, and will seek to secure the maximum return from the arrangement. To allow C an action against A is to divide the control B has over his contractual rights. And if C can come into the picture, then why not D, E, and F? The basic privity limitation in the law of contract—only parties to the agreement

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<sup>58</sup> See, e.g., *Ex parte Young*, 209 U.S. 123 (1908).

are entitled to maintain actions on it—thus represents an application of the standing doctrine to the law of contract, designed to prevent the endless proliferation of actions for a single breach of duty.<sup>59</sup> These other parties have probably been made worse off by the breach of contract; indeed, given the extensive level of commercial interdependence surely they are. So as with the tort cases we use a standing doctrine as a filtering device to treat some individuals as though they were not harmed even though we know they were.

The law of contracts also links together large numbers of individuals in some collective enterprise through an endless array of partnerships, associations, corporations, and other legal entities. These collective organizations could seek to specify in great detail all the rights and duties of the respective parties. But generally, their broad set of purposes makes it foolhardy to even try to set out the particulars in a complete contingent state contract. In the alternative, what these private organizations do is to adopt their own constitution in order to create an internal governance structure complete with a president and a management team and oversight through some board of directors. These private organizations have many structural resemblances to political organizations.<sup>60</sup> In particular they face the same trade-offs between the necessity for quick and effective action on the one hand, versus the need to prevent factional intrigue that could lead to expropriation of some members of the business for the benefit of others. All these composite organizations are set up by voluntary transactions, and individuals will not participate in them if they think that the expected return on their investment is negative. Any practice therefore that allows one group of investors or shareholders to profit by redirecting the capital of another group to itself will, since it will be anticipated, lead to stillborn associations. The

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<sup>59</sup> See *Moch v. Rensselaer Water Co.*, 159 N.E. 896, 898-99 (N.Y. 1928), where Cardozo put the point as follows:

The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with everyone who might potentially be benefited through the supply of water at the hydrants as to give negligent performance, without reasonable notice of a refusal to continue, the quality of a tort. . . . We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty. The dealer in coal who is to supply fuel for a shop must then answer to the customers if fuel is lacking. The manufacture of goods, who enters upon the performance of his contract, must answer, in that view, not only to the buyer, but to those who to his knowledge are looking to the buyer for their own sources of supply. *Id.*

Note that in Cardozo's view, the assertion that these claims count as tort claims means that they could not be brought if the defendant did not begin the performance of his agreed-upon work. But if contract doctrine applied, then the defendant could be held liable even if the contract were fully executory.

<sup>60</sup> See Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988) for an elaboration of the point.



organizers must put in place safeguards against these abuses in order to induce the initial participation in the joint venture.

One set of techniques used to control the risk of abuse, is to impose certain limitations on the kinds of transactions that can be taken by the executive alone, and even the executive in consultation with the Board of Directors. The traditional doctrine of ultra vires sought to control the problem of abuse by limiting the ends to which the collective assets could be devoted, and do so even at the cost of preventing the firm from engaging in certain profitable transactions. In addition, it was commonplace to insist that the firm's officers set aside the necessary reserves for capital expenditures, and to obtain the necessary bonds and guarantees for the performance of work by outside parties. Likewise, the basic charter could impose limitations on the capacity of the officers and directors of the firm to enter into a reorganization or sale of its assets.

Now suppose that officers and directors do some action, which is arguably in excess of their delegated powers. Who should be in a position to sue? Here the obvious candidates for the suit are those members or shareholders who are aggrieved by the action. In the typical organization, however, many individuals may fall into the same position. It becomes quickly obvious that a multiplicity of individual lawsuits does not offer a rational means to counter abuse at the center. But the response here is never to say that since all shareholders are equally aggrieved, then none are entitled to a cause of action. Rather, it has always been understood that the greater danger is that the stake of any individual member or shareholder will be too small relative to the operation of the system as a whole. The business risk is that no individual will therefore share the entire cost of suit when the benefits inure to all members and shareholders as a class. That result is likely to hold where the relief sought is individual damages to be paid directly into the pocket of the named plaintiff. But here at least the party who sues does not perforce confer a benefit on others who are similarly situated, because it is possible for a defendant to pay money to A without paying it to B.

It is therefore certainly possible to let direct shareholder actions proceed by individual suits or by permissive joinder, especially in cases of ordinary tort harms. But the indivisibility of the relief sought becomes almost a truism when the suit is brought in equity to enjoin a reorganization, to stop the consummation of an improper contract with a third party, or to remove an officer or director. Now we have a case of the creation of a limited public good from which all members or shareholders will benefit equally

whether they support its creation or not.<sup>61</sup> All individuals now stand in the same positions as members or shareholders. To deal with such situations, the courts of equity created the shareholder's derivative action. The basic legal position has been succinctly summarized:

The claim, however, may be that management's wrongdoing has directly injured the corporation and has thereby prejudiced the shareholders only indirectly. For example, the charge may be that directors or officers have breached their fiduciary duties by taking excessive salaries or appropriating corporate opportunities, or that management has improperly declined to enforce a corporate cause of action against outsiders. In these circumstances, the shareholders' injury (diminution in the value of their shares) derives from the fact that the alleged misconduct has reduced the value of the corporation's assets. Further, this type of derivative injury is suffered in common by all shareholders according to their proportionate interest in the corporation. The shareholders' derivative suit was created by equity courts to permit a shareholder to vindicate wrongs done to the corporation as a whole that management, because of either self-interest or neglect, would not remedy. It allows a shareholder to bring a secondary (or derivative) action on behalf of the corporation (and thus all its shareholders collectively) in contrast to the direct (or primary) cause of action in which shareholders assert their own rights. It may be viewed as a peculiar type of class suit in which the shareholder asserts a right of the corporation for the benefit of all who have an interest in the corporation's success.<sup>62</sup>

Note that the devices in question were created not by common law courts but by courts of equity with their flexible remedial structures. One clear implication from this passage is that the *only* persons who have an "interest in the corporation's success" are the shareholders of the corporation. Here too this conclusion is not meant to describe the economic consequences of corporate misconduct, by setting up the false pretense that the adverse effects of corporate misconduct has no effect on people who have business arrangements with corporate shareholders. Rather, limiting derivative actions to shareholders operates as a standing limitation with respect to equitable actions. So long as the shareholders, or any fraction of them, will proceed with suits, individu-

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<sup>61</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) for the classic discussion. Note that a public good need not benefit all members of society equally. It is enough that we can identify any group, all of whose members will benefit so long as one of them does, and the standard corporation implies that all assets of the firm are public goods to its membership.

<sup>62</sup> JESSE H. CHOPER ET AL., *CASES AND MATERIALS ON CORPORATIONS*, 785-86 (3rd ed. 1989). Note also the implicit standing limitation in the last sentence. The only people who have "an interest in the corporation's success" are the shareholders. *Id.*

als in the next outer ring should be shut out of bringing suit altogether. No one, except shareholders, has standing to protest any of the forms of corporate misconduct. The limitation derives from an understanding of the complex web of business limitations. It has nothing to do with the limited jurisdiction of the state or federal courts in which these actions are brought.

One possible way to avoid the analogy is to argue that shareholders all suffer injury and thus satisfy the direct injury test of the standing law. But if that is the case, then so do ordinary citizens and taxpayers who stand in the same relationship to their government that shareholders stand to their firm. But in fact the use of the derivative action is meant to cover cases where no particular shareholders have any suffered any special injury at all. Given the need for derivative actions, it is clear that state and federal rules have to accommodate this concern by developing what looks in all but name to be a form of class action. The origins of the equitable class action in federal court long precede the adoption of the Federal Rules of Civil Procedure in 1938 or the major revision of the class action rules in 1966.<sup>63</sup> Accordingly, in its least controversial application, the Federal Rules of Civil Procedure have authorized the use of class actions for all persons similarly situated as against the defendant.<sup>64</sup> The Notes to the 1966 Federal Rules make clear the strength of this case:

In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class.<sup>65</sup>

So understood, this use of the class action is designed to achieve three organizational goals simultaneously. First, it permits the passive individuals some say in the control and the operation of the lawsuit. Second, in the event of success, it permits the representative of the class to obtain some recovery for the work expended on behalf of the class proper, such as through a cash payment from the association or corporation made defendant in the suit. Third, after some equivocation, it now binds all class

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<sup>63</sup> See FLEMING JAMES ET AL., CIVIL PROCEDURE, § 10.21 (1992) for a brief account. See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (a representative early case).

<sup>64</sup> See Fed. R. Civ. P. 23.

<sup>65</sup> *Id.* at advisory committee's note, clause B (citing *Ben-Hur*, as well as a large number of corporate derivative actions dealing with "the proper recognition and handling of redemption or pre-emption rights").

members, so that if the class action loses, the defendant does not have to face a repetition of suits.<sup>66</sup>

Once again, it is important to see how these equitable conceptions carry over from private associations to governments. The analogous situation is one in which a municipal government enters into a contract that is ultra vires. In dealing with these cases, the uniform nineteenth century rule was that any citizen or taxpayer of the local government, just like any shareholder of the corporation, could sue to enjoin the transaction. Thus in *Crampton v. Zabriskie*,<sup>67</sup> the question was whether a member of the local township could enjoin the completion of a contract on the ground that the local government had entered into a contract for future work for which it had not, in violation of its charter, secured the requisite funding either through cash on hand or taxes already owing. Justice Field had no difficulty in allowing the taxpayer action, noting that it corresponded to the uniform practice of the time:

Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by State courts in numerous cases; and from the nature of the power exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injury, it would seem eminently proper for courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens on property-holders.<sup>68</sup>

In the course of his decision Field cited Dillon's well-known treatise on Municipal Corporations.<sup>69</sup> My examination of the 5th Revised edition of 1911 shows the synergy between the Court and treatise writer. Dillon for his part quotes extensively from *Crampton* to support the general proposition that taxpayers and property holders may have an injunction.<sup>70</sup> Earlier he writes as follows:

In the country, the right of *property-holders* or *taxable inhabitants* to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the property-holders or taxpayers, —such as making an unautho-

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<sup>66</sup> See, e.g., *Ben-Hur*, 255 U.S. 356; *Hansberry v. Lee*, 311 U.S. 32 (1940).

<sup>67</sup> 101 U.S. 601 (1879).

<sup>68</sup> *Id.* at 609. See also *Miller v. Grandy*, 13 Mich. 540, 550 (1865).

<sup>69</sup> *Crampton*, 101 U.S. at 609; JOHN F. DILLON, MUNICIPAL CORPORATIONS, 5th ed. § 1579-81 (1911).

<sup>70</sup> See DILLON, *supra* note 69, § 1581, at 2767.

rized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property. . . —has, without the aid of statutory provisions to that effect, been affirmed or recognized in numerous cases in many of the States. It is the prevailing, we may add, almost universal doctrine on this subject. It can, we think, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct, and adequate relief against their misuse.<sup>71</sup>

It is worthy of note, moreover, that Dillon immediately justifies this decision by drawing an appeal to the jurisdiction that equity courts have over private corporations where the “the ultimate *cestuis que trust* are the stockholders.”<sup>72</sup> Thereafter Dillon insists that the shareholders of a corporation, whether public or private, should be able to maintain an action to restrain unlawful conduct if the officers of that corporation fail to do so:

But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant, and particularly any taxable inhabitant who will be adversely affected, be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property-owners on whom the loss will eventually fall are without effectual remedy.<sup>73</sup>

Dillon clearly contemplates the aggregation of small fungible claims into one large claim. Consistent with the decision in *Crampton*, he does not contemplate a requirement of a distinctive claim for this particular taxpayer or citizen, nor does he tie the ability to bring suit to the substantive nature of the underlying claim. The same principle that governs incurring a debt in *Crampton* could apply to any other activity, such an illegal contract that calls for services to be rendered to the corporation. In no sense is the logic of Dillon’s treatise or *Crampton* limited to cases of liquidated damages. Indeed, an injunction may be all the more necessary when damages are hard to quantify, for that only increases the strength of the claim that damages are not adequate as a matter of law— a hallmark of nineteenth century equity jurisprudence. Nor does it matter whether this shareholder or citizen represents the majority view. Any one party can challenge illegality, just as one party to a contract can insist on its enforcement

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<sup>71</sup> *Id.* § 1579, at 2763-64.

<sup>72</sup> *Id.* § 1580, at 2766.

<sup>73</sup> *Id.* at 2766-67.

when all the others wish to abandon the deal. Those who wish to defend the legality of the transaction can intervene on the other side if they think that the corporate (or public) officers have not mounted a spirited defense. But once again, the clear view here is that on issues where defendants have to provide a public good to a class, no party suffers a discrete injury. The common law response may allow no party a cause of action. The equitable response allows *anyone* to bring that suit.

This examination of the private law analogies thus shows, quite clearly, the development of two distinct lines of authority, one in law and one in equity, for determining which parties should have standing to bring suit, for personal redress on the one hand or for structural injunctions on the other. Two very different standing doctrines emerge quite naturally out of the substantive and remedial aspects of both situations, even for suits brought in courts with plenary jurisdiction. In both cases, the doctrine necessarily cuts out from the legal system some individuals who can only show some economic harm that follows in consequence of the wrongdoing of other individuals. But in both cases, the standing doctrine is applied because it proves possible to identify a smaller group of better situated individuals to prosecute the actions at lower cost. In effect, individuals whose interests are derivative and indirect receive a mandatory free ride from those persons whose right of direct action reduces the likelihood of breach in the first place. But more to the point, they are *forced* to accept the role of free riders against their will. In principle, a legislature could change matters by rejecting the standing doctrine and creating a private right of action in, say, the children of injured parties.

Yet there are differences. In common law actions where the plaintiff seeks damages, the action goes to the party whose distinct interest allows him to stand out from the crowd. In contrast on the equity side, relief is meant to protect public goods for a class of individuals of which the named plaintiff is only one. Now the revised remedial focus leads to a transformation in the logic of standing. No longer is it appropriate, let alone necessary, for the plaintiff to show that he has a special or disproportionate interest. Rather, the precise opposite becomes the norm: the success of the class or representative action depends on the ability of the named plaintiff to show that he is *indistinguishable* from other persons in the same class. Distinctive injuries; special burdens; unique connections are no longer prerequisites to a legal action; they become obstacles to it. The great institutions regulated by equity depend on the creation of abstract entities—corporations, partnerships, and associations—to work because they are, to use the new jargony word, scalable. Their interests are additive without limit because they are fungible. Only when those conditions are satis-

fied can one person effectively represent all. Exactly how the class action is managed depends on the complex rules for the selection of the lead plaintiff, the scope and definition of class membership, the allocation of expenses and recovery, and a myriad of other details.

This radical difference in approach between law and equity has profound implications for understanding the constitutional doctrines of standing, to which we now turn. But the upshot should be briefly stated. The Supreme Court's standing jurisprudence uses the standing rules for common law damage actions to govern cases of equitable relief. In so doing the Court manages to realize the worst fears of the traditional, public choice theorist. As writers from Aristotle<sup>74</sup> to Russell Hardin<sup>75</sup> have stressed, one great weakness of a system of individual rights is that it creates this paradox: The public's business becomes nobody's business because no person has the incentive to take steps to protect that interest. The various forms of equitable action count as ways to make the public's business everyone's business, and the judicial response is to make sure that we return to the state of nature in which everybody's business is again nobody's business. As the next section shows, this one conceptual blunder turns everything upside down.

## II. STANDING AS A MATTER OF CONSTITUTIONAL LAW

### A. *Massachusetts v. Mellon*—A Closer Look

As noted earlier, the standing doctrine was born in fact, but not by name, during the progressive era in *Massachusetts v. Mellon*. Yet the political dynamics of the case are often not well understood so that it is wise to summarize them here. The most obvious question is why Massachusetts sought to nullify a statutory program when it could have escaped its tentacles by refusing to participate in that program at all. The only state agencies that fell under the thumb of the federal Children's Bureau established under the Act were those who sought out its money. Where is the coercion or imposition in that?

The answer to the case starts, perhaps with the appellant's citation in argument to the Supreme Court's then recent decision in *Hammer v. Dagenhart*,<sup>76</sup> in which the Court had invalidated a federal statute that sought to ban from shipment in interstate commerce any product of any firm or its affiliate that had been

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<sup>74</sup> See ARISTOTLE, POLITICS, Book II, ch. 3 reprinted in 8 GREAT BOOKS OF THE WESTERN WORLD 439, 456 (B. Jowett trans., 2nd ed. 1990) ("For that which is common to the greatest number has the least care bestowed on it.").

<sup>75</sup> See RUSSELL HARDIN, COLLECTIVE ACTION 8 (1982).

<sup>76</sup> 247 U.S. 251 (1918).

made in a plant that hired under-aged children in violation of federal child-labor statutes, which were more stringent than their state equivalent. *Hammer* clearly brought into graphic relief the question whether the commerce power could be used as an indirect means to regulate the local conditions of manufacture.<sup>77</sup> Here the United States explicitly stated that the national regulation of child labor was needed in order to prevent what the Solicitor General, John W. Davis, regarded as the ruinous competition among the states, which were, he claimed, in a kind of prisoner's dilemma.<sup>78</sup> Each state would have passed tougher child labor laws if not for the decisions of rival states to have more lenient measures. The claim was that only Congress could prevent the unfair competition between the states and the race to the bottom to which it was said to lead. But the congressional strategy upset the balance between state and local power. Congress could not force all individuals to abandon their ordinary common law rights as a condition for entering into interstate commerce. The firms subject to the regulation were allowed to challenge the congressional power to leverage its control over transportation and interstate sales into control over local manufacture. They were not barred by any notion of consent flowing from their knowledge of the federal statute when they shipped their goods in interstate commerce. To tolerate this congressional strategy in the one case opens the door to comprehensive federal regulation that no business is able to resist: the cost of compliance with these statutes is low compared with the cost of losing gains from all interstate trade. If forced to that choice, everyone will capitulate to the federal terms of trade, so that any enclave of state powers is effectively eroded. What is true, moreover, about direct prohibition on the shipment of goods, applies to a tax equal to ten percent of profits of any firm that uses child labor. So just before *Mellon*, the Court struck down such a tax in the *Child Labor Tax Case*.<sup>79</sup> The clear implication of that decision is that the power to tax (but not necessarily to spend) as contained in Art. I, § 8, cl. 1 was limited, as Madison claimed, to taxes that could be harmonized with the substantive powers contained elsewhere in Art. I, § 8.

Counsel for Massachusetts raised in explicit form the challenge to the aggressive use of spending power as well. Counsel did so because he had to show that he was entitled to protest the carrying on of a program that Massachusetts was free not to join. He

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<sup>77</sup> See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1427-32 (1987) [hereinafter Epstein, *Commerce Power*], and RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 146-50 (1993), for a more extensive statement of my views.

<sup>78</sup> *Hammer*, 247 U.S. at 256-57, discussed in Epstein, *Commerce Power*, *supra* note 77, at 1429-30.

<sup>79</sup> 259 U.S. 20 (1922).



also recognized, after a fashion, that his case presented an altered version of the constitutional prisoner's dilemma game raised in *Hammer*. In both cases, the use of a federal program was designed to thwart the competition between states that develops within a federalist system when each state formulates its own system of maternal care.

When the Maternity Act is examined in these structural terms, a state cannot vindicate its constitutional position simply by refusing to accept the proffered statutory benefits, any more than a manufacturer could keep its independence by refusing to ship goods in interstate commerce. Let Massachusetts refuse to participate in the Maternity Act programs, and citizens remain subject to the taxes in question, which are now directed elsewhere. The Maternity Act not only uses tax revenues from the states that participate in the program, but it uses tax revenues from states that refuse to participate in the program. The coercion comes from the linking of the benefit offered to the prior tax. In principle every state could prefer an outcome of no tax/no benefit, but so long as no state can undermine the power to tax, the dominant strategy for each state is to take the benefit. With the tax firmly in place, the fact of consent only allows the state to choose between its second and third choices: participate or don't participate, but by all means pay. Each state knows moreover that once it opts out the deal becomes ever sweeter for the states that remain.

Faced with these constraints, no state has any way to obtain its first alternative—stop the program in its tracks because its scope lies outside the spending clause—unless it can sue to dismantle the program. The upshot is that just carrying on the program, with or without Massachusetts' participation, necessarily skews the balance of power between the central government and the states. Indeed even if a majority of other states are prepared to wink at the Constitutional violation, Massachusetts should still be allowed to challenge its constitutionality. The limits on the spending clause should not be determined by majority vote. Until the scope of the standing clause is changed by explicit constitutional Amendment, then each single state has a vested right to make every other state play by the rules of the game. All these points were well understood by the Assistant Attorney General (Alexander Lincoln) who argued the case for Massachusetts.<sup>80</sup> The case thus offers an ideal setting for a structural injunction, which offers the only chance to stop the program in its tracks.

Justice Sutherland, however, saw none of this. His approach is to divert and conquer. The diversion begins when he confuses standing with political question. Massachusetts, he wrote, did not

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<sup>80</sup> See Lincoln's argument in, *Massachusetts v. Mellon*, 262 U.S. 447, 459-66 (1923).

present a “justiciable controversy either in its own behalf or as the representative of its citizens.”<sup>81</sup> Mrs. Frothingham is similarly prevented from raising these issues as a citizen or taxpayer. But *Mellon* does not seek to challenge the political judgments of the United States in deciding to enter foreign treaties. Nor does it resemble a case where the governor of one state refuses to honor some “moral obligation” to return a fugitive from justice to the state where the crime was committed. It is strictly and solely a question of the legality of the program under the spending clause.

Having first muddied the waters, Justice Sutherland then turns to the structural issues raised in *Mellon*. He reaches exactly the wrong conclusion about them because he misses the prisoner’s dilemma problem. In order to soften the blow for the standing analysis, he writes that “In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of this statute, though nothing has been done and nothing is to be done *without their consent*.”<sup>82</sup> This point is not essential to his decision, but the reference to consent raises a red herring in light of the overall structural issues that *Mellon*, like the *Child Labor Tax Case*, raises.

Sutherland’s analysis fares equally poorly when it turns to Mrs. Frothingham’s contention that she should be able to block the transaction as a taxpayer. His first mistake is to write as though she were only seeking a refund of her own money by noting “that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law.”<sup>83</sup> The stress is on the *her*, singular. But her claim is not for a refund, but for injunctive relief. Nor did William Rawls, Frothingham’s lawyer, make any due process argument. Rather he forcibly directed the attention of the Court to the nineteenth century precedents, such as *Crampton v. Zabriskie* that authorized taxpayer suits at the municipal level in order to prevent ultra vires or illegal actions. Sutherland’s recasting of the claim is simply a ruse to convert her structural objection into one about the fate of one lady’s dollars. It is now easy to make the transition to the common law tort actions, and to argue that the moneys could have been lost no matter how they had been spent, for if this appropriation fails then another might succeed.<sup>84</sup>

Sutherland’s riposte misses the point of Rawls’s objection on two counts. First, as in *Crampton* the concern is not just for her dollars, but for the dollars of all persons with whom she has a

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<sup>81</sup> *Id.* at 480.

<sup>82</sup> *Id.* at 483 (emphasis added).

<sup>83</sup> *Mellon*, 262 U.S. at 486.

<sup>84</sup> *Id.*

position in common. In Rawls's words what was sought was "a proceeding to be maintained by one of a large class affected by a law alleged to be invalid, for the purpose of enjoining a public officer from executing it",<sup>85</sup> citing again *Hammer v. Dagenhart*. The second point is, of course, to enjoin the performance of an illegal act. Treating this as a quasi-class action therefore brings the case within the *Crampton* principle. It also increases the size of the financial stakes substantially, and could easily alter the pattern of government behavior. Enjoin the payments under this statute, and the new revenue measure will not replicate the structural flaws of the one that is overruled. So whether the taxes are reduced, the national debt is trimmed, or new programs are authorized, federal power cannot expand whether individual states take the money or not.

Justice Sutherland never quotes the key passage from *Crampton v. Zabriskie*, which holds the plaintiff must be a citizen or taxpayer of the municipal corporation. The analogous position here is that all citizens of the United States and (perhaps) foreigners who pay local taxes may bring suit to enjoin the operation of the statute, even though foreigners who pay no taxes cannot. The real difference of course is that virtually everyone meets the standing test for suits against the national government even if only a small fraction of the populace meets it for the local government. But the difference does not matter. So long as the interests are fungible, then these interests can be amalgamated without difficulty. And if it be said that some citizens support the measure that is claimed to be ultra vires or illegal, then the same answer can be given here that is given to suits against municipal corporations. Issues of constitutionality and legality are not matters of majority vote. Others who disagree on the outcome should be allowed to intervene to defend the decision if the municipal government will not, but this option goes not to standing, but to joinder of necessary parties—a point that did not seem important in *Melton* owing to the vigorous defense that the United States made of its own program.

Yet Sutherland is utterly oblivious to the ease with which the rules on municipal corporations transfer to the federal level. Instead he purports to distinguish those cases (without examining them at all) as follows: "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate."<sup>86</sup> But there is nothing to suggest that the right to enjoin illegal behavior in *Crampton* depended on the taxpayer being able

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<sup>85</sup> *Id.* at 475.

<sup>86</sup> *Id.* at 486.

to show some minimum level of financial harm. The words “direct and immediate” formed no part of its logic, which stressed exactly the opposite point of view that the taxpayer’s position was one shared “in common” with other members of the community. Sutherland has clearly suppressed the equitable basis for plaintiff’s action, and has adopted, though not in so many words the definition of standing needed for common law tort actions:

The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation [he means municipal corporation] . . . IV Dillon Municipal Corporations, 5th ed., § 1580 et seq. But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparative minute and indeterminable; and the effect upon future taxation, of any payment out of funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.<sup>87</sup>

So the courts of equity are out of it. But he does not explain why the difference in the number of taxpayers at the federal level works a difference in principle. The theory in the municipal case was that the individual taxpayer was the representative of some larger group. That theory can carry over to this case as well. The theory further said that all these taxpayers cared both about the total amount of moneys in question *and* about enjoining the performance of illegal actions. Both considerations again apply. Nor does it help to describe the matter as one of “public and not of individual concern,”<sup>88</sup> as Sutherland does a moment later, because it is exactly those kinds of public goods that the equity action was designed to deal with in the first place. But once he disposes of the equity side of the court, he introduces the twin themes of separation of powers and the common law tests for direct injury that have proved so ill-suited to this area:

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.<sup>89</sup>

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<sup>87</sup> *Id.* at 487.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 488.

It all sounds good until we realize that this strong separationist sentiment is flatly inconsistent with judicial review under *Marbury v. Madison*, for the complaint here is not that the law is unwise, but that it lies beyond the power of Congress to enact. Yet such is the nature of standing that it often leads the justices to defend the exact opposite opinion, namely, that they should exercise their powers in ways that allow them to duck the responsibility that *Marbury* places securely in the judicial branch. Justice Sutherland gets to that conclusion in no time:

We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.<sup>90</sup>

This statement does nothing to repair the conceptual damage already done. The use of the term “*per se*” in the first sentence allows Sutherland to exploit a profound ambiguity. That statement is surely correct if it means that the Court cannot on its own motion examine the statute book and decide that some of its laws are beyond the power of Congress to enact. It must decide in response to a case, but that only means that a plaintiff has cared enough to initiate suit, not that he has suffered the direct injury appropriate for common law actions but irrelevant to the exercise of the Court’s (indeed any court’s) equitable powers.

## B. Reaping the Whirlwind

I have said enough to show that *Mellon* does not do justice to the equity portion of the Court’s judicial power under Article III. But whatever its weaknesses, once we substitute the word “standing” for the clumsy phrase “justiciable controversy,” *Mellon* compresses the modern case law on standing in a nutshell where it has since remained. Once that is done, two problems remain: the first is to give content to the idea of direct injury, and the second, more critical issue, is what device allows challenges to structural changes that harmed no one in particular, but everyone equally.

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<sup>90</sup> *Id.* at 488 (emphasis added). See *United States v. Richardson*, 418 U.S. 166, 191 (1974) (Powell, J., concurring), for a modern version of the same argument: “The power recognized in [*Marbury*] is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing.”

## (1) Direct Injury

The question of what counts as a direct injury came up again 15 years after *Mellon* in *Alabama Power Co. v. Ickes*,<sup>91</sup> where the question was whether a private electrical company had standing to protest loans and grants made under the National Industrial Recovery Act to several Alabama municipalities to help defray their cost of production for a local distribution system. The Power Company's argument was that the grants in question were illegal in that they gave the local municipalities a leg up in their competition with the plaintiffs. To the extent that the suit depended on taxpayer standing, Justice Sutherland dismissed it on the authority of *Massachusetts v. Mellon*. The newer wrinkle in this case was that the plaintiff sought to complain both as a taxpayer and a competitor. In this second capacity, its harm was surely greater and more distinctive than that of ordinary citizens who benefited from the improved local power service even if the cutting back of private services might have inconvenienced them. Yet at this point Sutherland translated the direct injury test into the question of whether the plaintiff has a valid cause of action, to which he gave a negative answer:

The term "direct injury" is there [i.e. in *Massachusetts v. Mellon*] used in its legal sense, as meaning a wrong which directly results in the violation of a legal right. "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay a foundation of an action . . . ."<sup>92</sup>

So the grounds for argument shift, for now it is not the size of the injury, but whether the competitive harm is compensable as a matter of common law principles. There are of course many economic harms that fall into this category of noncompensable losses, but it requires an independent judgment as to whether that result is sound. In the usual case of competitive harm, the *substantive* judgment is that the gains from competition can be realized only if each competitor must bear the losses inflicted when some rival offers better goods at lower cost. But it takes a distinct substantive leap to conclude that A should be left helpless if B receives illegal payments from C which count as a subsidy that distort the balance of trade between the parties. The subsidy itself, if legal, might not create this effect: after all, I am allowed to bankroll my son's new record store, even if it allows him to undercut the prices

<sup>91</sup> 302 U.S. 464 (1938). See *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), where similar issues were raised in this equally unsatisfactory decision.

<sup>92</sup> *Id.* at 479.

charged by strangers. Yet even here, an elaborate dispute exists at common law as to whether this result holds when a B acts with malice.<sup>93</sup> Surely a similar debate makes sense when illegal or unconstitutional payments are used to prop up one competitor at the expense of the other. Perhaps the answer should be that the disappointed competitor has no relief, but it is not because of the want of causal connection between the subsidy of one competitor and the financial woes of his rivals. The great vice of the Sutherland position is that it invokes a familiar legal crutch, “*damnum absque injuria*,” to cut off a serious inquiry into the impact of illegal payments on competitive balance, even for a competitor who has suffered a disproportionate injury. The direct injury test has thus become a charade. It should be regarded as a good thing that the more modern cases incorporate elements of the English practice,<sup>94</sup> which is to allow a disappointed party to an administrative procedure to maintain an action to attack an award to a competitor,<sup>95</sup> on grounds of injury in fact. The question of whether there is a valid cause of action still has to be answered, but not in the truncated form that Sutherland adopted.

The confusion over direct injury has also led to a serious confusion in subsequent cases. Thus in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,<sup>96</sup> environmental groups had challenged the decision by the Interstate Commerce Commission (ICC) not to suspend surcharges imposed on railroad shipment rates. The National Environmental Policy Act of 1969 (NEPA) requires a detailed environmental impact statement in “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”<sup>97</sup> In appearances before the ICC, SCRAP and other environmental groups (such as the Environmental Defense Fund), had protested that “failure to suspend the surcharge would cause their members ‘economic, recreational and aesthetic harm,’” insofar as it interfered with their use of parks, forests and other natural resources in the Washington D.C. area.<sup>98</sup> The plaintiffs then alleged that they counted as persons

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<sup>93</sup> See, e.g., *Allen v. Flood*, [1898] App. Cas. 151; *Tuttle v. Buck*, 119 N.W. 946 (Minn. 1909).

<sup>94</sup> See WADE & FROSYTH, *supra* note 9, at 702-03.

<sup>95</sup> See *Association of Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970), for the liberalization of standing law, not without problems of its own, which also makes reference to The Administrative Procedure Act to raise “the question whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.”

<sup>96</sup> 412 U.S. 669 (1973).

<sup>97</sup> National Environmental Policy Act of 1969 § 102 (2)(C), 42 U.S.C. § 4332 (2)(C) (1994).

<sup>98</sup> *SCRAP*, 412 U.S. at 675-76.

who were “adversely affected or aggrieved by agency action”<sup>99</sup> under the *Data Processing Services*’ “injury in fact” test. In dealing with the standing issue, the Court held that the allegations of harms to the local environment counted as more than claims of generalized injury and therefore survived the usual standing challenges based on the failure to show a special interest.

The Court’s conclusion here seems wrong as a matter of law, given the tortured chain of causation on which the plaintiffs necessarily relied. Most obviously, *SCRAP* did not involve the standard emissions of pollutants and toxic substances. Rather, what the chain of causation envisioned was that the relative increases in price would lead to a relative increase in the use of nonrecyclable goods relative to recyclables, which in turn was said to increase the pressure on the natural resources in forests, streams and mountains. The first thing about the case is to wonder why any environmental group is confident that it knows the direction, if any, of environmental impacts that would follow from the changes in rates for a wide range of goods whose responses to changes in freight rates could be largely uncorrelated. Nor are the consequences confined to the single substitution to which the plaintiff has drawn attention. Holding back a rate increase could lead to the reduction in railroad maintenance along the roads which in turn could increase the number of crashes or spills; or it could lead to railroad bankruptcies that in turn could result in major dislocation in transportation markets that cause far more harm than good.

On this view of the situation, the case should be dismissed, not because of some standing doctrine, but solely on the grounds that it does not meet the requirements of either NEPA or the APA. In light of the multiple directions of the imaginable consequences, the case is not one where there are federal actions “significantly affecting the quality of the human environment.” And even if there were, the uncertainty of their direction dooms any claim under the APA that the plaintiff is either “adversely affected or aggrieved” under the APA. For all we know the rate change could have had a positive effect on the environment, or a positive effect in some regions and a negative effect in others—but without any ability to determine which was which.

Results like this are common in ordinary private cases. The issue of causation surfaces in bewildering fashion, for example, in RICO cases when plaintiffs seek to establish ingenious connections between the defendant’s wrongful conduct and the injury to plaintiff’s property or business. In each of these cases, it is under-

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<sup>99</sup> The Administrative Procedure Act (APA), 5 U.S.C. § 702 (1994) provides, “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to have judicial review thereof.”



stood that the ordinary common law principles of proximate causation apply, and that these principles allow a court to grant summary judgment for the defendant where the plaintiff's causal chain is composed of missing links. Thus in *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*,<sup>100</sup> the court explicitly invoked the language of standing (without any overtones of federal jurisdiction) when it observed that "the Supreme Court stated that a plaintiff's standing to sue under RICO requires 'a showing that the defendant's violation not only was a "but for" cause of his injury, but was the proximate cause as well.'"<sup>101</sup>

*Laborers Local 17* offers a textbook example of applying common law causation principles. The plaintiffs had alleged that the deceptive advertisement campaign of the tobacco companies had so deceived individual union members that they continued to smoke to excess, thereby increasing the medical costs to the health plans of which they were members. There was no allegation that the fraud had worked an effect on the health plans directly, but only that, as in *SCRAP*, the consequences had seeped through the system, causing "infrastructure harms" to the health plans for which compensation was required. No luck, came the response, a decision that makes explicit reliance on ideas of standing. The Court wrote:

It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries; (2) the countereffect that the tobacco companies' direct fraud would have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs. On a fundamental level, these difficulties of proving damages stem from the agency of the individual smokers in deciding whether, and how frequently, to smoke. In this light, the direct injury test can be seen as wisely limiting *standing* to sue to those situations where the chain of causation leading to damages is not complicated by the intervening agency of third parties (here, the smokers) from whom the plaintiffs' injuries derive.<sup>102</sup>

This prolonged chain of consequences bears eerie resemblance to the allegations contained in *SCRAP*. To the extent that the causation issue is relevant, therefore, the summary judgment is appropriate on nonconstitutional standing grounds. Indeed, it seems clear that every case in which a court decides that the

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<sup>100</sup> 191 F.3d 229 (2d Cir. 1999).

<sup>101</sup> *Id.* at 234 (citing *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258, 268 (1992)).

<sup>102</sup> *Laborers Local*, 191 F.3d at 239-40 (emphasis added).

plaintiff's injuries are too remote can be treated after a fashion as one in which the plaintiff is denied standing. But it would strain imagination to argue that the determinations of proximate cause as a matter of tort law shape the constitutional limitations on the jurisdiction of the federal courts.

Next it is useful to examine briefly *Warth v. Seldin*,<sup>103</sup> where plaintiffs, a collection of groups and individuals in the Rochester area brought suit against the nearby Town of Penfield and members of its zoning board, claiming that its illegal policies had excluded persons of low and median income from living in the town. The Court held that none of the plaintiffs had standing to maintain this "generalized grievance," and that, further, "the plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."<sup>104</sup> The gist of the complaint was that the behavior of the Town had blocked the ability of outsiders to purchase property within the township. At one level, it is possible to argue, as did Justice Powell, that none of the plaintiffs could show that they had been excluded by the restrictions in question. But the complaint also alleged that developers and builders had been blocked from building homes that they, or at least some of their members could afford. It was not clear who would benefit if the restrictions had been removed and this inability to trace the connection from a relaxation of the zoning restrictions to the new entrants was said to doom the complaint.

*Warth* raises two different variations on the causation question. The first issue, which sometimes goes by the name *ius tertii*, amounts to a claim that the appropriate parties to challenge the refusal of the defendants to issue the appropriate permits are the builders and developers who could apply for them if they chose.<sup>105</sup> Justice Powell did not treat this as an absolute bar to standing, but could easily make it "more difficult" to achieve that claim in light of the fact that only two developers had sought to obtain building permits for subsidized housing, when it could not be said that either of these permits, if awarded, would have resulted in new housing that the plaintiffs could have purchased. Putting the point in this matter raises the question of why these plaintiffs should be allowed to sue when parties closer to the permit process have standing to sue on their own behalf.<sup>106</sup> The second part of the

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<sup>103</sup> 422 U.S. 490 (1975).

<sup>104</sup> *Id.* at 499.

<sup>105</sup> *Id.* at 504 ("[P]etitioners claim that respondents' enforcement of the ordinance against third parties—developers, builders, and the like—has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford.").

<sup>106</sup> See, e.g., *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (upholding restrictive zoning against an equal protection challenge).

question simply treats the uncertain role of the builders and developers as but additional reason why “the facts alleged fail to support an actionable causal relationship between Penfield’s zoning practices and petitioner’s asserted injury.”

As to the first point, the developers and builders might not have sued because they could not see the financial profit in taking on a local government that is determined to fight zoning issues for the long haul. Indeed, it was only the use of third party plaintiffs similar to the plaintiffs that brought to a head New Jersey’s interminable litigation in the *Mount Laurel* cases.<sup>107</sup> The situation thus looks like one in which the immediate parties who are harmed will not take up the cudgels, so why cut out parties in the next outer ring from federal courts categorically on constitutional grounds, even when racial discrimination does not count as an element in the case? The better response is one that allows for an amalgamation of cases that raise common challenges so that they can be disposed of in a unified proceeding.

Likewise, *Warth* is mistaken even if it is treated as just another application of the tort rules of proximate cause to the constitutional doctrine of standing. Unlike *SCRAP* (and *Laborers Local 17*), the exclusion of developers, who would sell to members of the plaintiff class, was not some debatable consequence of an action undertaken with reference to some other objective. Justice Powell misses the point that this case looks like an intentional interference (by legal force) with prospective advantage cases in which it is held that the schoolmaster or the trader was allowed a suit even though the guns were deliberately trained on his prospective pupils or trading partners.<sup>108</sup> And like those cases, the consequences at issue here were those that the zoning board (whose business is exclusion) manifestly intended.

The difference between the earlier common law cases and *Warth* is that it is not possible to identify with certainty which individuals were the victims of the defendant’s conduct. But again the point does not require the invocation of any special doctrine of standing. Rather, now the case looks like a variation on the market share rule of *Sindell v. Abbott Laboratories*,<sup>109</sup> where the question before the court is what should be done when it is known with certainty that some members of the plaintiffs class have been harmed, in that case by their mother’s ingestion of DES, but it cannot be determined which. The key insight of the

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<sup>107</sup> See, e.g., *Southern Burlington County NAACP v. Mount Laurel*, 456 A.2d 390 (N.J. 1983); *Southern Burlington County NAACP v. Mount Laurel*, 336 A.2d 713 (N.J. 1975). See John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20 (1987), for an account of the above noted cases.

<sup>108</sup> See, *supra* note 103 and accompanying text.

<sup>109</sup> 607 P.2d 924 (Cal. 1980).

market share rule is that the *amalgamation of individual claims* is the most sensible technique to overcome the weaknesses that each individual plaintiff has in making out her case on the issue of causation in fact.<sup>110</sup> Thus it would lead to massive underdeterrence if each of 100 plaintiffs were sent home empty-handed because the probability that her individual injuries were caused by the defendant was only 40 percent. Here it becomes hard to deny that the restrictive zoning practices did not keep out some plaintiffs; so long as the appropriate class contains some of the obvious victims, then they should be allowed to sue as a group if the direct injury test is appropriate.<sup>111</sup> But in *Warth*, as in *SCRAP*, the remedy sought was a lifting of the injunctive relief.

Finally, the element of direct causation of harm took on a somewhat weird coloration in *Lujan v. Defenders of Wildlife*,<sup>112</sup> in which the substantive question before the Court was whether the Secretary of the Interior had properly interpreted section 7 of the Endangered Species Act which required that federal agencies undertaking or funding projects should first consult with the Secretary of the Interior to determine that their projects do not jeopardize endangered or threatened species.<sup>113</sup> The Interior Department promulgated a rule stating that this requirement applied only to actions done within the United States or on the high seas, but not within foreign countries. It is hard to imagine a better organization to challenge the administrative rendering of the ESA, given its long-term commitments. But since prior Supreme Court law blocked this route, the inquiry turned to the question of whether two members of the Defenders could show a sufficient nexus by pleading that they had seen some protected species overseas and wished at some indefinite time to travel abroad to see them again. Justice Scalia conceded that “the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing,”<sup>114</sup> but balked at allowing a generalized “animal nexus” theory when neither plaintiff had to demonstrate distinct plans to go overseas to the area in which the threatened species lived. Why then bother

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<sup>110</sup> See Comment, DES and a Proposed Theory of Enterprise Liability, 46 *FORDHAM L. REV.* 963 (1978).

<sup>111</sup> See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 117 (1987).

<sup>112</sup> 504 U.S. 555 (1992).

<sup>113</sup> See Section 7(a)(2) of the Endangered Species Act of 1973:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

<sup>114</sup> 504 U.S. at 562-63.

<sup>115</sup> *Lujan*, 504 U.S. at 562-63.

with the requirement at all? The travel plans of any given plaintiff make no discernible difference in terms of the ostensible policies behind the standing requirement. The issue under dispute has nothing to do with investigating animals and everything to do with statutory interpretation and administrative law. The animal nexus plaintiff is no better or no worse to push those claims than the direct observer. The suit is tailor made for the equity side of the standing doctrine. I shall discuss those considerations as part of a more detailed consideration of structured injunctions.

### C. Structural Injunctions

We are now in position to examine the major confusions of the standing question, which relates to its use in obtaining equitable relief against illegal action. The relationship between standing and the spending clause first raised in *Mellon* resurfaced again forty-five years after *Frothingham* in *Flast v. Cohen*.<sup>115</sup> The Court switched gears by allowing a taxpayer suit to challenge federal aid to religious education under the Elementary and Secondary Education Act of 1965. The specific ground for the challenge was that the establishment clause of the First Amendment limited the power of Congress to spend for the general welfare. In a real sense the case looks like a rerun of *Mellon*, but the plaintiff emerged victorious for reasons whose unintelligibility defies brief summarization. Thus Chief Justice Warren wrote:

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.<sup>116</sup>

The Court then held that these conditions were satisfied for reasons that bear no relationship to this obscure excursus into logical links, nexus and incidental expenditures: "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was

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<sup>115</sup> 392 U.S. 83 (1968).

<sup>116</sup> *Id.* at 102-03.

that the taxing and spending power would be used to favor one religion over another or to support religion in general.”<sup>117</sup> Yet what is true of the establishment clause in relation to the general welfare clause is surely true of expenditures in violation of general welfare clause alone: special payments presage illicit redistributions of wealth.<sup>118</sup> The great vice of the Maternity Act was at least as bad, perhaps worse, because it involved both the risk of wealth distribution across states—surely a larger concern in 1787 than in 1923—and the alteration of the balance between state and federal power through the aggressive use of the combined power to tax and to spend. It is an odd use of constitutional history to identify the structural reasons for one clause of the document and to ignore the parallel arguments elsewhere.

What makes the *Flast* episode so curious is that its labored rationale had no legs. Thus in *Valley Forge Christian College v. Americans United Against Church & State*<sup>119</sup>, the Defense Department gave away excess property to Valley Forge for free, after deciding to reduce its fair valuation by 100 percent to take into account the public benefit that inured from the transfer. The plaintiff group, committed to the separation of church and state, relied on taxpayer standing to block the transfer. The obvious ground for protest was that the individual transfer violated the establishment clause by turning public property into religious use, the level of subsidy here is as great as if the Defense Department gave the College a sum of money equal to the value of the land, which it then used to purchase it. Nonetheless, *Flast* was held not

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<sup>117</sup> *Id.* at 103. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986*, 444 (1990), for a defense of *Flast* in these terms (noting that a difference might exist between those violations of the spending clause that offend a specific guarantee of the Bill of Rights and those which simply lie outside the scope of Congress). But again the distinction makes no difference: standing goes to the plaintiff's stake, which does not get any larger when two constitutional provisions are implicated instead of one.

<sup>118</sup> For an effort to resurrect the “general welfare” language as a real limitation on the government power, see John Eastman, *Restoring the “General” to the General Welfare Clause*, 4 *CHAP. L. REV.* 63 (2001). The position has some real intellectual support. No one doubts that the word “common defense” operates as some kind of limitation on the power to tax and spend. Why then assume that the phrase “general welfare” was meant to be nonexpendious, given that it would render the “common defense” language wholly redundant. Rather, a more sensible approach is that the two terms should be read *in pari materia* as an effort to limit government expenditures to classical public goods, i.e. those in which it is impossible to exclude benefits from A when they are given to B. Here it would be too restrictive to read that language to say that expenditures must benefit everyone if they are to benefit anyone: that would also make hash of spending for the defense of the West Coast and not for the East Coast. But it does treat the general welfare as covering those expenditures that are intended to apply, under uniform standards to public goods that are nonexcludable with respect to some large fraction of the population. And it certainly allows expenditures that are made for one segment of the population under programs that have application across the board. What it rules out are programs of income redistribution for particular individuals, where the cash or in kind benefits have no classical public goods qualities.

<sup>119</sup> 454 U.S. 464 (1982).

to apply because this particular executive action had taken place pursuant to Congress's power to dispose of excess property under Article IV, § 3, cl. 2 the property clause—"The Congress shall have [the] Power to dispose of and make all needful Rules and Regulations respective the Territory or other Property belonging to the United States", and therefore was not an general appropriation of funds under the spending clause. The point had a certain element of *deja vu* because in the oral argument in *Mellon* the ever-resourceful Attorney Rawls had sought to defend the expenditures under the Maternity Act as disposition of excess property under this clause.<sup>120</sup> But the deeper problem is, why should a violation of the establishment clause trigger standing in the one case and not the other, when the risk of faction may, if anything be greater with a specific appropriation than it is with a general rule?

No real answer was given to that question. Instead Justice Rehnquist quickly shifted the discussion back to the general principles governing standing, and noted that the plaintiff had not identified any personal injury beyond the psychological harm of being forced to watch a violation of the Constitution, which hardly distinguishes the case from *Flast*. Thereafter he went on to give a convenient modern rationalization for the rule that was more complete, but no more persuasive than that offered by Justice Sutherland in *Mellon* for his rejection of the basic equity model defended above. Thus Justice Rehnquist argued that the direct injury requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." This point sounds bizarre in connection with the elaborate arguments which could not have been, but were in fact offered in both *Mellon* and *Valley Forge*. The arguments there were fully and adequately made on both sides of the case; no one after the fact has been able to identify a single consideration that was omitted from either discussion that could have been supplied by a more detailed operation of the Maternity Act on the one hand, or the disposition of surplus property on the other.

Indeed, quite the opposite is true. The legal issues presented in *Mellon* rendered adequacies or inadequacies of the federal or state practices, the number of states that signed up, and its benefits programs utterly irrelevant to the *facial* constitutional challenge raised against the statute. Likewise the outright gift of public property to a religious organization raises a clear constitutional question, whether that facility is used for classrooms or dor-

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<sup>120</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 446 (1923). The argument was money counted as property under the clause, which seems preposterous in light of the overall structure of the clause and the constitution.

mitories. It is as though the taxpayer suit in *Crampton* should have been turned aside on the ground that no taxpayer could comment intelligently on the quality of brick and mortar specified to be used in the construction of the proposed hospital facility. What stands out in both *Mellon* and *Valley Forge* is that the ineligible plaintiffs raised sensible per se, facial constitutional challenges that they were well able to litigate. The point is especially true in light of the alternative: there is no obvious second tier candidate in *Mellon*, and the only person who *might* have standing in a *Flast* like situation under the direct injury test would be the disappointed second bidder, if any, who could hardly be expected to wage a major legal war to save a few dollars.

As is evident from the nonrandom selection of plaintiffs in both cases, it is manifestly wrong to assume that a direct injury correlates even weakly with the incentives needed to articulate the relevant issues in a protracted legal struggle. Parties surely know their own interests, whether they are financial, intellectual or political. They can decide by themselves what level of resources that they wish to spend in what kind of situation. Indeed it is likely that the ideological plaintiffs, both of the left or the right, 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. To the extent that standing issues are entwined with financial concerns, these equitable actions against the government designed to validate a common interest are no different in form or substantive from the garden variety class action or derivative suits routinely brought against private defendants. The great risk with multi-party litigation is not excessive intervention by strangers but the free-rider problem, whereby parties who cannot secure sufficient funding will let the case pass because the benefits are obtained by outsiders. That objection rings false as a description of the motivation of ideological parties of all persuasions. It is not that they will turn money down; but they will often litigate on issues knowing that the prospect of a financial return is negligible. But even for those litigants who are in it for the money, a standing doctrine is crude beyond belief as a means to sort out the go-getters from the slackers.

What really matters in these cases are the incentives and payoffs that govern these suits. As in ordinary derivative actions, the appropriate inquiries should be directed towards methods of compensation, or about rules used to prevent abuse of process: does the successful plaintiff receive a lien on the proceeds of recovery, or a payment from the corporation benefited by its work? Should the plaintiff be subject to penalties for losing? For bringing frivolous suits? To answer these questions, we need rules that



regulate class actions, intervention, joinder, fee awards, and res judicata. The standing requirement as such addresses none of these issues.

Finally, the tort-based standing requirement is not advanced by the observation that the federal courts are not places for concerned bystanders to ventilate their dissatisfaction with government programs, or that courts should not be converted into "judicial versions of college debating societies." All litigation resembles a debating society given the clash of wills. But litigation is serious business for these parties whether or not they are said to have standing. The plaintiffs who bring these suits are asking to enjoin some activities and to require others. The courts will only be reduced to the level of debating societies if they announce in advance that they will not on principle supply any relief to the parties before it. But reverse the standing rules, and the litigation can proceed to its necessary conclusion. The standard derivative action brought against municipal corporations does not reduce state courts to cheering societies. Parallel actions against the federal government will have no different effects.

The bypass of constitutional adjudication under *Mellon* has been invoked in other structural situations as well. Thus in *Schlesinger v. Reservists to Stop the War*,<sup>121</sup> the plaintiffs, present and former members of the reserves, claimed that the compatibility clause, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office," was violated when several members of Congress held commissions in the reserves. The structural elements of the case were systematically disregarded with the observation that the members of the plaintiff organization had no greater stake in this issue than any other citizen. So a constitutional issue is deflected from the courts, without any obvious explanation as to how it might otherwise be resolved.

In a similar vein, the companion case, *United States v. Richardson*,<sup>122</sup> refused to allow the plaintiffs to attack the secrecy surrounding the appropriations to the Central Intelligence Agency on the grounds that it violated Art. I, § 9, cl. 7, which provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Whether that section is subject to a sensible exception for expenditures whose publication could give aid and comfort to the enemy, is not my concern here: the suit could easily be defeated on the ground that the explicit command of this clause is defeated by an implied exception narrowly tailored to the occasion. But the

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<sup>121</sup> 418 U.S. 208 (1974).

<sup>122</sup> 418 U.S. 166 (1974).

Court, after repeating the observation that the loss in question was “common to all members of the public,”—and hence suitable for equitable relief, held that the issue was one that should be rightly considered by the representative branches of government as a political question. One might as well say that all shareholder derivative suits should never be allowed because minority shareholders are free to lobby the board of directors and their fellow shareholders. Once again the partial rejection of *Marbury* follows as a matter of course.

Finally, the Court’s neglect of the equity side of standing bars the articulation of a coherent approach to the structural issues raised by the voting cases. Today we have gone past *Ashby v. White*, and now must routinely confront situations far more difficult than those involving simple exclusion of lawful voters from the polls. Since *Baker v. Carr*<sup>123</sup> the Court has had to face a non-stop set of cases dealing with both the size and the shape of districts for federal and state office.<sup>124</sup> In each and every instant, what is at stake is what individuals should be grouped together in what district and for what reason. No matter what the source of the grievance—unequal numbers, illicit racial grouping—a decision to draw the lines in one way has consequences both for the people included within a district and for those who are, for better or for worse, shipped off to some other district. Some citizens could be upset at being excluded from certain districts or included in others. Or they could be upset at the people who are added in, or taken away from them. But all the grievances are about the overall shape of the electoral distribution, not about the value of the individual vote. To treat district line-drawing as involving some discrete injury to any particular voter is a hopeless and artificial refinement that bears no relationship to any constitutional or statutory challenges to the legality of the action. There is no credible way in which some ostensible personal injury is linked to the ability to raise sustained and principled challenges to the knotty substantive issues that have to be resolved once the standing hurdle has been overcome.

In light of these issues, the Supreme Court should have adopted a rule that allows any aggrieved voter within his or her state to challenge the plan. Yet in *United States v. Hays*,<sup>125</sup> the Court, speaking through Justice O’Connor, recited the standard litany of cases (including *Lujan* and *Valley Forge*) to insist that an aggrieved citizen show the appropriate direct and immediate in-

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<sup>123</sup> 369 U.S. 186 (1962).

<sup>124</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that irrational voting schemes could be challenged on equal protection grounds when they could only be understood as an effort, without justification, to segregate individuals on the ground of race).

<sup>125</sup> 515 U.S. 737 (1995).

terest to maintain the challenge. The Court concluded that any individual (no matter of what race) who lives within a district has standing to challenge its outcome, even though citizens outside the district (who might claim to be properly within it) do not.<sup>126</sup> The ostensible rationale for this conclusion is that those within the district suffer “special representational harms”, while those outside do not. The term “special” was invoked to make it appear that the voting cases fall within the rule first set out in *Mellon*, but the term loses all its bite given that the one plaintiff within a district shares his position in common with all others within that district. That veral legerdemain is wholly unnecessary, for a simple switch to the equitable model of standing, taking into account the interdependence in the composition of all districts makes it clear that there is only one proper conclusion in these cases. Anyone who lives within the state can sue to protest the composition of the district in which he is included or from which he is excluded. The further refinements simply do not matter. Thus it seems to be a mistake to argue, as John Ely does, that standing should be limited to individuals who are racial minorities in the district in which they are located.<sup>127</sup> And it tends to support, on somewhat different grounds, the conclusion of Samuel Issacharoff and Pamela Karlan that *all* individuals have standing to protest the outcome. They reach this conclusion on the strength of an “expressive, noninstrumental” policy that is triggered to a substantive theory of equal protection that sees race as irrelevant to the districting process.<sup>128</sup> But that view ties the issue of standing too closely to a controversial theory of substantive relief. The simpler, more general, and more cogent explanation for system wide voter standing is that the equitable side of the judicial power is designed to deal with any and all sorts of amalgamated claims that one individual has in common with others.

### III. COMPLICATIONS OF THE EQUITABLE METHOD

The major flaw that originated in *Mellon*, and survives to this date, is to treat taxpayer and citizen suits for equitable relief as

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<sup>126</sup> *Id.* at 745. For learned attacks on this decision see John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997), and Samuel Issacharoff & Pamela Karlan, *Standing and Misunderstanding in Voting Rights*, 111 HARV. L. REV. 2276 (1998). Given what I have written above, it seems a mistake to try to find some linkage between the subset of voters who have standing and the substantive theory on which they wish to proceed. Ely's restrictive position on standing—that only individuals who are members of racial minorities in their particular districts have standing—seems a clear mistake. Issacharoff and Karlan seem much closer to the mark when, invoking “expressive” theories of injury.

<sup>127</sup> See Ely, *supra* note 126, at 594.

<sup>128</sup> See Issacharoff & Karlan, *supra* note 126, at 2286. “When the government uses race to assign some voters to District X, it tells *all* voters that race matters.” *Id.* (emphasis added).

beyond the judicial power under Article III. The counter-argument is that the standing requirement is not the appropriate way to deal with the adjustments that take place when plaintiffs bring either class actions or suits in which they purport to represent the interests that all citizens and taxpayers hold in common. The central point is that amalgamation of individual claims is both possible and necessary only where these claims are largely fungible with each other. It is one thing; however, to invoke the principle of equitable jurisdiction, and quite another to ignore those principles insofar as they relate to the conduct of complex litigation once the plaintiffs seek some structural relief.

To complete the overall picture of a revised standing doctrine, therefore, it becomes imperative to show how the traditional limitations on the use of equitable jurisdiction should influence the treatment of a wide range of cases that are at present wrongly excluded under the standing requirement. In particular three general issues present themselves for discussion. The first is the question of whether a plaintiff's action should be dismissed on the ground that some necessary parties to the litigation have not been joined in the suit. The second question is whether the traditional limitations on the awards of equitable remedies should be respected once the standing obstacles have been overcome. The third question is whether any purported limitations imposed by the standing requirement can be negated by a congressional determination that certain citizens groups should be afforded standing to sue.

#### A. Who are necessary parties to litigation?

It is a common premise of the current debates over standing that the case and controversy language of Article III makes it inappropriate for any party to ask the court for an advisory opinion. No matter whether the case rests on legal or equitable principles, at the very least a case or controversy involves a clash between two adverse parties before the Court. A close cousin to the advisory opinion is in practice the collusive lawsuit in which the plaintiff sues the defendant to enjoin a practice that both parties regard as illegal.<sup>129</sup> It is quite clear that these collusive lawsuits present the train of abuses that must be taken into account in suits that seek equitable as well as legal relief. The question then arises: what should be done about the problem? Here there are two possible courses of action. The first is to dismiss the action on the ground that it simply represents an effort by two parties, not one, to obtain an advisory opinion. The second is to join to the lawsuit

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<sup>129</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (government intervened in a suit brought by a shareholder against his corporation).

a party whose interest is indeed opposed to both parties to the collusive action. The interjection of the third party into the suit—the choice of procedural device does not matter for these purposes—removes the danger that phony litigation will determine the course of American law.<sup>130</sup>

Matters become more difficult when it is not quite clear whether a lawsuit is collusive or not. That situation can easily arise when two unrelated parties engage in litigation whose main concern is the relationship that one party to the transaction has to an unrelated party. It could easily be that the party sued is quite happy, even eager to see its legal relations with third persons altered; or it could be reluctant to see them altered, but not keen on expending the resources needed to keep that relationship alive. The question then arises as to what should be done when it is not known if the initial lawsuit is collusive, but where there is a partial alignment between the interests of the litigants and imperfect alignment with the interests of third parties. This issue gets systematically suppressed in those cases in which the standing requirement is invoked to block suits. But it comes to the fore once the standing is accorded to representative plaintiffs in accordance with traditional equitable criteria.

One early case that raised this problem was *Ashwander v. Tennessee Valley Authority*,<sup>131</sup> where the question before the Court was whether holders of voting preferred stock could sue to enjoin the Alabama Power Company from entering into a contract that called for a sale of assets to the TVA. The objection was that the contract was illegal because the establishment of the TVA was itself unconstitutional. Chief Justice Hughes found that shareholders had standing to pursue the suit against the corporation on grounds of its illegality, and also that the Power Company had in fact defended its right to enter into the contracts. But the entire difficulty on the question was obviated by the joinder of the TVA as a defender in the case, so that it could step up its activities in the event that the Power Company decided to plead its own cause faintly. But if TVA had not been joined, then it might well have been perfectly appropriate to dismiss the case on the ground that the lawsuit could do untold mischief to the status of an absent party. Standing, as it were, becomes a doctrine that is used to weed out cases brought not by the wrong plaintiff, but against the wrong defendant.

That same theme carries over into more modern cases. One of the leading exemplars of modern standing law is *Allen v.*

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<sup>130</sup> A similar technique is often used in mass torts/products liability cases to prevent removal to federal court.

<sup>131</sup> 297 U.S. 288 (1936).

*Wright*,<sup>132</sup> in which the parents of black public students enrolled in districts undergoing desegregation sued to require the IRS to stiffen the standards that allowed federal tax-exemptions to private schools operating within these districts, which the plaintiffs claimed had adopted racially discriminatory topics. The suit was dismissed on the ground that the plaintiffs lacked standing, given that the only injuries that they reported individually were that blacks were “stigmatized” by their inability to attend these private schools, and the private schools within the district necessarily denied their children the right to attend an integrated school. The former obviously does not show a particularized injury, and the second depends on elaborate predictions as to what would happen within the district if the tax exemptions were removed, so that Justice O’Connor had little trouble in deciding that the usual tort-like requirements for standing were not satisfied.

Viewed from the perspective taken here, *any* citizen or taxpayer should have standing to challenge this tax exemption. That said, the action still should have been dismissed because none of the local schools whose tax-exemptions were at risk was joined as a party defendant to the case. Here of course, presumably, they would have an opportunity to protest after the fact any IRS decision targeted to them. But if the matter is ripe for litigation from the point of view of the plaintiffs, then it is ripe from the point of view of the defendants. The IRS, moreover, has a long history of equivocation, especially in connection with Bob Jones University, on whether these tax exemptions are properly granted, so it could not be relied upon to defend this lawsuit with the same vigor as the named schools. Once these defendants are introduced, the resistance to the claim is likely to be far more stout, which is again as it should be. And if it turns out that the entire matter becomes one too complex for litigation, then the suit could be dismissed on that ground, at least if some administrative remedy were made available to the plaintiffs—provided that the defendants had at least some opportunity to appear in proceedings directed against them. The individualized tort grievance rarely presents the issues of collateral import that are routine occurrences in equitable cases.

A similar analysis applies to *Simon v. Eastern Kentucky Welfare Rights Organization*.<sup>133</sup> The Internal Revenue Service had issued a ruling that treated as charitable tax-exempt corporations several nonprofit hospitals that had supplied only limited emergency services to indigent patients. Justice Powell denied the relief chiefly on the ground that it was not possible to trace the

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<sup>132</sup> 468 U.S. 737 (1984).

<sup>133</sup> 426 U.S. 26 (1976).

causal connection between the hospital's favorable tax treatment and the services that it rendered. It could well be that the hospitals would decide to pursue for-profit patients more vigorously if they lost their tax-exempt status. Justice Brennan's dissent did not dispute the conceptual framework for evaluating standing cases, but thought that the "opportunity and ability" to obtain treatment counted as a particularized grievance, even though no particular refusal of service had been shown.

Within the tort-side of the standing doctrine, the hard question is how special is special enough. From the perspective of equitable remedies though, any taxpayer should have standing to enjoin the exemption, but once again the question is whether it can do so with only the IRS on the opposite side. Here again the risks of collusive pressures are evident, so that at the very least notice and an opportunity to intervene should be granted to the nonprofit hospitals whose exemptions were at issue. However, that procedural response is not an argument for the imposition of a standing requirement but rather for a requirement of the exhaustion of administrative remedies, in which the IRS first investigates any complaint filed, after giving the challenged parties a chance to respond administratively to the charges that have been lost. And if the complaints are frivolous, or intended to harass, then monetary sanctions might be used to curb the abuse. The precise details on procedure cannot be decided on in the abstract. But it surely makes far more sense to lay bare the choices about third party practice rather than to enjoin the suit solely by reference to the plaintiff's taxpayer status, given the evident risk of over-inclusion.

The same concern about parties was in fact raised in *Lujan*, in connection with the question of redressibility. The nub of the Secretary's position was that plaintiff could not get (what equity courts used to call) comprehensive relief against the Secretary. The statutory provision required that other federal agencies consult with the Secretary to insure that actions they fund or execute comply with the statute. But these agencies were not joined in the suit. But to say this is to invoke the standing doctrine to deal with a joinder of parties issue on the defendant's side. Again a court is faced with hard choices. One approach is to limit the relief to a specific project so that the correct Federal agencies can be joined. That hardly seems appropriate in this context until it is determined whether the ESA has effect in foreign countries. On that issue, it seems perfectly proper to allow this plaintiff to seek limited relief without the joinder of additional parties simply by litigating the question of foreign coverage against the Secretary, where the equitable relief requested is not the review of a particular project, but the emendation of the regulations to reflect the

proper interpretation of the statute. The great vice of the current law is that it lumps together the distinct question of who may sue with the question of who must be sued, when the choice of proper defendants depends on the nature of the relief that plaintiff seeks. If that suit proves successful, then in some future case it is open to the Defenders, or indeed any other citizen or taxpayer, to join both the Secretary and the particular agency to see whether some additional relief is requested—which raises questions of discretionary nature of equitable remedies, to which I now turn.

## B. Discretionary Remedies

The next major issue with equitable remedies is whether they issue as of right or at the discretion of the court. As one might expect, the first cut to this problem takes into account the nature of the underlying claims. The more the dispute looks like a two-person dispute over a short period of time, the easier it is to think that equitable remedies should be a matter of right. Thus if the question is whether the plaintiff should be allowed to enjoin a substantial nuisance, the answer to that question could easily be yes, even though some authority allows the court to balance the hardships when the defendant's use is highly valuable, and the plaintiff's of only minor worth.<sup>134</sup> With specific performance in land sale contracts, the presumptive rule is that the remedy is awarded as of right, at least where the rights of third parties do not intervene.<sup>135</sup> In the first case, the legal objective is relatively straightforward, which is to shut down the wrongful acts of an identified stranger. In the second, the order for specific performance can be issued without requiring the court to superintend some ongoing and disputatious relationship. Once the title to the land is transferred, then nothing remains for either party to do.

Matters do not always remain this simple. Equitable relief in land conveyances and nuisances can easily become complicated, for example when third party rights intervene. The equitable remedy of specific performance is systematically excluded in employment contracts, absent a statutory violation, because it places too much of a burden on courts to superintend questions of whether the employee has slacked off on the job, or the employer has increased his demands on the employee. Yet by the same token, courts have been willing to issue an injunction that prevents an employee in breach from working for a competitor, for equity courts can easily ensure that this injunction is observed.

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<sup>134</sup> For some of the complications, see *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658 (Tenn. 1904).

<sup>135</sup> See Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355-64 (1978).



The permissible use of equitable remedies is also tested in the context of derivative suits and reorganizations. One reason why the traditional rules focused on enjoining illegal actions is that this remedy looks so clean. But matters take on a different view when courts have to issue supervisory orders to the corporate directors or trustees in reorganizations, which are difficult to formulate in advance, and to evaluate thereafter. This broad set of equitable principles surely carries over to the judicial power in equity as it exists under Article III. It should be relatively easy to order courts to perform specific acts or to refrain from illegal ones. But it is far more difficult for courts to require that administrative parties undertake complex actions that require the appropriation of funds or require the cooperation of particular officials. Of course, no fixed rule prohibits courts from entering that thicket should the occasion require it. But surely there are many occasions in which courts should refrain from getting involved in problems that they cannot supervise. This asymmetry in remedies creates an obvious tension; it is easier for a target of regulation to resist claims that it should be subject to illegal commands than it is for outsiders to insist on the performance of certain actions.

These questions could be lumped together with all the other issues raised under the single banner of standing, but disaggregation often leads to a better understanding of why it may well have been correct for courts to decline to exercise their equitable jurisdiction. For example, it seems clear that the Supreme Court should not have declined to exercise its equitable jurisdiction in *Alabama Power*. If the subsidies supplied by the United States are illegal, then it is simple enough to enjoin their payment. It does not matter for these purposes whether the illegal act took the form of sanctions or subsidy. In the former case the action lies with the target or regulation; in the latter it lies with the disappointed competitor of the firm that received the illegal subsidy.

On the other hand, it is quite clear that no court in exercise of its equitable jurisdiction should take it upon itself to suspend the rate increase in *SCRAP* at the request of the plaintiff. To be sure, the Supreme Court sidestepped this question in *SCRAP* when it held that the Interstate Commerce Act precluded any court from enjoining an ICC order.<sup>136</sup> But it seems clear that the preliminary injunction should not issue even if the ICA contained no statutory bar. The connection between the asserted ICC conduct and the global injury claimed was far from clear; and any rate rollback would have dramatic consequences on all sorts of third parties,

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<sup>136</sup> See Interstate Commerce Act § 15(7), 49 U.S.C. § 15(7) (1964), as construed in, *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963).

including a full range of shippers and carriers, and perhaps other environmental groups, that did not see the same causal connection as in *SCRAP*. The case is one where damages are, to say the least, speculative so that the most that could be done would be to ask whether the ICC had taken into account *SCRAP*'s views in the course of its own deliberations, which of course it had.

The problem of discretion in remedies surfaces again with *Warth v. Seldin*, for it is an open question of what relief might be granted once it is assumed that the plaintiff's have standing to pursue their claims. To answer that question, it becomes necessary to first explore the substantive theory of relief that plaintiff's pursue—for example, is it an equal protection claim or a due process claim. Only after one knows what portions of the local zoning ordinance is found defective, and for what reason, does it become possible to decide what relief, if any, should be ordered. At this stage the fact that plaintiffs have not claimed that any specific project has been excluded, renders it impossible to order relief that allows the construction to go ahead subject to only those zoning restrictions that survive constitutional challenge. At this point, therefore, the nebulous nature of the plaintiff's claim comes back to haunt the overall suit. To be sure, it might be possible to give some limited relief to the extent that some portions of the local regulations are shown to be per se unconstitutional. But at this point, the case does not offer enough information about the nature of the claimed violation to support intelligent judgments about the appropriate form of relief. But this insufficiency should not be regarded as a backhanded justification for denying the suit in the first place. Once the standing issue is resolved in favor of these plaintiffs on a class basis, then the substantive development of the suit should give sufficient indication as to the permissible scope of relief. The vice in *Warth* is the premature truncation of the lawsuit. It is not some defect in the exercise of equitable jurisdiction.

A similar analysis of the matter applies to *Lujan*, or more accurately, any subsequent suit that challenges the adequacy of the Secretary of Interior's administration of the program if it is decided that the ESA reaches projects funded or carried out in foreign countries. At this stage, it seems possible to entertain suits that require the Secretary to order his office to apply the same standards of review to projects in foreign nations as he does to domestic projects or to those on the high seas. That judgment in effect states that the Secretary could not apply its budget authorization process exclusively to domestic projects. But it is an open question as to how much further the judicial supervision can go. It may well be more difficult to scrutinize projects that take place overseas; or more difficult to implement American guidelines for

projects that have to meet local requirements that could easily be inconsistent with our own. At some point, it looks as though the budget allocations and the administrative determinations will be shot through with the types of discretion that no court of equity can sensibly second guess. And it could easily turn out that these problems are more acute in foreign projects than in domestic ones. If that is the case, then at some point, the concerns of redressibility, rightly isolated, could lead a decision to refuse to grant equitable relief. But it takes a very different inquiry from the one offered by Justice Scalia who concentrated solely on the one feature that does not matter at all—the travel plans of this plaintiff.

The same issue of relief and discretion was similarly raised in *Linda R.S. v. Richard D.*<sup>137</sup> In that case, Texas law made it a misdemeanor for any parent to willfully desert, neglect or refuse to support or maintain a child under 18.<sup>138</sup> On its face the statute did not distinguish between legitimate and illegitimate children, and plaintiff's class action alleged that Texas Courts had wrongfully invoked the law only to the parents of legitimate and not illegitimate children. Here again it is important to disentangle the question of whether the plaintiff has standing to present the case from the question of whether a court of equity could award a sensible remedy. On the first issue, Justice Marshall took the position that the claim of injury was "speculative," that the chain of causation was not long enough to reach this case: "if the appellant were granted the requested relief, it would result only in the jailing of the child's father."<sup>139</sup> It hardly follows, however, that this plaintiff needs for the prosecutor to act in her individual case in order to gain from a change in the legal rules. The *threat* of a possible suit has for her only an upside and no private downside, so it takes no great imagination to believe that she is better off if it is brought, if only because she could use it as a lever to negotiate a settlement that could then be enforced on ordinary contract grounds. As only individuals in need of support and maintenance are in this position, it appears as though the traditional standing requirement is met, assuming it is relevant.

But the second problem is more difficult to deal with: should the Court issue any equitable relief at all? The nub of difficulty here is that prosecutors have to husband their resources in order to decide which actions should be brought, and which not. The objection looks to be decisive against any individual lawsuit that claims that the prosecutors should have moved in one particular instance. It would simply be an intolerable intrusion on the oper-

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<sup>137</sup> 410 U.S. 614 (1973).

<sup>138</sup> TEX. PENAL CODE ANN. § 25.05 (West 1989) (discussed in *Linda R.S.* as Art. 602 of the Texas Penal Code).

<sup>139</sup> *Linda R.S.*, 410 U.S. at 618.

ation of a prosecutor's office to let the squeaky wheel get all the grease. But this was a class action lawsuit, which claimed that the Texas Courts had followed a discriminatory practice that violated federal constitutional norms of equal protection. So the suit is one to enjoin an illegal practice that had been sanctioned by the Texas Supreme Court. At this point the argument is only that Texas has to use the same set of discretionary criteria to decide on whether to bring prosecution on the statute for the parents of legitimate and illegitimate children alike. At the outset, it seems within the scope of a court of equity to impose that requirement, without asking it to monitor individual cases. At this point, the resolution of the case starts to look like that appropriate in *Lujan*, for in both the gist of the order sought is to extend the application of a statute to a class of cases from which it has been illegally and systematically excluded. It could well follow that forcing a change in state policies will not cure any illegal situation. But by the same token it could be expected to have at least some substantial effect, even only because of its hortatory effect on local officials. Accordingly, the standing should have been recognized, and assuming that the constitutional violation was made out, a first round of equitable relief ordered. It could wait for a later day to see whether a court of equity should refuse to intervene further in any dispute that might arise over the interpretation and application of the earlier judicial order. It makes no sense for the doctrine of standing to nip the issue in the bud.

#### CONCLUDING OBSERVATIONS: TYING UP A FEW LOOSE ENDS

The central thesis of this paper is that the current confusion and dissatisfaction with the doctrine of standing follow from the Court's total failure to appreciate the differences in the way in which the legal and equitable principles that apply to any state court of general jurisdiction carry over to the exercise of equitable jurisdiction in the federal courts.

This account of standing goes a long way to obviate the vexed constitutional question raised in *Lujan* as to whether Congress can fix up the defects in the standing doctrine by authorizing citizen suits in environmental cases. Justice Powell added endless confusion to this question in *Warth* when he suggested that some components of the standing doctrine were "prudential," while others, including the requirement that "plaintiff still must allege a distinct and palpable injury to himself" were not.<sup>140</sup> The distinction makes no sense. Article III says that the "judicial Power shall extend to all Cases in Law and Equity, arising under . . ." carries with it the clear implication that it does not extend to those cases

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<sup>140</sup> *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

that do not “arise under” the appropriate classes of cases. Thus, it seems clear that Congress could not authorize the Court to hear advisory opinions because these do not count as cases at all.

It follows therefore that Justice Scalia was correct insofar as he concluded in *Lujan* that Congress could not simply authorize a citizen suit in federal court if the requirement of a discrete and palpable injury were cut from the same constitutional cloth as the prohibition of an advisory opinion. But it is not. Once the equitable jurisdiction of the Court is acknowledged, then citizen or taxpayer suits to enjoin illegal conduct or to require the issuing of a regulation in accordance with law fall squarely within the judicial power, just as these suits do in private litigation. At this point no congressional authorization of these suits must be supplied. Indeed, to be more emphatic, any effort by Congress to strip the Supreme Court of its appellate jurisdiction to hear these issues would itself raise serious constitutional issues, especially if its purpose was to insulate congressional action from judicial review.

One central task of the courts in a system of judicial review is to make sure that the legislature and the executive do not exceed their respective powers. That much is required by the rule of law. The invocation of a convoluted doctrine of standing, such as that now practiced in the Supreme Court, is wholly antithetical to that objective and amounts to the partial overruling of *Marbury v. Madison* without any textual or structural warrant for that reversal of policy. Herein lies perhaps the greatest irony about our level of collective trust in constitutional safeguards for the rule of law. The English Constitution contains no explicit power of judicial review, and no limitations on Parliamentary power. The doctrine of standing is part and parcel of their judicial law. England too has been subject to the powerful winds of the welfare state, and has adopted many substantive policies that I regard as indefensible and self-destructive. But on this standing issue it has followed a more sensible path. In speaking of its doctrine of standing, Wade and Forsyth disposed of the problems that have plagued American constitutional law in a few sentences when they observed that unless some method is given to challenge illegal administrative actions, “the rule of law breaks down.”<sup>141</sup> The irony is of course that the broader view on illegality and standing is taken in a system that has no explicit constitutional guarantees of individual rights. But perhaps one important lesson shines on this bit of comparative history. Perhaps we can learn one lesson. The safety of a nation depends as much on the strength of its institutions and citizens as it does on the written provisions of its Con-

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<sup>141</sup> See WADE & FORSYTH, *supra* note 9, at 696.

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stitution. And the sad point here is that, in the case of standing *in law and equity* it need not be this way.