

Standing in Law & Equity

A DEFENSE OF CITIZEN AND TAXPAYER SUITS

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WHETHER STANDING? Few provisions in the United States Constitution have generated more heat and less light than Article III, section 2, which specifies the scope of the federal judicial power: “The judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the United States, and Treaties Made, or which shall be made under their Authority.” The canonical view holds that these words restrict the power of federal courts to decide disputes (to use a neutral word) between parties for two reasons. First, the words “cases” and “controversies” are said to embed the notion of “standing” into the scope of the federal judicial power, even though that term appears nowhere in the text of Article III itself. Second, the proper interpretation of the standing requirement in turn respects the separation of powers that demarcates the legislative power in Article I, the executive power in Article II, and the judicial

power in Article III.

From these institutional concerns Justice O’Connor in *Allen v. Wright* drew these strong inferences, with both prudential and constitutional significance:

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege a personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.¹

That redressable injury, moreover, must be “distinct and palpable,” as opposed to

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1 *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citations omitted).

“abstract” or “conjectural” or “hypothetical.”² In essence there is a requirement that the defendant’s conduct be the cause of a distinct injury to the plaintiff not shared by other individuals for which the legal system can provide an appropriate remedy.

The thesis of this article is that the conventional account of standing is wholly erroneous.³ The words “cases” and “controversies” do not impose any limitation on the judicial power of the federal courts above and beyond those associated with the prohibition against advisory opinions. From the earliest times, the Supreme Court, even on request, refused to offer its advice to the President or one of his agents on the constitutionality of some proposed legislative or executive decision. This practice rests on the simple observation that it would be unwise for the judges to compromise their judicial independence by giving advice on matters that might come before them in their judicial capacity.⁴

This prohibition against advisory opinions flows easily from the basic text. The minimum – indeed, only – requirement for a case or controversy is two parties with adverse interests. The advisory opinion typically has but a single party who works outside the normal judicial path. The same cannot be said, however, of the standing gloss on Article III, which seeks to partition lawsuits between adverse parties into those that count as cases or controversies and those that do not. As a textual matter, this dodge seems precluded by the phrase “all cases, in law and equity” arising under the Constitution, the Laws, and Treaties of the United States. The term “all” has to be read as a term of inclusion, not one of limitation.

Most critically, the reference to cases covers both cases in law and cases in equity. As

this article explains, however, the Supreme Court has in its standing requirements articulated only a test for cases in law, but not for those in equity. Consistent with this hypothesis, the historical requirements for equity cases often diverged from those for cases in law. The requirement of discrete harm applies only to cases in law. Obviously many equity cases also involve discrete harms, but for many cases in equity the governing principle was exactly the opposite. The plaintiff could bring an action on behalf of a class of individuals only if they were similarly situated with him. The success of these amalgamations depended on the plaintiff’s interest being *indistinguishable* from those whom he sought to represent. Particularized injury at equity was a disqualification, not a requirement for these class-like suits.

Once the relationship between legal and equitable cases is understood, it follows that the concept of standing, while vital to civil litigation, has no connection to any distinctive constitutional limitation of the use of federal judicial power. Rather the principle arises solely in response to one simple and sensible requirement of judicial administration: Do not allow actions to be brought by remote and distant plaintiffs, of whom there may be many, when a single plaintiff with a distinctive and substantial interest is able to sue in his own right. Rightly understood, standing has nothing to do with causation or redressability under Article III. Parties denied standing *have* suffered harm caused by the defendant’s action. They are precluded from suing solely because other individuals with larger injuries can imperfectly vindicate their interests. On this view, taxpayer and citizen suits, now routinely barred in federal court,

² Id.

³ For a longer and more detailed defense of this position, see Richard A. Epstein, *Standing and Spending – The Role of Legal and Equitable Principles*, 4 CHAPMAN L. REV. 1 (2001).

⁴ See, for the materials, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-66 (2d ed. 1973).

should be routinely allowed as cases *in equity* under Article III.

In order to establish these claims, the remainder of this article is divided into four parts. Part I explores the role of standing in cases in law. Part II discusses the very different logic of standing in equity. Part III then explores the misguided rationales offered for the standing requirements in Justice Sutherland's watershed opinion in *Massachusetts v. Mellon* and *Frothingham v. Mellon*.⁵ Part IV then explains why many cases that have dismissed actions for want of standing were correct for a different reason: courts in equity, in the exercise of their sound discretion, should have denied relief unless other necessary or indispensable parties were joined to the case as defendants.

I. STANDING IN LAW

Start with the simplest of cases. A kills B's dog. The normal response to this situation is that B, not C some stranger, has the sole right to sue for the loss under the substantive law. That right to sue makes it easy to say that B has standing to sue as well. But it would still be a mistake to conflate the idea of standing with the view that B has a valid cause of action. Suppose the jurisdiction requires B to prove negligence in order to recover for the loss of his dog. B still has standing to bring a strict liability cause of action, even though he will be met with a successful demurrer to his claim. Likewise, B has standing to sue X, even if she had nothing to do with the death of B's dog. Standing never turns on the validity of the cause of action, but only on the substantial stake that the plaintiff has in bringing that cause of action, regardless of its merits. B has standing to bring a flawed cause of action for the loss of his dog.

Nor, as a moment's reflection reveals, is the law of standing crystal clear about C's position. Here it is tempting to say that since C does not own the dog, she is in no position to sue for its loss. The idea of standing becomes closely entwined with the protection of property interests. But it hardly follows that Chas not suffered any harm because she lacks an ownership interest. C could be B's next-door neighbor who plays with the dog on a regular basis, and is shattered by its death. No theory of proximate causation makes that damage too remote.⁶ The sequence of harm is "direct" because no act of God or deliberate action of some third party severs the causal connection. The harm is, if this matters, so routine that it is impossible to deny that such collateral damages are foreseeable to the reasonable person.

Causation then does not decide the outcome in this case. Rather, a specialized rule of standing is invoked out of the recognition that each owner could have many neighbors. Each of these more numerous neighbors has a smaller stake on the outcome of the case than the owner. It is therefore better to ignore these losses in order to simplify the legal system by channeling the rights of action through one party. So long as the owner is allowed to sue, others receive the indirect benefits of deterrence before the loss, even if they do not get any direct compensation after the fact. The standing requirement reflects the implicit tradeoff that the sharp increase in suits creates a huge administrative nightmare for little improvement in marginal deterrence.

It should not, however, be assumed that this tradeoff is uniform in all cases. The common law action for loss of consortium provides a useful counterexample. The defendant injures one spouse, and the other is allowed to sue for

⁵ 262 U.S. 447 (1923) (consolidated actions).

⁶ For discussion generally, see Richard A. Epstein, TORTS §§ 10.6–10.13 (1999).

the loss of companionship.⁷ Each person has at most one spouse, not many. The losses are likely to be concentrated and large. The administrative complications are relatively small owing to the high level of cooperation between the two plaintiffs. Yet while American law is willing to brook the additional complications, English law, which has always had less confidence in the remedial wonders of the tort system, denies the action for loss of consortium to both husbands and wives.⁸ We see a genuine difference of opinion on the tradeoff in the close case, but none in the easier ones. The dominant American rule denies children the right to sue for the loss of consortium of their parents,⁹ although some courts have begun to allow this cause of action at least in cases of death or serious injury to the parent.¹⁰

This same approach carries over to matters involving financial losses. The person who is deceived is normally allowed to sue for fraud. But the courts have uniformly refused to allow individuals who seek recovery for indirect losses to bring their own lawsuits. Perhaps the leading decision on this score is *Holmes v. Securities Investor Protection Corp.*,¹¹ which referred to common law rules on proximate causation to fashion this standing principle in RICO suits. That decision has been followed uniformly at common law to deny health care plans the ability to sue tobacco companies alleged to have deceived smokers who were also plan enrollees. The sensible solution is to allow the smokers to maintain their own cause of action. The health plans could then recover

their own out-of-pocket expenses by bringing actions of subrogation. Here again there is no theory of proximate causation, whether based on directness or foreseeability, that rules the health plan losses out of bounds. Rather, the actions are denied categorically out of the clear recognition that the added complexity of calculating the proper level of losses is not justified by any marginal improvement in overall deterrent effect. "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."¹² The standing notion is easily introduced into this context wholly without regard to either the limited nature of the federal judicial power or some independent concern with separation of powers. The same arguments could, and should, bar the plaintiffs' actions in state courts with plenary jurisdiction.

The tort issues, however, become more complex in the absence of private ownership. Thus suppose that the defendant emits pollution that kills thousands of fish in public waters. Since no fish have been caught, none are owned. No one therefore fills the shoes of B in the earlier case where A killed B's dog. Ownership rules therefore do not identify an ideal person with standing to sue. One possibility is to insist that since no owner has been injured, no one need compensate for the loss. I have made this misguided argument myself.¹³

7 See, e.g., *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950) (extending the right to recover for loss of consortium from husbands to wives).

8 See Administration of Justice Act, 30 & 31 Eliz. 2 § 2 (1982) (for the abolition of all actions for loss of consortium in England, and of all such actions for parents, children and menial servants).

9 *Borer v. American Airlines*, 563 P.2d 858 (Cal. 1977) (denying action for death of children).

10 See, e.g., *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980).

11 503 U.S. 258 (1992).

12 *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 240 (2d Cir. 1999) (emphasis added).

13 Richard A. Epstein, *Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 52 (1979).

But the more complete analysis asks what substitutes for this direct right of action might improve the overall situation. One possibility is to allow commercial fishermen to sue for their losses sustained.¹⁴ But who else? One District Court decision also conferred standing on marina, boat, tackle and bait shop owners, but denied it to seafood wholesalers, retailers and distributors who purchased the output of commercial fishermen. It is the same tradeoff all over again. The fewest parties with the largest stakes may bring suit. All others are denied, in so many words, standing to bring suit for losses that the defendant did cause.

Last are the mixed cases where one person has suffered large injuries while many others have suffered smaller ones. One party is injured by an obstacle on the public road that merely inconveniences hundreds of others. In 1535 the English judges allowed the one party who suffered the special injury to maintain suit, but denied all others the right of action.¹⁵ Their collective interest was vindicated through administrative sanctions against the wrongdoer. None of the huge number of small losses is too remote. Rather the familiar tradeoff is at work, with one variation: the state may impose a fine on the wrongdoer to offset the insufficient deterrence that stems from the truncation of the set of tort actions. But notice the final result. The selective standing rule for public nuisance anticipates the modern standing doctrine by nearly 400 years. But equity needs to be added to the picture.

II. STANDING IN EQUITY

Frequently, standing in equity follows the

rules for standing at law. The plaintiff who demands specific performance of a land sales contract, who seeks to foreclose a mortgage, or who seeks to enjoin a nuisance is not content with common law damages, but requests the court to order the defendant to perform or abstain from particular actions. These suits all meet the traditional requirements for standing in actions at law. The situation, however, changes when courts of equity invoke novel remedies to amalgamate individual claims. For example, the equitable invention of the derivative action allows a representative shareholder to sue corporate officers and directors in the name of the corporation for the benefit of all shareholders similarly situated.

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.¹⁶

This rationale carries over to class actions against unincorporated associations,¹⁷ and to many corporate reorganizations. Modern class actions make the most sense in just those contexts where all plaintiffs have fungible interests, as with the so-called 23(b)(1) class actions.¹⁸ Here any outcome both benefits and binds all members of the class. No shareholder can free ride off the collective solution. No defendant has to face an endless repetition of similar

14 See, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

15 *Anon.*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1535).

16 *Jesse H. Choper et al.*, *CASES AND MATERIALS ON CORPORATIONS* 785-86 (3rd ed. 1989).

17 See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (a representative early case).

18 FED. RULES CIV. PROC. 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").

suits.¹⁹ The remedial structure thus provides full and complete redress. Equitable aggregation in derivative actions thus works precisely because no plaintiff has any discrete or special interest different in quality or kind from that of any other aggrieved party. Far from seeking unique plaintiffs, suits in equity depend on the commonality of interests that the named plaintiff can establish with the rest of the class. Any standing limitation at most precludes any *non*-shareholder from becoming a class member, let alone the class representative.

III. STANDING IN PUBLIC LAW

We are now in a position to see how litigation in equity undermines any special standing under Article III. One common attack on the Court's restrictive standing rules seeks to distance constitutional litigation from private law rules on standing. Different rules are needed under the administrative state, as Wade and Forsyth note, because "public authorities have many powers and duties, which affect the public generally rather than particular individuals."²⁰ Note that these are English writers who address the question of standing in the English system, which has no federalism and no strong position of judicial separation of powers. But even if we pass those points aside, the effort to create new public law rules of standing seems plausible only if we falsely equate "private law" with the common law,²¹ when in fact it embraces both cases in law and cases in equity. The explicit linkage between

public and private law works by carrying over these equitable conceptions from private associations to governments. The municipal corporation becomes the analogue to the private corporation and the doctrine of *ultra vires* could apply to both.²² In dealing with these cases, the uniform nineteenth-century rule allowed any citizen or taxpayer of the local government, just like any shareholder of the corporation, to enjoin the transaction that exceeded its powers.

Thus in *Crampton v. Zabriskie*, a member of the local township was allowed to enjoin the completion of a contract for which the local government had not, in violation of its charter, secured the requisite funding. Justice Field allowed the taxpayer action under the uniform practice of the time, given "the illegal creation of a debt which they in *common with* other property-holders of the county may otherwise be compelled to pay." In his view, "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."²³ Here the injunctive relief works for the benefit of all citizens and taxpayers. The use of the class action thus allows the entire matter to be resolved for all persons at one time. The pressing question is why this precedent does not carry over to all citizen and taxpayer suits brought against the United States for actions of the Congress or the Executive

19 See, e.g., *Ben-Hur*, 255 U.S. 356; *Hansberry v. Lee*, 311 U.S. 32 (1940).

20 See William Wade & Christopher Forsyth, *ADMINISTRATIVE LAW* 696 (7th ed. 1994). For the same sentiment, see Cass R. Sunstein, *Standing and the Privatization of American Law*, 88 COLUM. L. REV. 1432, 1434-36 (1988).

21 Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163, 187 (1992) ("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.") (emphasis added).

22 See, e.g., Robert Charles Clark, *CORPORATE LAW* 675-676 (1986).

23 101 U.S. 601, 609 (1879) (emphasis added).

that, like those in *Crampton*, are ultra vires.

In order to answer that question, it is critical to look closely at Justice Sutherland's opinion in *Frothingham*, which refused to apply *Crampton* to federal issues. At issue in *Frothingham* was whether Congress's spending power authorized federal expenditures of funds to the states for the purposes of promoting maternal and infant health under the Maternity Act.²⁴ The gist of the challenge was that Congress could not make grants under Article I, section 8, clause I to accomplish what it could not do through direct regulation under the pre-1937 restrictive reading of the commerce clause then in force under *Hammer v. Dagenhart*.²⁵ This constitutional objection was deflected on technical grounds when Justice Sutherland held that neither Massachusetts nor one of its citizens, Mrs. Frothingham, had standing to seek to enjoin Mellon, as the Secretary of the Treasury, from distributing the statutory funds.

Plaintiffs urged that *Crampton* should govern, noting that this case too 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."²⁶ Likewise, Massachusetts protested the introduction of the program because it could not protect itself simply by refusing to accept the funds.²⁷ That partial opt-out would not prevent its citizens having their tax revenues spent entirely in other states. Its "consent" to participate in that program counted for naught given its inability to

opt out of both federal contributions and federal distributions. If Massachusetts were forced to choose between paying taxes and receiving benefits, and paying taxes and receiving no benefits, then the outcome was inexorable. It, and every other state, would join the program even if it were flatly unconstitutional.

In spite of these objections, Justice Sutherland refused to treat either claim as raising structural objections to a new constitutional order. Instead he wrote as if the only stake of the individual plaintiffs was to secure restoration to the treasury of their "minute and indeterminable" share of the federal tax revenues expended on the program. *Crampton* disappears beneath the waves because: "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 appropriate."²⁸ But nothing in *Crampton* suggested that the right to enjoin illegal action depended on a taxpayer showing some minimum fraction of financial harm, and nothing that Sutherland wrote suggested that the size of the dollar stake for any individual taxpayer was larger in *Frothingham* than in *Crampton*.²⁹ The words "direct and immediate" formed no part of *Crampton's* 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 niftily suppressed the equitable basis for plaintiff's action, and in its stead he adopted, though not in so many words, the

24 262 U.S. at 478-79; Act of Nov. 23, 1921, ch. 135, 42 Stat. 224.

25 247 U.S. 251 (1918), holding that Congress did not have power to restrict the flow of goods in interstate commerce in order to assure compliance with federal child-labor standards. The matter changed sharply with the post-1937 view of the commerce power. *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

26 *Frothingham*, 262 U.S. at 475, argument of William Rawls.

27 See the argument of Alexander Lincoln in *Massachusetts v. Mellon*, 262 U.S. 447, 459-466 (1923).

28 *Id.* at 486.

29 This point led David Currie to question *Frothingham*, even within the framework of the conventional standing doctrine, which he accepts. See David P. Currie, *THE CONSTITUTION IN THE SUPREME COURT, THE SECOND CENTURY 1888-1986*, at 183-185 (1990).

definition of standing needed for common law tort actions.

Sutherland muddied the waters still further by invoking the principle of separation of powers when it was least needed, by noting that our Constitution commits to the legislature the duty of making the 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.”³⁰ At this point the doctrine of standing should be exposed for what it is – the conscious narrowing of Chief Justice Marshall’s decision in *Marbury v. Madison*.³¹ One of the great uncertainties of that case arose because in declaring portions of the Judiciary Act of 1789 unconstitutional, Marshall simply held that the courts did not have to issue a commission to the worthy Marbury. The case did not in so many words decide that the judicial department had the power to order either Congress or the Executive to issue a commission in that case. It was only with *Cooper v. Aaron*,³² when the Court ordered the Arkansas governor and legislature to back down, that it became clear that the power of judicial review in *Marbury* gave the Court plenary power to order all other branches of government, state or federal, to do its bidding.

Usually some direct victim is available to challenge any legislative or executive action. But using tax revenues to achieve impermissible ends typically does not impose a discrete burden on anyone. The usual complaint against the standing rules is that they leave an

unnecessary void in the power of courts to determine whether government conduct is illegal whenever *no one* suffers any disproportionate impact from the state action. Writers from Aristotle on forward have understood that “everyone’s business is nobody’s business,”³³ and so too have judges in equity. This political objection therefore has a secure textual home in the words “all cases ... in equity.” Any given individual willing to bear the inordinate costs of bringing extensive litigation against the United States should have his day in court. If more than one person wants to press the same objection, then some multi-district panel could coordinate stays or consolidations if the parties themselves are unable to prevent unnecessary repetition in litigation.

What seems utterly odd in this situation, however, is the common assertion, made most eloquently by Alexander Bickel, that standing is needed in order to insure the “necessary concreteness” in the outcome of the case.³⁴ Who better able to litigate these issues than those groups who care not a whit about a few dollars, but deeply about the preservation of the overall constitutional structure as they see it? An odd, if somewhat unprincipled, exception to the general rule against standing has been made for cases brought under the Establishment Clause.³⁵ But can anyone say with a straight face that Americans United Against Church and State does not have the requisite interest to maintain a challenge against a giveaway of surplus property to a Christian College, solely

³⁰ *Id.* at 488.

³¹ 5 U.S. 137 (1803).

³² 358 U.S. 1 (1958).

³³ See Aristotle, *POLITICS*, Book II, ch. 3 (B. Jowett trans., Richard McKeon, *THE BASIC WORKS OF ARISTOTLE* 1148 (1941)) (“For that which is common to the greatest number has the least care bestowed on it.”). For the modern statement, see Russell Hardin, *COLLECTIVE ACTION* 8 (1982).

³⁴ See Alexander M. Bickel, *THE LEAST DANGEROUS BRANCH* 115-116 (1962), echoed in *Valley Forge Christian College v. Americans United Against Church & State*, 454 U.S. 464 (1982).

³⁵ *Flast v. Cohen*, 392 U.S. 83 (1968), challenging federal aid to religious education under the Elementary and Secondary Education Act of 1965.

because it is brought under the excess property clause,³⁶ while some disappointed bidder who expected a tiny profit from the receipt of such property is in a better position to contest the claim? There is no correlation at all between the capacity to represent a position effectively and the presence of a distinctive pocket-book interest.

This ad hoc rationalization should not displace the general rules of equity jurisdiction when the stakes are so high. In *Valley Forge*, the court insisted that the representative branches of government should be held to account for their misdeeds through the political process. Perhaps they will. But surely that is no answer to the obvious objection that if the distributions were unconstitutional in the first place, they could not be ratified by a political majority. Certain political questions may well be too hot for the Court to handle, but the standing doctrine is a wretched filter for singling them out. I can think of no reason why the want of a special plaintiff should lead the Court to take a pass in such cases as *Schlesinger v. Reservists to Stop the War*,³⁷ where the plaintiffs claimed that the Incompatibility Clause – “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 plaintiffs sought to show that they were “special” because they were present and former members of the reserves. But any citizen should be able to raise a challenge to this structural issue. Likewise, the companion case of *United States v. Richardson*³⁸ made the same mistake by refusing to allow the plaintiffs to attack the secrecy surrounding the appropriations to the Central

Intelligence Agency as a violation of Article I, section 9, clause 7 – “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” Perhaps the issue should be kept out of courts in the name of military security. But if so it is utterly misguided to hide that fact in the observation that the loss in question was “common to all members of the public.”

IV. COMPLICATIONS IN THE EQUITABLE METHOD

A clear recognition of the role of equitable jurisdiction also helps to answer other important questions about how complex litigation should be organized in federal court. In particular, three general issues present themselves for discussion. First, should plaintiffs action be dismissed unless some necessary or indispensable parties are joined to the suit? Second, how should federal courts apply the traditional limitations on equitable remedies once those standing obstacles have been overcome? Third, may any purported limitations imposed by the standing requirement be negated if Congress grants certain citizens or groups the right to sue in federal court?

Joining Defendants

The first problem could easily arise if the United States entered into collusive litigation with an ostensibly adverse party. Thus in *Allen v. Wright*,³⁹ the parents of black public-school 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 those districts, which the plaintiffs

36 *Valley Forge*, 454 U.S. 464; Article IV, § 3, cl. 2 (“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.”).

37 418 U.S. 208 (1974).

38 418 U.S. 166 (1974).

39 468 U.S. 737 (1984).

claimed had adopted racially discriminatory practices. Although the suit was dismissed on the ground that the plaintiffs lacked standing because they only alleged that black students were “stigmatized” by their inability to attend these private schools, the action still should have been dismissed unless the local schools whose tax-exemptions were at risk had been joined as defendants in the case. But if all parties were joined, then why not hear the case out on the merits with all points of view fully represented?

Similarly, in *Simon v. Eastern Ky. Welfare Rights Org.*,⁴⁰ the IRS had treated as charitable, tax-exempt corporations several nonprofit hospitals that supplied only limited emergency services to indigent patients. Justice Powell denied the relief chiefly on the inability to trace the causal connection between the hospital’s favorable tax treatment and its policy toward indigent patients. But as a matter of equity, the right solution is not to dismiss the suit but to offer the tax-exempt institutions a place at the table under the usual federal rules governing third-party practice.

Equitable Discretion

The current concern with the redressable nature of grievances is also a standard issue whenever a court in a nuisance case decides whether, and on what terms, to issue an injunction. Is the injunction issued as of right whenever the harm is substantial, or does the court balance the equities between the parties when the defendant’s use is highly valuable, and the plaintiffs of only minor worth?⁴¹ Similarly, specific performance is generally awarded in land sale contracts, at least where the rights of third parties do not intervene.⁴²

This broad set of equitable principles surely applies to cases under Article III when a court is asked to order an administrative agency to appropriate funds or enlist the cooperation of other public officials. These questions should not, however, be buried under the single banner of standing, for disaggregation offers a better understanding of why it may well have been correct for courts to decline to exercise their equitable jurisdiction. For example, the Supreme Court should not have declined to exercise its equitable jurisdiction in *Alabama Power Co. v. Ickes*, where the question was whether a private electric 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.⁴³ If the grants were illegal, then either a taxpayer or a competitor should be able to raise the matter, and a simple injunction against the practice would not lie beyond the powers of a court of equity. Justice Sutherland just complicated the matter unnecessarily when he held that the term “direct injury” from *Massachusetts v. Mellon* should only be understood to mean “a wrong which directly results in the violation of a legal right.” Here it is insufficient to invoke the old Roman phrase “damnum absque injuria” (harm without legal injury) to solve the problem at hand. That maxim has nothing to do with standing, but embodies the substantive principle that certain injuries (e.g., competition, blocking of views) are not wrongs in themselves. But it hardly precludes the argument that certain methods of competition (e.g., product disparagement or passing off) are in fact wrongful, at which point the competitor is far more likely

40 426 U.S. 26 (1976).

41 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).

42 See Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355-364 (1978).

43 302 U.S. 464 (1938). See *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1939), where similar issues were raised in this equally unsatisfactory decision.

to sue than disappointed consumers. When the dust settles, the case hardly raises matters so difficult that a well-drawn injunction could not deal with them. Fortunately, our more modern cases incorporate elements of the English practice,⁴⁴ which is to allow a disappointed party to an administrative procedure to maintain an action to attack an award to a competitor on grounds of injury in fact.⁴⁵ But the obscure law as to what counts as an injury in fact seems unnecessary if the only question is who can enjoin the performance of an ultra vires act. Anyone can. Issues of damages of course raise different considerations.

Yet, by the same token, no court could exercise its equitable jurisdiction in favor of the plaintiffs in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.⁴⁶ There, environmental groups had challenged the decision by the Interstate Commerce Commission (ICC) not to suspend surcharges imposed on railroad shipment rates. Any 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, including a full range of shippers and carriers, and perhaps other environmental groups that did not see the causal universe through the same rose-colored glasses. Any damages would be, to say the least, speculative so that the most that any court should do is to ask the ICC to take into account SCRAP's views in the course of its own deliberations, which of course it had.

A similar analysis applies in *Lujan v. Defenders of Wildlife*,⁴⁷ where the substantive question

before the Court was whether the Secretary of the Interior had properly limited Section 7 of the Endangered Species Act to apply only to actions done within the United States or on the high seas, but not within foreign countries. Why not allow Defenders of Wildlife to challenge that determination in light of its long-term commitments? It is a sad commentary on misplaced judicial ingenuity that the Court bypassed the obvious, and instead made federal jurisdiction turn on whether two members of the Defenders had seen some protected species overseas and wished at some indefinite time to travel abroad to see them again. Why then bother with standing at all? Just order, if appropriate, the Secretary 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. But it is an open question whether judicial supervision should go further in light of the difficulty of scrutinizing overseas projects that in individual cases may be subject to inconsistent local requirements. At some point, a court of equity should refrain from overseeing individual budget allocations because the issues are not redressable in legal action.

Is Standing Doctrine Constitutionally Required?

This account of standing largely obviates the vexed constitutional question of whether Congress can fix up the defects in the standing doctrine by authorizing citizen suits in environmental cases. On this question Justice Powell in *Warth v. Selden* stated that some components of the standing doctrine were

44 See WADE & FORSYTH, *supra* note 20, at 702-03.

45 See *Association of Data Processing Serv. 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."

46 412 U.S. 669 (1973).

47 504 U.S. 555 (1992).

“prudential,” while others, including the requirement that “plaintiff ... allege a distinct and palpable injury to himself,”⁴⁸ were constitutionally mandated. The distinction makes no sense. Article III says that the “judicial Power shall extend to all Cases in Law and Equity, arising under” That language carries with it the clear implication that it does not extend to those cases that do not “arise under” the appropriate classes of cases. Thus, Congress could not authorize the Court to consider requests for advisory opinions because those do not count as cases at all. But the discrete and palpable injury case is not cut from the same cloth. Once the equitable jurisdiction of the federal courts is acknowledged, then citizen or taxpayer suits to enjoin illegal conduct fall squarely within the judicial power. No further congressional authorization is needed. Indeed, any effort by Congress to strip the Supreme Court of its appellate jurisdiction to hear these issues would itself raise serious constitutional issues.

The bottom line is this: courts use judicial

review is to make sure that the legislature and the executive do not exceed their respective powers. Today’s convoluted doctrine of standing 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. The English can recognize that unless some method is given to challenge illegal administrative actions, “the rule of law breaks down.”⁴⁹ Why can’t we, when our federal courts have jurisdiction over all cases in law and in equity? 

⁴⁸ 422 U.S. 490, 501 (1975).

⁴⁹ See WADE @ FORSYTH, *supra* note 20, at 696.