Standing for the Structural Constitution

Aziz Z. Huq*

[To Schmooze participants: With many thanks for your willingness to read this, I provide here an edited version of a longer project; specifically, you have an introduction, Part I, and Part IV of the anticipated paper.]

Introduction

An unacknowledged tension exists today between two central, unquestioned axioms of Article III jurisprudence. One is the familiar black-letter law rule that a "plaintiff generally must assert his own rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[1] This principle takes root in Chief Justice John Marshall's opinion in *Marbury v. Madison*, which directed federal courts "solely to decide on the rights of individuals."[2] The second axiom is implicit in numerous Supreme Court precedents dating back decades yet rarely articulated explicitly. It holds that individual litigants can secure relief not merely for violations of their own individual rights, but also for infringements of the Constitution's *institutional* architecture—i.e., states' rights or branches' prerogatives. Judges routinely invoke principles of separation of powers[3] or federalism[4] that seem to adhere in institutions to award relief to individual litigants. However hallowed they might be, these two axioms coexist only uneasily. For structural constitutional principles are rarely conceived in individualized terms. Rather they align more closely with "generalized grievance[s] shared by a large number of citizens in a substantially equal measure"[5] that Article III is crafted to keep at bay.

In a little-noticed opinion handed down in penultimate week of the October Term 2010, the Supreme Court took up this tension, and resolved it unanimously in favor of justiciability.[6] Writing for the Court in *Bond v. United States*, Justice Anthony Kennedy held that "[a]n individual has a *direct* interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particularized, and redressible."[7] Individuals are also protected by the separation of powers, observed Kennedy, and hence "not disabled from relying on [that] principl[e] in

*Assistant professor of law, University of Chicago Law School. This is a discussion draft, and not for citation or quotation.

[1] Warth v. Seldin, 422 U.S. 490, 499 (1975).

[2] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (punctuation omitted).

[3] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010); Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating line-item veto); Bowsher v. Synar, 478 U.S. 714, 732−34 (1986) (invalidating direct congressional control of spending); INS v. Chadha, 462 U.S. 919, 930−31 (1983) (invalidating legislative veto).

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

[5] Duke Power Co. v. Carolina Env't Study Group, 438 U.S. 59, 80 (1978).

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

[7] 131 S. Ct. at 2364 (emphasis added).

otherwise justiciable cases and controversies."[8] *Bond* in effect means that an individual otherwise properly situated for Article III purposes can involve not just her own constitutional interests but also those of our shared constitutional institutions as grounds for relief.

Bond occasioned thunderous silence in the law reviews.[9] Perhaps this inattention is understandable. *Bond* upset no statutory or doctrinal status quo. While hardly a mundane sight, individual plaintiffs do invoke structural constitutional flaws for relief periodically in federal court—and indeed have done so for nearly a century.[10] Nor did *Bond* occasion any downstream policy upset. Given the historical pedigree of individual standing in structural constitutional litigation, its Article III holding presages no large reordering of federal-court litigation. To the contrary, the brevity and unanimity of Justice Kennedy's opinion suggested the Court was merely resolving a trivial housekeeping matter in the "incoherent and confusing" field of standing.[11]

But the question whether individual litigants should have standing to raise structural constitutional questions is more complex than *Bond* and commentators suppose. At its core, this Article advances the claim that individuals are typically ill-positioned to vindicate structural constitutional values. In lieu of the current Article III disposition, I instead propose the following rule: *when an individual litigant seeks to enforce a structural constitutional principle that immediately redounds to the benefit of an official institution, and there is no reason the latter could not enforce that interest itself, a federal court should not permit the individual litigant to allege and obtain relief on the basis of the separation of powers or federalism*. In the mine run of cases, Congress, the executive branch, or a state will be available to vindicate a structural principle. The relevant institution should be left to elect whether or not to do so. In such instances, individual litigants should be categorically barred from obtaining relief based on the traducing of governance structures held in common. Consistent with my proposed rule, however, I further identify a subset of cases in which individuals ought to have standing. In these cases, litigants assert a due process-like interest isomorphic with Article III of the Constitution.[12] The individual interest and the structural principle wholly overlap in such litigation. Additionally, no official actor is available to enforce the structural principle. In such instances, standing should be permitted for individual litigants.

My analysis of individual standing for the structural constitution rests on two pillars, one doctrinal and the other sounding in political-economy terms. I first consider the Court's tangled constitutional and prudential standing framework,[13] a jurisprudential morass famous for its "unpredictability and ideological nature."[14] Given that complexity, it should be no surprise that precedent can be leveraged into a plausible case either for or against individual standing for the structural constitution. Resisting the jurisprudence's entropic tendency, I contend that the *Bond*

[8] *Id.* at 2365.
[9] An exception is a largely descriptive piece by Scott G. Thompson & Christopher Klimmek, *Tenth Amendment Challenges after* Bond v. United States, 46 U.S.F. L. REV. 995 (2012).
[10] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918).
[11] F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008).
[12] *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2608–20 (2011).
[13] *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 619 (1989).
[14] Dan Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121, 122 (2011).

Court's analysis failed to account for several of Article III's foundational values. Even on narrow doctrinal grounds, it is unjustified. Large lacunae mar *Bond*'s constitutional analysis while prudential concerns insistently list against individual standing.

The second element of my analysis moves beyond standing's doctrinal moorings to situate individual standing for the structural constitution in a political economy and institutional context. Drawing on public-choice and political science tools, I query whether such standing will indeed vindicate the separation of powers and federalism. Application of such tools yields even yet more reason to be skeptical of individual standing for the structural constitution. My analysis compares the effects of individual and institutional standing. Individuals' incentives, I argue, conduce away from the goals of structural constitutionalism, and are indeed likely to exacerbate rent-seeking pathologies in the legislative process. Counterintuitively, opening the door to more individual litigants does not necessarily generate more compliance with the structural constitution. But in contrast to private litigants, political institutions have meaningful cause to resist the urge to challenge desirable institutional innovations, and to invoke judicial supervision only when truly warranted. Although very clearly far from perfect, institutional incentives are likely to generate better outcomes than individual incentives to sue. In net, this (concededly rough) comparative analysis suggests that structural constitutional values are best entrusted to the institutions they directly benefit, not chanced on the happenstance of which individual litigants find self-serving gain in their invocation.

Working hand in glove, these 'internalist' doctrinal and 'externalist' political economy challenges suggest that individual litigation of structural constitutional rules is more likely to distort than to sustain a constitutionally appropriate equilibrium. If structural constitutional questions are to be adjudicated in federal court at all, it would be wise to delimit such jurisdiction to cases filed by those institutions best placed to raise all relevant considerations—the states or political branches that are ultimately the immediate objects of constitutional solicitude.

The analysis proceeds in five steps. Part I begins by defining the domain of relevant inquiry, delineating the class of cases in which an individual litigant seeks to vindicate the structural constitution. Part II canvasses the relevant standing doctrine. Part III then turns to the *Bond* case to explore its conclusion that individual litigants have Article III standing to vindicate the structural constitution. I argue that the relatively parsimonious analysis of *Bond* majority opinion, while not wholly without doctrinal warrant, suppresses much difficulty that ought to be aired. More aggressively, I press the position that a contrary holding in *Bond* would cohere better with the assumptions and doctrinal specifications of Article III jurisprudence. Part IV turns from doctrine to political economy. Drawing on institutional and public choice analytic tools, I identify a range of undesirable effects from permitting individual standing for the structural constitution. Based on these doctrinal and political economy analyses, Part V proposes an alternative rule that would preclude most (but not all) individual standing for the structural constitution.

I. Individual Litigants and the Structural Constitution

Structural constitutional questions present to federal courts in several ways. To clarify the scope of my argument, I begin by identifying the subset of cases with which I am concerned here. I then explain why these cases in fact implicate the defense of structural interests alone, and cannot be fairly characterized as involving the defense of some sort of individual right—specifically, what has been called a right to a valid rule.

A. Structural Constitutional Litigation in Federal Court

To begin with, what is the class of litigation in which individuals, rather than official, institutional actors, bring structural constitutional claims? It is certainly not the entire domain of structural constitutional litigation. Institutional actors often press their own constitutional interests in federal court. The president, for example, routinely asserts an Article II interest in exercising control over administrative agencies. Congress, acting through its committees, can also file suit seeking to vindicate constitutionally grounded interests in the midst of inter-branch conflicts. States too vindicate federalism interests by resisting national commandeering, asserting sovereign immunity, and challenging conditions freighted with federal spending. Indeed, the only constitutionally salient institution that lacks the capacity to lodge objections in court on structural constitutional grounds is the Article III judiciary itself. With that one exception, the doors to the federal courthouse stand, as a practical matter, open to any of the institutional entities picked out in the Constitution as salient features of our structural constitution.

But the courthouse doors also stand open to *individual* litigants seeking to vindicate structural constitutional values. In the separation of powers context, for example, an individual litigant can lodge a facial challenge to federal legislation on the ground that it violates some aspect of the structural constitutional. Consider the 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[15] In *Free Enterprise Fund*, a Nevada accounting firm challenged the regulatory authority of the federal Public Company Accounting Oversight Board ("PCAOB").[16] The accounting firm did not assert PCAOB had infringed on any constitutionally protected interest that the firm possessed, but rather that the Board's organic act "contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control."[17] Even though the President evinced no wish for greater control of the board,[18] the Court invalidated one part of PCAOB's organic statute so as to establish more direct presidential control.[19] *Free Enterprise Fund* is not an outlier. In earlier separation of powers cases, individual litigants have been allowed to raise the interests of either Congress or the executive as a shield against regulation or coercive action.[20]

---

[15] 130 S. Ct. 3138 (2010).
[16] *Id*. at 3149.
[17] *Id*.
[18] *Id*. at 3154. (Indeed, the Solicitor General, representing the President's interests, "was unwilling to concede that even *five* layers between the President and the Board would be too many.")
[19] *Id*. at 3161–62 (declining to invalidate the statute in its entirety, instead severing the unconstitutional dual for-cause removal provisions from the remainder of the statute).
[20] Hence, in *INS v. Chadha*, the Court invalidated the line-item veto at the behest of a noncitizen litigant in an immigration proceeding. 462 U.S. 919, 930−31 (1983). In *Clinton v. City of New York*, the Court allowed recipients

The same pattern is observed in federalism cases….

IV. The Political Economy of Standing for the Structural Constitution

This Part turns from an internal to an external perspective—that is, from doctrine to political economy. It examines the practical consequences of extending individual standing for the structural constitution to individuals. The analysis has two strands that together compound to a simple *comparative* claim—all things considered, the structural constitution is safer in solely institutional than in institutional and individual hands.

First, I examine the individual incentives that animate structural constitutional litigation using public choice theory. The latter trains on the interest groups that not only drive legislative agendas but also deploy judicial review to obtain policy goods they cannot secure in the political process.[21] Notionally a matter of high principle, structural constitutional litigation is not inured from interest-group politics. Rather than promoting a desirable structural equilibrium, individual standing for the structural constitution will likely promote the exogenous agendas of private parties while undermining collective constitutional goods. Second, I consider *institutional* incentives to defend the structural constitution. To this end, I employ what has been termed a "new-separation-of-powers approach," which posits that "we cannot fully understand the behavior of one institution without understanding it in the context of the othe[r institutions with which it coexists.]"[22] No less than legislatures and agencies—the typical focus of the new separation-of-powers approach—federal courts are embedded in sequential interactions with other government institutions animated by distinctive strategic goals.[23] This perspective generates a relatively optimistic view of institutionally initiated litigation. In tandem, these two analyses provide reasons to prefer exclusively institutional standing for the structural constitution to the exclusion of individual litigants.

It is important to stress that my argument here is comparative in nature. I do not make the (implausible) claim that institutions have perfectly tailored incentives. Instead, I argue that a *comparison* of individual and institutional incentives suggests that we secure more desirable results by limiting standing to institutions.

A. Individual Standing for the Structural Constitution Reconsidered

This Subpart develops two consequentialist arguments against the proposition that individuals should have standing to litigate the structural constitution. Together, these arguments

---

of federal spending to challenge President Clinton's use of a line-item veto as an infringement on Congress's law-making authority. 524 U.S. 417 (1998).

[21] *See* MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 471–75 (2009) (describing potential theories of interest group influence on the courts); *see also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 66–68 (1991) (noting consequences of interest group influence on the courts).

[22] Rui P. de Figueiredo, Jr., Tonja Jacobi & Barry R. Weingast, *The New Separation-of-Powers Approach to American Politics*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY 200 (Barry R. Weingast & Donald Wittman, eds., 2006).

[23] *Id*. at 201.

undermine the intuitive notion that opening the courthouse door wider to private litigants conduces to greater fidelity to the Constitution. The first argument explains why that intuition, likely grounded for many in the individual rights context, cannot be translated into the structural constitutional context. The second line of attack draws on public choice theory and focuses more tightly on private litigants' likely incentives in practice.

1. The Divergent Goals of Rights and Structural Litigation

Recall that Part III.A posited a distinction between individual rights and structural constitutional adjudication—the difference between maximizing and equilibriating. Whereas a court's responsibility respecting individual rights is to maximize the latter within the bounds of legitimate state interests, a court's task in respect to the separation of powers and federalism involves a more complex balancing act. A judge facing a structural constitutional question cannot merely maximize one value within constraints, but must instead thread carefully between several distinct and inconsistent constitutional values to attain a desirable equilibrium. Given the distinction between these two goals, it is likely that generous individual standing rules will fit comfortably with the courts' goals in individual rights cases but have perverse, undesired effects in structural constitutional litigation.

The distinction I draw here between rights and structural litigation relies on the assumption that more permissive standing rules are likely to increase the volume of potential litigation and therefore to increase the likelihood of a given constitutional good being vindicated. This assumption of a positive correlation between standing rules and litigation outputs rests on simple, if not wholly uncontroversial, premises. To air these premises, consider a counterfactual world in which a constitutional value—say, the Establishment Clause—can only be enforced by litigants who cannot choose to opt out of the challenged government institution.[24] In this counterfactual world, school children could challenge graduation prayers, but citizens could not challenge religious displays in public buildings. Courts would not be able to confront all government practices that might trench on Establishment Clause values. Moreover, judges receive only a weak signal that there is any reason for concern about impermissible establishment outside Article III parameters. On the other hand, imagine a world of generous standing to challenge alleged establishments in schools, government buildings, official practices, and even coinage. The larger volume of persons with relevant injuries makes it more likely that courts will be presented with fact-patterns raising all potential ways in which a constitutional good can be violated. Litigants will have many more opportunities to raise challenges, to distinguish earlier precedent, and to locate sympathetic plaintiffs. To the extent they plough their furrows in a common-law, incrementalist vein, judges also have more opportunities to explicate and thus reinforce the constitutional value. More permissive standing rules additionally have epistemic pay-offs for judges. And with more potential plaintiffs, it is more likely that courts will quickly promulgate decision rules dealing with all possible ways in which a right can be compromised.[25] In all these ways, a greater volume of potential litigants increases the courts'

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

[25] But greater volumes of litigation might also impose a fiscal burden on the state, leaving it fewer funds to honor rights. It is hard to know in the abstract whether this is a serious problem. Given the marginality of litigation costs to today's administrative state, there is some reason to be skeptical the problem is significant.

ability to vindicate constitutional rights to their fullest extent possible within the bounds of legitimate state interests.[26] To be sure, it is certainly possible that courts will reject Establishment Clause claims across the board. But it is still much more likely that the relevant constitutional good will be enforced in expectation.[27]

In the individual rights domain, courts' goal of maximizing the attainment of rights means that more expansive judicial vindication of a constitutional good is, all things considered, likely to be desirable. Broader standing means that the shadow of judicial intervention is more likely to have a general deterrence in addition to a specific deterrence effect. As one commentator explains, "[t]he availability of private suits [will] increase the likelihood that enforcement actions will occur, and, as a result, would cause more potential defendants to refrain from conduct they would otherwise engage."[28]

By contrast, the goal of structural constitutional litigation is the more delicate task of attaining and maintaining an appropriate interbranch or intergovernmental equilibrium. Increasing the volume of litigants will not necessarily conduce to this balancing goal. The net effect of a larger volume of litigation on either the federal or interbranch balance depends on the precise content of that engorged litigant flow. For permissive individual standing rules to yield desirable results, the expected stream of individual litigants alleging structural constitutional error would have to be composed in such a way as to anticipate and produce the right interbranch or intergovernmental balance. For example, it would be necessary to have just the right number of litigants pressing states' rights and just the right number of countervailing litigants trumpeting the national government's interests. In the separation of powers domain, each branch would also need its own (numerically correctly proportioned) cadre of champions in court.[29] In short, it would be necessary to have a population of litigants precisely composed of the *right sort* of claimants to avoid lopsided imbalances in favor of either a particular branch or particular level of government. But there is simply no reason to believe we possess such good fortune. Nor can we plausibly posit some providential invisible hand to assure the correct distribution of litigants.

Optimistic predictions are rendered even more improbable by two aspects of current standing doctrine. *First*, the doctrinal rule against generalized grievances ensures that judicial coverage of structural constitutional issues will be patchy. Even under an expansive view of individual standing for the structural constitution, not all structural principles have proved to be justiciable. Two examples from the separation of powers context illustrate. First, the Framers included provisions in Article I to prevent the executive from "seducing congressmen with

[26] Even if more permissive standing rules increase the risk that judges inadvertently slight a legitimate state interest, the correlative error of underprotection also arises in a greater number of cases. The net effect of these two countervailing trends is not clear ex ante.

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

[28] *See* Richard H. Fallon, *The Linkage Between Justiciability and Remedies—and their Connections to Substantive Rights*, 92 VA. L. REV. 633, 667 (2006).

[29] Federal courts, moreover, may err in asymmetrical ways. In separation of powers cases, for example, one might expect that presidential selection of judges would typically generate a pro-executive bench. I assume this problem has been solved in the following. If judges are biased between branches or between the nation and the states, there may be a reason for more general skepticism about the aggregate effect of structural constitutional litigation.

government sinecures" or bribing them with "double salaries or make-work jobs."[30] The Court, however, has treated these 'anti-entanglement' rules as nonjusticiable. Hence, violations of the Emoluments Clause[31] generate no actionable injury,[32] and violations of the Ineligibility Clause[33] similarly create no individual Article III plaintiffs.[34] In each line of cases, the bar to generalized grievances shuts down enforcement of elements in the structural constitution designed to prevent excessive interbranch overlap.[35] As a result, the institutional design principle of restricting impermissible interbranch entanglements will be systematically underenforced because of a consistent undersupply of eligible plaintiffs.[36] At the same time, other elements of the Constitution that have a checking effect through *mandatory* interbranch entanglements—e.g., impeachment, the veto, and the senatorial confirmation role in appointments—all operate with judicial enforcement. The net result is quantitative unevenness in judicial vindication of the structural constitution as interbranch checks are enforced, but limits on interbranch entanglements are not.

A second example of the unbalancing consequences of access rules concerns the allocation of law-making power. With the exception of two seemingly "aberration[al]" outliers in the 1930s, the Court has declined to enforce any strong constraint on the quantum of delegation from Congress to the executive branch.[37] At the same time, the Court has also continued to allow plaintiffs to challenge legislative efforts to regulate delegations post hoc.[38] Another asymmetry ensues. The Court evinces large deference to political branches' institutional choices along one margin, hence enabling large institutional change. But then, along another diametrically opposed margin, it "prevents … compensating adjustment from being made by any institution, short of obtaining a constitutional amendment."[39] The result is that interest groups have ample opportunities to mobilize in the courts—but only with respect to violations of Article I by Congress, not converse executive abrogations of legislative power. Again, the expected result of such uneven access to the federal courts is not a desirable structural equilibrium, but imbalanced and erratic outputs.

Asymmetries of the sort identified here are hardly unique to the separation of powers. In the federalism domain, the Court has treated some federal governmental obligations toward the state as nullities on justiciability grounds. Individuals seeking to invoke states' interests created

---

[30] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 63, 78, 182 (2006).
[31] U.S. Const. Art. I, §6, cl. 2.
[32] *See* Ex Parte Levitt, 302 U.S. 633, 634 (1972).
[33] U.S. Const. Art. I, §6, cl. 2.
[34] *See Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 217 (1974).
[35] Furthermore, lower courts have held that Congress is precluded from granted standing to challenge unconstitutional interbranch entanglements because of the absence of Article III standing. *See* Rodearmel v. Clinton, 666 F. Supp. 2d 123, 128–129 (D.D.C. 2009), *appeal dismissed for lack of jurisdiction*, 130 S. Ct. 3384, 177 L. Ed. 2d 300 (2010).
[36] It is hard to see how the Court could 'compensate' for this gap by overenforcing in justiciable cases.
[37] *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002).
[38] *See* INS v. Chadha, 462 U.S. 919, 930−31 (1983).
[39] Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 436 (2003) [hereinafter Vermeule, *Hume's Second-Best*] (arguing that judges might engage in "systematic deference [or] systematic seriatim enforcement of local constitutional provisions" but that "judges should [not] evaluate global consequences on a case-by-case basis"). My point here is that judges should not take different strategies to related design questions.

by the Elections Clause of Article have been turned away at the courthouse door.[40] Similarly, efforts to invoke the federal obligation to maintain states' "Republican Form of Government" have been blocked on political-question grounds.[41] Even as the Court has assiduously tended to one side of the federalism dynamic, it thus systematically fails to enforce positive duties owed by the national government to the states. In the end, these asymmetries mean the courts will systematically slight some aspects of the interbranch or intergovernmental balance, even as other aspects secure plenary vindication.

The second reason for expecting distorted outcomes from individual standing focuses on the doctrinal details of standing: the injury-of-fact, causation, and redressibility elements of the doctrine as now drawn virtually guarantee the uneven distribution of individual litigation over structural constitution values.

Consider, by way of a motivating example, the legislative veto, which was invalidated in 1983 in *INS v. Chadha*.[42] Congress had been using simple resolutions to direct cabinet secretaries to engage in investigations and issue reports since at least 1903.[43] A first legislative veto was enacted in 1932—more than fifty years before the *Chadha* opinion.[44] It is surely worth inquiring as to why there was an absence of constitutional challenges to the legislative veto for about half a century.[45] One possible explanation is that Congress did not need to use the legislative veto frequently in order to influence executive-branch behavior—the mere shadow of congressional responses was sufficient to induce desired agency policies.[46] If legislative vetoes were largely anticipated by agencies unwilling to antagonize their congressional paymasters, we would expect to see less agency slack and few instances in which Congress in fact deployed the veto. Anticipated responsiveness on the executive's part, however, would drain the pool of individuals who could satisfy the injury in fact, causation, and redressibility requirements of Article III standing.[47] At the same time, Congress would still obtain roughly the results it would have obtained via active use of the veto.

Alternatively, a structural constitutional violation may generate no litigants with Article III standing because it throws up only immediate winners. Hence, the White House might accept an unconstitutional restriction upon its appointment or directive authority because it is in the

[40] *See* Lance v. Coffman, 549 U.S. 437, 442 (2007) (denying individual standing to bring claims under U.S. Const. Art. I, §4, cl.1).
[41] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 20–21, 39–42 (1949).
[42] 462 U.S. 919, 930−31 (1983).
[43] *See, e.g.*, Act of Feb. 14, 1903, Pub. L. No. 87, § 8, 32 Stat. 825, 829 (1903).
[44] *See* Act of June 30, 1932, Pub. L. No. 212, 47 Stat. 382, §407 (1932).
[45] One reason is not relevant here: Congress's use of legislative vetoes tended to fall off in the absence of political conflict between the branches. The 1940s and the 1970s were thus periods of increased employment of legislative vetoes. *See* David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 258–59 (1982). Of course, in the 1950s and 1960s, the earlier statutes with legislative vetoes remained on the books and in use.
[46] And when Congress did use it, standing bars sometimes precluded adjudication. *See* McCorkle v. United States, 559 F.2d 1258, 1261–62 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (denying challenge to legislative veto provision in the Salary Act on standing grounds).
[47] This account finds vindication in the persistent post-*Chadha* use of the legislative veto as a signaling device between Congress and the federal administrative state. *See* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 275, 288 (1993).

short-term political interest of an Oval Office incumbent. Or states might accept an impermissible intrusion on their regulatory jurisdiction to gain cost-savings. The Constitution may be violated in both cases, but all those directly affected are beneficiaries of the violation. And beneficiaries cannot sue. This problem is somewhat parallel to the concern with "givings" identified by property scholars as the hidden corollary of the takings problem. Roughly speaking, a 'givings' arises when "the value of … property increases as a result of governance action" even if the government does not act directly on the property.[48] Like takings, givings implicate fairness, efficiency, and anti-rent-seeking concerns.[49] Yet givings are largely off the judicial radar. The result is a skewed jurisprudence that often gives a free pass to rent-seeking and other foibles supposedly parried by the Taking Clause.[50] The same concerns, mutatis mutandi, arise in the structural constitutional context, when constitutional violations produce an immediate social welfare surplus that can be used to buy off all relevant parties.

Even when a constitutional violation has more tangible consequences, affected interest groups may still not have a sufficient injury in fact. For example, in some instances a violation of the separation of powers results in a loss of information for the public. Absent a statutory basis for suit, however, no individual plaintiff has standing. Thus, in *United States v. Richardson*,[51] the Court held that a member of the public could not challenge violations of the Accounts Clause of Article I, Section 9,[52] based on the federal government's failure to publish a budget for the Central Intelligence Agency. In this fashion, the constitutional floor for injury-in-fact shapes the universe of structural constitutional litigation filed. Along with the anticipated response problem and the bar to beneficiary standing, the boundaries on injury-in-fact thus provide another reason to anticipate lopsided results when individuals vindicate the structural constitution.

2. Public Choice and Structural Constitutional Litigation

The second consequentialist argument against individual standing for the structural constitution focuses more narrowly on the likely incentives of litigants. Incentives matter because litigation is costly. Not all potential litigants will therefore file suit. To understand the consequences of granting individuals standing to litigate the structural constitution, it is necessary to model the reasons individuals have for having recourse to the courts. Public choice theory furnishes a basis for such predictions. Developed first in the 1980s, public choice involves application of economic models to political institutions. Scholars identified the relative cost of collective action for interest groups of varying size as a basis for predictions about the kind of legislative consequences (if any) the clash of interest groups would generate.[53] Drawing on Mancur Olsen's pioneering work, which emphasized the high transaction costs encumbering large organizations,[54] they predicted that smaller, more concentrated groups would be the more effective lobbyists.[55] To be sure, public choice's elegant predictions have been complicated and

[48] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 551 (2001).
[49] *Id*. at 577–90.
[50] *Id*. at 615–16 (proposing changes to policy and doctrine).
[51] 418 U.S. 166, 176–77 (1974).
[52] U.S. Const. Art. I, §9, cl.7.
[53] STEARNS & ZYWICKI, *supra* note --, at 69–72 (outlining simple model offered by James Wilson and Michael Hayes).
[54] MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GOODS 2 (1965).
[55] *See* Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

qualified by evidence that different policies generate different patterns of enactment costs,[56] and that interest-group coalitions tend to be complex and not easily reducible to a 'small group' or 'large group.'[57] But the theory's core insight—that public policy is the product of competition between private interest groups for legislative influence—remains both valid and illuminating.

Public choice insights spill over into the judicial domain. Courts, no less than legislatures, are arenas for interest group mobilization, and public choice tools can be used to predict which when private actors will invest in efforts to secure policy change through the courts.[58] Of course, interest groups do not influence federal judges in the same way that they obtain leverage over legislators. Federal judges do not stand for reelection.[59] They also operate under tight "institutional constraints" that limit their ability to reward interest group entreaties.[60] Interest groups may nonetheless seek to influence appointments on the theory that judicial ideology predicts voting behavior after appointment.[61] And even after a judge is confirmed, interest groups can influence the sequence and type of cases lodged before tribunals as a way of molding the path of the law. After all, without a litigant well resourced and motivated enough to challenge a law, no court will discover a given constitutional flaw.

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

Once the courthouse door is open, however, the play of incentives and interests will determine the net effect of litigation. Given permissible standing rules, public choice theory predicts that it will most likely be interest groups with relatively large incentives and small collective-action costs who will invoke federal-court jurisdiction in the name of the structural constitution. All other things being equal, this suggests that it will be "regulated industries [that are sufficiently] well-financed and well-organized, especially when compared to the general public and public interest groups"[62] that file suit. Such "[s]mall intensely interested groups are … likely to spend more on their litigation efforts than any large diffuse groups opposing them …

---

[56] Voter distaste for a policy can drive up the 'price' of that policy. *See* Arthur T. Denzau & Michael C. Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 AM. POL. SCI. REV. 89, 99 (1986). Group size may also be uncorrelated to interest groups' ability to supply information, which is argued to be the principal currency of lobbying. *See* Richard L. Hall & Alan V. Deardorff, *Lobbying as a Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69 (2006).

[57] FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 26 (2009) (noting "a surprising tendency for sides to be heterogeneous").

[58] F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 967 (1998).

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

[60] Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 827.

[61] David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1033, 1056 (2008) (noting "the proliferation of interest groups" involved in the judicial confirmation process).

[62] Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 22 (2010).

[and] will on balance be able to hire more skilled lawyers and thus have more influence on the information presented to the court about the social desirability of the parties' conduct and any legal rule under consideration."[63] By comparison, widely diffused and weakly organized sections of the public sharing an interest in vindicating a certain vision of the Constitution will often not be able to muster the resources to support costly, time-consuming, and uncertain federal-court litigation. Even ideological litigants, that is, need to find a sponsor with adequate funds to support. With the important exception of criminal cases such as *Bond* and *Lopez*, ideologically inspired individual litigants will often lack the incentives and resources to pursue a lonely, seemingly quixotic crusade through the federal judicial hierarchy.

Under these conditions, the incentives of private litigants in structural constitutional cases (including criminal cases) are likely to engender a deregulatory tilt in litigation outcomes.[64] Regulated industries and entities, all else being equal, tend to seek a lighter rather than a heavily governmental hand (except, to be sure, in instances where regulation preserves a monopoly against new entrants). They will therefore tend to use structural constitutional litigation to challenge regulation. This deregulatory slant can be observed in some recent developments in the scope of the Commerce Clause[65] and the emergent body of removal-power jurisprudence.[66] In both domains, major challenges to federal laws such as the Sarbanes-Oxley Act and the federal healthcare law have pursued a deregulatory agenda that interest groups had previously pressed, unsuccessfully, in Congress. Hence, it is precisely in those rare instances in which a legislative coalition is assembled to overcome a well organized and well resourced interest group that structural constitutional litigation is likely to be harnessed as yet another veto-gate to delay or derail new regulation. To the extent that the legislative process already favors certain the well resourced and organized—as public choice theory predicts—judicial review will "only exacerbate the influence of interest groups."[67]

The deregulatory slant to interest-group incentives means that the net effect of individual standing is not likely to align with the equilibrating goal of structural constitutionalism. If interest groups that litigate the structural constitution are motivated by a deregulatory agenda, there is no reason to expect that they will cease enforcement of a structural constitutional value when it has reached its optimal level. To the contrary, they will keep pressing their claims until they can squeeze no more private value out of litigation.[68] Moreover, interest groups might use an incremental approach to policy change as a way to carve out potential opponents into manageable subcoalitions that can more easily be picked off while also gradually assembling a

[63] Elhauge, *supra* note --, at 77.

[64] To be sure, insulation of a policy-making forum through design decisions meant to foster independence from exogenous political forces. Seems like an incomplete sentence. *See* Rui J. P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321, 331 (2002) (observing that groups that are electorally weak are more likely to insulate their preferred policies by designing independent agencies). But the courts remain vulnerable to the influence for interest groups as a consequence of variations in the volume and nature of cases filed under different standing and justiciability regimes.

[65] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 612 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[66] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

[67] Elhauge, *supra* note --, at 67–68.

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

larger and larger coalition that is increasingly unstoppable.[69] This piecemeal approach not only enables a divide-and-conquer strategy by litigating interest groups, it also conforms to an observed judicial preference for minimalism on the Supreme Court.[70] Due to these entwined dynamics, individual standing can induce larger shifts in structural constitutionalism than what may be compelled by the Constitution or socially desirable because "advocates can nudge the law to that end step-by-step."[71] In this fashion, the incentives of interest groups will lead to highly imperfect enforcement of structural constitutional values.

* * *

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

B. Institutional Standing for the Structural Constitution

This subpart employs the "new separation of powers"[72] mode of analysis to interrogate whether institutions such as states and branches fare any better as defenders of the structural constitution. The new separation of powers approach usefully draws attention to how courts are embedded in a larger context of repeated interactions with other branches or the several states, all of whom anticipate and respond strategically to each other. Application of this strategic, dynamic lens to standing doctrine's operation surfaces some reasons for thinking that institutional litigants pressing structural constitutional claims will do a better job than their individual counterparts. Again, it is worth stressing the limited reach of this claim: It is not that institutions have perfect incentives, only that they do sufficiently better than individuals that the structural constitution is best left in their hands alone.

Begin by considering the design task facing elected actors with respect to any policy problem with structural constitutional implications. The separation, checking, and equilibrating functions of structural constitutionalism must be achieved within the context of a fluid and evolving set of government institutions separated by two centuries from the Framers' presumptions. Elected officials need to make difficult, contextualized decisions about how best to create stable institutional arrangements and to honor structural constitutional principles.[73]

---

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

[70] *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 3–4 (2011).

[71] Levmore, *supra* note --, at 822.

[72] *See* de Figueiredo, Jacobi & Weingast, *supra* note --, at 200.

[73] Even those who assert their adherence to the Constitution's original meaning must attend to this problem. For example, adjudication of the Line-Item Veto in *Clinton v. City of New York*, 524 U.S. 417 (1998), entailed a determination as to how to understand the Presentment Clause in an age of omnibus legislation—a question to which

Their deals often reflect the interests of branches and subnational actors, who play roles in the legislative process.[74] Standing doctrine can either open or close the door to post hoc challenges to structural arrangement by interest groups that lost out in the legislative process.[75] More permissive standing rules render such arrangements more vulnerable to ex post challenges, and hence less valuable in expectation. At a very minimum, therefore, adding individual to institutional standing creates a new source of friction on efforts to solve emergent policy puzzles through institutional innovation.[76]

The destabilizing effect of individual standing is likely to be much greater than the destabilizing effect of institutional standing. Their effects will likely diverge because of the different litigation incentives of individuals and institutions. States and branches—unlike individuals or interest groups—are necessarily repeat players in their interactions with each other. Even if they are influenced by interest-group dynamics, states and branches have an incentive not shared by most individual litigants to maintain their reputation as reliable interlocutors and bargaining partners. They have this incentive because they normally wish to preserve the possibility of beneficial cooperation with other governmental entities in later periods.[77] Institutional actors therefore have some incentive to invoke the judicial process if and only if a given law violates some exogenously determined structural rule.[78] More concretely, the Solicitor General, who represents the United States in the Supreme Court is often said to act somewhat akin to a "tenth Justice" by "tak[ing] the position that reflects his best judgment of what the law is, just as he would if he were literally a Justice."[79] The long-term, institutional perspective adopted by the Solicitor General is powerful evidence that institutions' litigation behavior is not wholly reducible to the play of interest-group interests. The same is also likely to be true of states' attorneys general, if to a lesser degree. Institutional actors thus have less incentive to invoke judicial review if it means unraveling a deal in which they have participated. Even if institutions have standing to bring structural constitutional challenges, therefore, they has some incentive to accept the accommodations and innovations necessary to preserve basic aspects of the constitutional architecture against shifting political, social, and economic trends.[80]

---

there is no obvious originalist answer, and which divided the Court's two originalists, Justice Thomas and Justice Scalia.

[74] *See* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 215 (2009).

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

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

[77] On the evolution of cooperative strategy in situations of repeated play, *see* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 54 (1984).

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

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

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

The incentives of individuals, by contrast, are unconstrained by the allure of potential gains from repeated interactions and the compulsion to preserve reputation. Rather, many litigants will be one-shot players, or at best representatives of interest groups pursing self-interested strategies orthogonal to the goals of preserving structural constitutional principles or maximizing overall social welfare. Unlike institutional actors, they have an incentive to file suit when a legislative intervention impedes their interests, whether or not the new law violates a structural constitutional principle. Provided expected litigated costs are sufficiently low, interest groups have an incentive to challenge valid as well as invalid arrangements in the hope that a federal judge errs and invalidates the rule.[81] The hope is not baseless. Judges are at a large comparative institutional disadvantage when it comes to determining whether and how different aspects of national constitutional design interact and either do or do not offset each other.[82] Individual litigants' strategy of maximizing private gains from structural litigation—a goal that institutional litigants do not share—therefore presses outcomes away from desirable interbranch and intergovernmental equilibriums.

To be sure, expanding standing for the structural constitution to include individuals does yield one benefit: the likelihood of unconstitutional arrangements being challenged and invalidated goes up. But it is hard to see why this should be decisive. Institutions such as states and branches already have some quantum of motivation to defend their own prerogatives. To be sure, office holders may not *always* be motivated by the best interests of their institutions. But this worry is easy to overdo: there is plenty of evidence that participants in the American political system take seriously values of legality and constitutionality. Further, it is hardly clear that allowing post hoc interventions by individual litigants would remedy office-holders' lack of motivation to defend institutional prerogatives. Those individual litigants have even less reason to care about the constitutional balance. They are more likely to be focused on the instrumental deployment of structural constitutional principles as devices to attain other exogenous policy ends. And it is passing odd to say that since office-holders are distracted from the pursuit of structural constitutional values by parochial political concerns, the very interest groups driving those narrow, political goals should be authorized to take up the baton of institutional interests in federal court. It is less odd to think that even if officials are influenced by interest groups, they nonetheless have some independence of action, seem to take institutional perspectives, and anticipate iterative interactions in ways that distinguish them from individuals.

* * *

In short, whereas there are powerful arguments against individual standing for the structural constitution, there are at least colorable arguments that institutional standing alone will do an adequate (but hardly perfect) job. Individual standing in this context will tend to destabilize the federal-state and interbranch balances. By contrast, states and the political branches will often be motivated by more desirable incentives than individual litigants because

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

[82] *Cf.* Vermeule, *Hume's Second-Best*, *supra* note --, at 436–47 (criticizing jurisprudence that relies on "a heroic judicial capacity to identify the global effects of particular institutional innovations"). As framed by Professor Vermeule, the argument might apply to both rights and structure questions. My argument here bears only on the problem of offsetting adjustments in the structural constitutional context.

they are more deeply embedded in institutional cultures and iterative interactions. Comparative analysis in sum suggests that individual standing should be discarded in favor of institutional standing alone in structural constitutional cases.

V. Recalibrating Standing for the Structural Constitution

If the doctrinal and institutional consequences of allowing individuals access to the federal courts to pursue structural constitutional arguments are unwelcome, how should constitutional law change? This Part proposes a new gloss on standing doctrine that would mitigate the undesirable consequences cataloged in Parts II and III. The aim of my proposed doctrinal reform is narrowly drawn. I do not propose to render structural constitutional litigation wholly nonjusticiable. Perhaps that result is justified on other grounds. But I have not argued for that much larger shift in the judicial role here. Eschewing any such 'bait and switch', the proposal detailed here would mitigate the deleterious effects of individual standing for the structural constitution without wholly removing the courts from the business of structural constitutional enforcement.

The proposed new rule for standing in respect to the structural constitution goes as follows: *When an individual litigant seeks to enforce a structural constitutional principle redounding to the benefit of an official institution, and there is no reason the latter could not enforce that interest itself, a federal court should not permit the individual litigant to allege and obtain relief on the basis of the separation of powers or federalism*. In the mine run of cases, it is the case that the branch, the state, or an official of one of these governmental entities will have standing to raise a claim. Congress or the executive, that is, can and do sue to protect Article I or Article II prerogatives. States can challenge laws that exceed Congress's Commerce Clause authority, as the recent healthcare litigation shows, or its authority under Section 5 of the Fourteenth Amendment. In most cases, therefore, this categorical rule bars individual standing. In a subset of cases, however, it permits third-party standing on behalf of the structural constitution when there is a first-party litigant available to defend a constitutional value in court.

[The paper proceeds to elaborate this idea at greater length]