DUE PROCESS & THE STANDING DOCTRINE

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The standing doctrine undergirds every case litigated in federal court yet, despite its ubiquity, the doctrine is difficult to apply, cannot be derived from the plain meaning of Article III of the Constitution, and does not effectively serve the goals the Supreme Court has explained as its raison d'être. Accordingly, the standing doctrine has frequently been criticized as a policy-driven, judicially-invented, fabrication. This article posits that, appropriately understood, the standing doctrine is required by the Constitution's text—but by the Due Process Clauses of the Fifth and Fourteenth Amendments, not by Article III. The Due Process Clauses prohibit courts from depriving a person of "life, liberty, or property, without due process of law." As Justice Amy Coney Barrett has explained, stare decisis can often function similarly to preclusion, and consequently the application of stare decisis can deprive litigants of their life, liberty, or property rights without due process of law. This article proposes that standing resolves the due process issue identified by Justice Barrett by ensuring that litigants presently before a court are adequately representing potential future litigants and thereby providing those future litigants with due process. In short, the Due Process Clauses require courts to check for standing because otherwise the application of stare decisis—a legal principle tracing back to before the Founding—would

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deprive future litigants of their rights without due process of law. Viewing standing as a due process requirement both ties the doctrine to the Constitution's text and helps explain much of the Court's discussion of the standing doctrine's purpose. This article then discusses the implications that arise from reframing standing as a due process requirement rather than an Article III requirement. These include implications for courts' jurisdiction, the method of assessing standing, state courts, and the treatment of precedent.

INTRODUCTION

The standing doctrine undergirds every case litigated in federal court yet, despite its ubiquity, the doctrine is difficult to apply,[1] cannot be derived from the text of Article III of the Constitution,[2] and does not effectively serve the goals[3] the Supreme Court has explained as its raison d'être.[4] Recent Supreme Court case law has

1. *See* William A. Fletcher, *The Structure of Standing* 98 YALE L.J. 221, 223 (1988) (describing the "apparent lawlessness of many standing cases" and their "wildly vacillating results"); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115–16 (11th Cir. 2021) (Newsom, J., concurring) (providing examples of the inconsistent results from assessing standing doctrine's injury-in-fact requirement).

2. Cass Sunstein, *What's Standing After L*ujan*? Of Citizen Suits, "Injuries," and Article III,* 91 MICH. L. REV. 163, 166 (1992) (arguing that current standing doctrine "has no support in the text or history of Article III"); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 101 (7th ed. 2015) ("[T]he Constitution contains no Standing Clause."); *City of Hallandale Beach,* 996 F.3d at 1115 (Newsom, J., concurring) (arguing that standing doctrine is not grounded in the text of the Constitution).

3. The goals the Supreme Court has enumerated for standing include: "ensuring that litigants are truly adverse and therefore likely to present the case effectively, ensuring that the people most directly concerned are able to litigate the questions at issue, ensuring that a concrete case informs the court of the consequences of its decisions, and preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches." Fletcher, *supra* note 1, at 222.

4. *See* Part IV, *infra.* Perhaps unsurprisingly, the Supreme Court has admitted that its justiciability doctrines "relate in part, and in different though overlapping ways, to an idea, *which is more than an intuition but less than a rigorous and explicit theory,* about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." Allen v. Wright, 468 U.S. 737, 750 (1984) (emphasis added) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (1983) (Bork, J., concurring)).

only exacerbated these problems.[5] Thus, this article proposes a new, textually-tied, and easily applicable way to think about and analyze standing. The Supreme Court has traditionally explained that the "case or controversy" language in Article III of the Constitution requires that parties have standing. By contrast, this article argues that the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than Article III, require courts to conduct a standing analysis.

In the United States, we have an "adversarial system of adjudication."[6] In contrast to some courts in Europe, where judges act as investigators, in the United States judges are (at least in theory) neutral adjudicators.[7] United States judges decide only those legal issues properly presented by the parties in the case before them.[8] Consequently, it is the litigants' responsibility to properly argue their side of the case. If they fail to do so, the court's decision may be legally incorrect, or at least misguided. This would not be such a big problem if the court's holding only affected the parties of that isolated case. But, because of stare decisis—the fundamental principle that courts must decide later cases based on the precedents set in earlier cases—earlier, poorly-decided, cases have serious adverse consequences for future litigants.[9]

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5. *See generally* Richard Pierce, *Standing Law Is Inconsistent and Incoherent*, YALE J. ON REGUL. NOTICE & COMMENT (2021), https://www.yalejreg.com/nc/standing-law-is-inconsistent-and-incoherent/ [https://perma.cc/7A5Y-CAK6].

6. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020).

7. *See* United States v. Campbell, 26 F.4th 860, 893 (11th Cir. 2022) (Newsom & Jordan, JJ., dissenting).

8. *Id.* at 872.

9. Binding precedent is a "precedent that a court must follow. For example, a lower court is bound by an applicable holding of a higher court in the same jurisdiction." *Precedent,* BLACK'S LAW DICTIONARY (11th ed. 2019). The concept of stare decisis is an indelible part of our judicial system. *See* THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.").

If a litigant can fail to properly argue his case, thereby causing a different later litigant to suffer adverse consequences, how can we claim that the later litigant has been afforded due process of law? Indeed, then Professor, later Justice Barrett has raised this issue, arguing that "the rigid application of precedent raises due process concerns, and, on occasion, slides into unconstitutionality" because it "deprives a litigant of the right to a hearing on the merits of her claims." [10] This article proposes that standing resolves the due process issue identified by Justice Barrett because standing ensures that litigants presently before a court are adequately representing potential future litigants and thereby protecting those future litigants' due process rights.[11]

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10. Amy Coney Barrett, *Stare Decisis and Due Process,* 74 U. COLO. L. REV. 1011, 1012–13 (2003).

11. Although I believe this article is the first to explicitly tie standing doctrine to the Due Process Clauses of the Fifth and Fourteenth Amendments, the idea that standing serves a due process function has been noted before. In a 1979 article authored by Professor Lea Brilmayer, Brilmayer theorized that one of "three interrelated policies" of the Article III "case or controversy requirement" is to avoid the "unfairness of holding later litigants to an adverse judgment in which they may not have been properly represented." Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement,* 93 HARV. L. REV. 297, 302, 306–310 (1979). But, despite understanding that standing serves due process goals, Brilmayer analyzed standing as a requirement of Article III of the Constitution rather than, as this article proposes, solely a requirement of the Due Process Clauses. That difference has a number of implications for how standing is assessed. In 1980, Professor Mark V. Tushnet responded to Professor Brilmayer's article, arguing that Brilmayer's theory "fails to supply an adequate tool for analysis," "does not reflect the sociological realities of litigation," and "rests on an artificially stringent theory of precedent." Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer,* 93 HARV. L. REV. 1698, 1698 (1980). As previously noted, unlike the Article III focus of Brilmayer and Tushnet's articles, this article focuses on showing that standing is a requirement of the Due Process Clauses, not of Article III. This standing theory is not policy-based (as Brilmayer's is, *see Brilmayer, supra*, at 315) but rather rests on the Constitution's text. Furthermore, the implications that arise from viewing standing as a Due Process Clause requirement, rather than an Article III *jurisdictional* requirement, resolve some of the criticisms Tushnet leveled against Brilmayer's article. This article sets forth an "adequate tool for analysis" taking into account Tushnet's criticisms, reflects the "sociological realities of litigation," and explains why precedent can present a due process concern. Additionally, it discusses some of the changes that have occurred in the discussion of standing since Brilmayer and Tushnet's articles. Accordingly, I hope that this article can provide a valuable contribution to, and reopening of, that earlier conversation between Brilmayer and Tushnet.

To understand how standing provides due process for future litigants, it's helpful to analogize the principle of precedent to the doctrines of claim and issue preclusion. Claim preclusion, or res judicata, is "[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions." [12] Similarly, issue preclusion is "[t]he binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based."[13] Although they are different concepts, "precedent and preclusion can govern the same questions and apply under the same circumstances."[14] The two concepts—precedent and preclusion—dictate whether a party can successfully litigate a case or an issue within a case. While precedent will not technically stop a litigant from bringing suit,[15] it can just as surely cause them to lose, leading to the same result. Indeed, then-Professor Barrett has said that "when viewed from the perspective of an individual litigant, stare decisis often functions like the doctrine of issue preclusion."[16]

"[T]he Supreme Court has consistently affirmed the idea that due process generally prohibits courts from applying preclusion to someone who has not yet had her day in court."[17] But, there are a few exceptions to the rule, such as class actions where class members are bound to the class representative's judgment though they themselves were not present in court.[18] In those exceptional

12. *Res Judicata,* BLACK'S LAW DICTIONARY (11th ed. 2019)

13. *Collateral Estoppel,* BLACK'S LAW DICTIONARY (11th ed. 2019).

14. Alan M. Trammel, *Precedent and Preclusion,* 93 NOTRE DAME L. REV. 565, 569 (2018).

15. *See* Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971).

16. Barrett, *supra* note 10, at 1012.

17. Trammel *supra* note 14, at 570; *see also* Richards v. Jefferson County, 517 U.S. 793, 798 (1996) (recognizing a "deep-rooted historic tradition that everyone should have his own day in court").

18. *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.02 (2020); *see also* Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" (citing Califano v. Yamasaki, 442 U.S. 682, 700–701 (1979)); FED. R. CIV.

circumstances the absent parties must be *adequately represented* before they can be bound by the court's judgment.[19] If the Due Process Clauses prohibit courts from applying *preclusion* to someone who has not had her day in court, how can courts apply binding *precedent* to a litigant, a process with the same result, when that litigant has also not had her day in court? The answer, I believe, is the standing doctrine.

The manner in which the Supreme Court and lower courts have explained standing demonstrates that courts already use the doctrine to ensure that the parties involved in litigation care sufficiently about the outcome of their cases, are devoting the resources and effort to that case necessary to win, and, in doing so, are implicitly protecting the due process rights of future litigants. The assumption in our adversarial system is that when each side is trying to win, the court will be presented with the best arguments and will come to the correct result.[20] And that correct result—called precedent—inures to the benefit of future litigants. Thus, the standing doctrine ensures that the parties presently before the court are adequately representing potential future litigants before those future litigants are bound by the court's precedent.

This article demonstrates that the standing doctrine serves to protect due process in the precedent context, is constitutionally required by the Due Process Clauses, and that courts have already used standing for this purpose even if they have not been explicit about doing so. Reframing the standing doctrine as a Due Process Clause requirement is important for multiple reasons. Tying the

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P. 23 (setting forth structure for class actions); Int'l Ass'n of Machinists v. St., 367 U.S. 740, 794 (1961) (Black, J., dissenting) ("After all the class suit doctrine is only a narrow judicially created exception to the rule that a case or controversy involves litigants who have been duly notified and given an opportunity to be present in court either in person or by counsel.").

19. *See* FED. R. CIV. P. 23(a)(4) (requiring that "the representative parties will fairly and adequately protect the interests of the class"); *see also* Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties.")

20. *See* Mackey v. Montrym, 443 U.S. 1, 13 (1979).

doctrine to the Constitution's text helps prevent the courts from judicial policymaking and confines the courts to their proper role applying the plain meaning of the Constitution's text. Furthermore, reframing standing as a prudential device to serve due process values has jurisdictional implications, precedent implications, federalism implications, and implications for how courts should assess standing. Proving these claims, this Article proceeds in five Parts. Part I provides background on the current Article III standing doctrine and the criticisms of that doctrine. Part II provides background on the requirements of the Due Process Clauses. Part III explains how the application of precedent has changed over time and binds litigants. Part IV makes the case that the Due Process Clauses of the Fifth and Fourteenth Amendments require a standing doctrine. Finally, Part V discusses the implications of reconceptualizing the standing doctrine as a Due Process Clause requirement rather than an Article III requirement.

I. ARTICLE III STANDING DOCTRINE

Although this article proposes a new way to think about standing doctrine, to understand why reframing the doctrine is necessary it is important to first understand the existing doctrine and its problems. Thus, this Part provides a high-level overview of modern standing doctrine and describes common criticisms of the doctrine. It is by no means comprehensive because, to borrow Professor Robert Pushaw's quip, "current Supreme Court [standing] doctrine and legal scholarship . . . would require thousands of pages to summarize and analyze completely."[21] Nonetheless, I hope this Part will help those unfamiliar with the standing doctrine become sufficiently versed to understand this article and how its proposal fits into (or runs contrary to) the pre-existing doctrine and theory. Section A traces the history of the standing doctrine from its inception through recent case law. Section B summarizes four main

21. Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts,* 69 NOTRE DAME L. REV. 447, 519 n.335 (1994).

criticisms of the standing doctrine in order to show why reframing the doctrine—the goal of this article—is necessary.

A. Background Case Law

According to the Supreme Court, a litigant must have standing because Article III, § 2 of the Constitution limits the federal courts' jurisdiction to "Cases" and "Controversies"—and only certain types of suits brought by certain types of litigants (that is, cases with litigants who have standing) count as such.[22] What criteria a litigant must satisfy to establish standing has shifted over time.

The idea that only certain litigants can bring "Cases" within the meaning of Article III § 2 seemingly began developing over a century after the Constitution's ratification.[23] Although it did not use the word "standing," the Supreme Court first hinted at the doctrine in the 1922 case, *Fairchild v. Hughes*.[24] In *Fairchild,* the Court held that a citizen who lived in a state with women's suffrage, had not brought "a case, within the meaning of § 2 of Article III of the Constitution," when the plaintiff challenged the validity of the Nineteenth Amendment's ratification.[25] The Court reasoned that the plaintiff's suit did not count as a case because the plaintiff's claim was not "brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress,

22. *See* Flast v. Cohen, 392 U.S. 83, 94 (1968) ("The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.'").

23. *See* Fletcher, *supra* note 1, at 224–25 (describing how standing doctrine began to develop in the early nineteenth century in part due to the "growth of the administrative state and an increase in litigation to articulate and enforce public, primarily constitutional, values").

24. 258 U.S. 126 (1922). It is somewhat noteworthy that the Court didn't use the word standing because the term has been employed in the legal context since at least 1904. *See Standing,* A STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1749 (1904) ("A right or capacity to sue or maintain an action; as, a sufficient *standing* in court.").

25. *See Fairchild,* 258 U.S. at 129. The Nineteenth Amendment prohibits voting discrimination on the basis of sex. U.S. CONST. amend. XIX.

or punishment of wrongs."[26] The Court continued by explaining that the plaintiff had only the general right "possessed by every citizen, to require that the Government be administered according to law," and therefore had no particular interest in the case sufficient for him to challenge the amendment.[27] To summarize, when refusing to exercise jurisdiction, the Court focused on: (1) the procedure by which the plaintiff sued, and (2) the plaintiff's stake in the outcome.

The following year, the Court decided *Massachusetts v. Mellon*[28] in which it held that it could review the constitutionality of a statute only where the plaintiff has alleged that he "has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement, and not merely that he suffers in some indefinite way in common with people generally."[29] *Mellon* involved two consolidated suits brought by the state of Massachusetts and a private plaintiff to enjoin the Maternity Act—a statute appropriating funds with the goal of reducing maternal and infant mortality.[30] The Court held that neither Massachusetts nor the individual plaintiff had a real stake in the case because the statute imposed no burden on the state and the individual plaintiff's interest in the case was "minute and indeterminable."[31] Again, notice that like in *Fairchild,* the Court's focus was on the plaintiffs' stake in the outcome. Because neither plaintiff had a sufficient stake, the Court held that neither the state nor the private plaintiff could sue to enjoin the statute.[32] The Court reasoned that since there was no "Case" or "Controversy" before it, the separation of powers principle inherent in the Constitution

26. *Fairchild,* 258 U.S. at 129 (quotation omitted).

27. *Id.*

28. This case was consolidated with Frothingham v. Mellon, 262 U.S. 447 (1923), and some refer to it using that name.

29. 262 U.S. 447, 488 (1923).

30. *Id.*

31. *Id.* at 482, 484–85, 487.

32. *Id.* at 488.

prohibited it from interfering with the actions of Congress.[33] However, although *Mellon* framed its decision as resting on the separation-of-powers principle in the Constitution, some scholars have argued that the Court's rule was non-constitutional and merely a matter of judicial restraint.[34] Accordingly, it's not clear that either *Fairchild* or *Mellon* intended to create a constitutional rule of standing.

Several decades later, the Court further expounded on the requirements for standing in *Flast v. Cohen*.[35] In *Flast,* the plaintiff sued the Secretary of Health, Education, and Welfare, arguing that by spending tax-derived funds on religious schools, the government violated the First Amendment's ban on the establishment of religion.[36] Prior to *Flast,* the Court had indicated that a taxpayer lacked standing to challenge legislation on the ground that it would raise taxes.[37] But, the Court in *Flast* clarified that litigants may sometimes have standing as taxpayers because a taxpayer may "have the requisite personal stake in the outcome, depending upon the circumstances of the particular case."[38] *Flast* explained that the focus of the standing inquiry is the litigant, not the issues to be adjudicated, because standing serves to ensure the "dispute sought to be adjudicated will be presented in an adversary context."[39]

Beginning in the 1970 case, *Association of Data Processing Service Organizations v. Camp,* the standing doctrine went through a significant change.[40] For the first time, the Court held that a plaintiff must have suffered an "injury in fact" to satisfy the case-or-

33. *Id.* ("The general rule is that neither department may invade the province of the other, and neither may control, direct or restrain the action of the other.").

34. *See Flast,* 392 U.S. at 92 n.6 ("The prevailing view of the commentators is that *Frothingham* announced only a nonconstitutional rule of self-restraint.").

35. *Id.*

36. *Id.* at 85.

37. *See Mellon,* 262 U.S. at 486.

38. *Flast,* 392 U.S. at 101.

39. *Id.*

40. 397 U.S. 150, 154 (1970).

controversy requirement.[41] What made *Data Processing* such a dramatic change was that the Court disavowed looking at legal injuries—that is, whether a person's legal right has been violated—and instead insisted that the relevant inquiry was whether "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[42] Before *Data Processing* it "was well-understood, and had been for decades, that a plaintiff could sue only for the violation of a legal right."[43] In its holding in *Data Processing*, the Court set the groundwork for requiring that the plaintiff's injury be of a specific type—regardless of the related legal right.

Then, in what's considered the seminal standing case, *Lujan v. Defenders of Wildlife*, the Court further fleshed out the doctrine.[44] *Lujan* involved a challenge to a regulation issued by the Secretary of the Interior interpreting the geographic area to which a section of the Endangered Species Act of 1973 applied.[45] The plaintiffs contended that the Secretary's regulation improperly interpreted the Act and sued the Secretary to enjoin his interpretation because the interpretation would have further endangered certain species outside of the United States.[46]

In the course of holding that the plaintiffs lacked standing to challenge the regulation, the Court explained that the "irreducible constitutional minimum" of standing is comprised of three elements.[47] "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial

41. *See id.* at 152; Fletcher, *supra* note 1, at 229–30.

42. *Data Processing*, 397 U.S. at 153.

43. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1117 (11th Cir. 2021) (Newsom, J., concurring).

44. 504 U.S. 555 (1992); Sunstein, *supra* note 2, at 165 ("[T]he decision ranks among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated.").

45. *Lujan*, 504 U.S. at 557–58.

46. *Id.* at 559.

47. *Id.* at 560.

decision."[48] Critically, the Court explained that, to count as an "injury in fact," the injury must be "(a) concrete and particularized" and "(b) actual or imminent, not 'conjectural' or 'hypothetical.'"[49] Consequently, even though the plaintiffs sued pursuant to a lawfully enacted statute, because they had no immediate plans to benefit from the endangered species, the Court held that their injury was not "concrete and particularized," or "actual or imminent" and, therefore, that they had not suffered an injury-in-fact.[50] In deciding that the plaintiffs lacked standing, the Court essentially rejected Congress's attempt to confer on the plaintiffs a legal right to sue.[51]

The Court has recently doubled down on its injury-in-fact analysis in *Spokeo, Inc. v. Robins*[52] and *TransUnion LLC v. Ramirez*.[53] Both cases involved causes of action created by statute, the Fair Credit Reporting Act.[54] In these cases, the Court held that, to be "concrete," a plaintiff's injury must be similar to an injury recognized at common law, though courts are also instructed to take Congress's judgment into account.[55] Essentially, even if the plaintiff is injured in some way, that injury only counts as "concrete" if the plaintiff can find a common law analogue for his or her cause of action, or if the injury is specified by the Constitution itself. But how similar the injury needs to be to a common law analogue is

48. Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1547 (2016) (citing *Lujan,* 504 U.S. at 560–61).

49. *Lujan,* 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

50. *Id.* at 560, 564.

51. *Id.* at 576.

52. 136 S. Ct. 1540 (2016).

53. 141 S. Ct. 2190 (2021).

54. *Spokeo,* 136 S. Ct. at 1544; *TransUnion,* 141 S. Ct. at 2200.

55. *Spokeo,* 136 S. Ct. at 1549 ("[When determining concreteness] it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."); *id. (*noting that, "[i]n determining whether an intangible harm constitutes injury in fact," "the judgment of Congress play[s] [an] important role[]"); *TransUnion,* 141 S. Ct. at 2200 (quoting *id.* at 1540) ("Central to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts.").

anyone's guess.[56] It's also unclear how "traditional" the common law analogue must be.

In summary, current standing doctrine requires that in order to exercise jurisdiction, federal courts must first check whether a plaintiff has an injury-in-fact, meaning an injury that is similar to an injury for which the common law would have provided a remedy.

Further complicating the doctrine, the Supreme Court has held that there are additional, so-called "prudential," limitations on standing. The distinction between the constitutional and prudential standing requirements has not always been clear. For instance, in *Warth v. Seldin,* the Court held that, even if a litigant has an injury sufficient for constitutional standing, the Court may still refuse to hear that litigant's case if her harm is a "*generalized grievance* shared in substantially equal measure by all or a large class of citizens."[57] But in *Lexmark International, Inc. v. Static Control Components, Inc.*, the Court reversed course and explained that its earlier characterization of the bar on suits raising *generalized grievances* as prudential was inapt and that the bar on such suits was, in fact, jurisdictional. [58] The difference between prudential and constitutional standing is important because the Court has said that Congress may waive the requirement of prudential standing but it cannot do so with jurisdictional standing.[59] That said, the Court's trend of restricting the types of injuries that count as "concrete," and expanding the standing requirements that it deems constitutional—as opposed to merely prudential—has largely undermined the difference between constitutional and prudential standing.

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56. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1116–17, 1121 (11th Cir. 2021) (Newsom, J., concurring) (providing examples of inconsistent applications of the concreteness analysis). *Compare* Hunstein v. Preferred Collection and Mgmt. Servs., Inc., 48 F.4th 1236, 1250 (11th Cir. 2022) (holding that plaintiff lacked Article III standing, *with id.* at 1272 (Newsom, J., dissenting) (stating that plaintiff satisfied test for Article III standing).

57. 422 U.S. 490, 499 (1975) (emphasis added).

58. 572 U.S. 118, 127 n.3 (2014).

59. *Warth,* 422 U.S. at 501.

B. Criticism of Current Standing Doctrine Exemplifies Why it is Necessary to Reframe the Doctrine

Prominent jurists and scholars have identified a number of problems with standing doctrine demonstrating that the doctrine—as currently applied—is unsound and merits reevaluation.[60] Accordingly, this section discusses especially noteworthy critiques to show why reframing the doctrine—as this article proposes to do—is necessary. The critiques of the standing doctrine generally fall into one of four categories.

First, and most importantly, the standing analysis is divorced from the Constitution's text. As one prominent text puts it: "Despite the clarity with which the Court articulates the elements of standing, the Constitution contains no Standing Clause."[61] Expressing the same idea in *Sierra v. City of Hallandale Beach*, Eleventh Circuit Judge Kevin Newsom observed that, "despite the oft-repeated invocations of it, nothing in Article III's language compels our current standing doctrine, with all its attendant rules about the kinds of injuries—'concrete,' 'particularized,' 'actual or imminent'—that suffice to make a 'Case.'"[62] Judge Newsom notes that even Justice Scalia, *Lujan*'s author, formerly conceded that the Constitution's text does not necessarily require the standing

60. *See, e.g.*, Laufer v. Arpan LLC, 29 F.4th 1268, 1284 (11th Cir. 2022) (Newsom, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023) (explaining that the Supreme Court's recent decision in TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021), has only further confused the standing doctrine); *City of Hallandale Beach*, 996 F.3d at 1115 (Newsom, J., concurring) (explaining that the standing doctrine, and especially the injury-in-fact requirement, are not grounded in the Constitution's text or history); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550–1552 (2016) (Thomas, J., concurring) (explaining that Article III does not require the same standing analysis for public and private rights cases); Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 971–73 (11th Cir. 2020) (Jordan, J., dissenting) (explaining that the modern standing inquiry is ahistorical); Springer v. Cleveland Clinic Emp. Health Plan Total Care, 900 F.3d 284, 290–91 (6th Cir. 2018) (Thapar, J., concurring) (expounding on the private versus public rights theory of standing).

61. FALLON, JR. ET AL., *supra* note 2, at 101.

62. 996 F.3d at 1122 (Newsom, J., concurring).

doctrine.[63] Judge Newsom explains that the most natural reading of Article III is that a "Case" exists when a person has a cause of action, meaning "(1) that his legal rights have been violated and (2) that the law authorizes him to seek judicial relief."[64] The word "Case" does not require a person to have an injury-in-fact.[65] Because the Court's injury-in-fact standard forces litigants to satisfy a higher burden than Article III requires, Judge Newsom concludes that the Court's focus on injury-in-fact is atextual.

Similarly, Professor Steven L. Winter has argued that at the Founding a "Case" or "Controversy" within the meaning of Article III simply meant that "the matter before [the court] fit one of the recognized forms of action"—one of the numerous recognized procedures by which a legal claim could be made.[66] Winter therefore argues that whether a party suffered an injury-in-fact was not the primary metric by which the existence of a case or controversy was determined and that the injury-in-fact standard is inconsistent with the text of Article III.[67] If we think back to the Court's opinion in *Fairchild* and its focus on the need for plaintiffs to bring cases through "regular proceedings as are established by law," we can see that early standing cases seem to support Winter's theory.[68]

The standing doctrine is also inconsistent with the text of Article I. As the Court articulated it in *Spokeo* and *TransUnion*, the injury-in-fact standard is particularly misguided because it effectively

63. *Id.* ("[A]s [Justice Scalia] explained elsewhere, standing doctrine's location in Article III was never 'linguistically inevitable'; the Court used Article III's case-or-controversy language to constitutionalize standing, at least in part, 'for want of a better vehicle.'" (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983))).

64. *Id.*

65. *Id.*

66. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396–96 (1988).

67. *Id.* at 1396; *see also id.* at 1377 ("One legitimately may wonder how a constitutional doctrine now said to inhere in [A]rticle III's 'case or controversy' language could be so late in making an appearance, do so with so skimpy a pedigree, and take so long to be recognized even by the primary academic expositors of the law of federal courts.").

68. Fairchild v. Hughes, 258 U.S. 126, 129 (1922).

prevents Congress from creating new rights that are dissimilar from those recognized at common law.[69] Article I of the Constitution confers Congress with the power to pass new laws and, at least in theory, create new rights.[70] Thus, the injury-in-fact requirement essentially reads Congress's right-creating power out of the Constitution.[71]

I agree with the above criticism that the current standing doctrine is inconsistent with the Constitution's text. Like Judge Newsom, it seems to me that Article III requires nothing more than a cause of action—a "Case"—in order to confer the federal courts with jurisdiction. For reasons I explain more fully in Parts IV and V, the due process theory of standing proposed by this article avoids the problems highlighted by Judge Newsom, Professor Winter, and others. First, analyzing standing as a Due Process Clause requirement connects the doctrine with the plain meaning of the Constitution's text. And second, framing standing as a Due Process Clause requirement, rather than as an Article III requirement,

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69. *See* Erwin Chemerinsky, *What's Standing After T*ransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE FEATURES 269, 283 (2021) (referring to *TransUnion,* Chemerinsky explains that if the opinion is "read literally, the opinion holds that statutes can create rights which give rise to standing only if there was a historical or common law basis for recognizing the injury").

70. *See* U.S. CONST. art. I, § 8, cl. 1, cl. 18 ("The Congress shall have Power To . . . provide for the . . . general Welfare . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."); *see also* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting) (citing Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting)) ("The First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder 'could not show monetary loss.'"); *Muransky,* 979 F.3d at 972 (Jordan, J., dissenting) ("It was also understood that Congress could create private rights by statute and that a plaintiff could sue based on a violation of that statutory right without regard to actual damages.").

71. *TransUnion,* 141 S. Ct. at 2218 (Thomas, J., dissenting) (arguing that the Court's injury-in-fact requirement does not "accord[] proper respect for the power of Congress and other legislatures to define legal rights").

allows courts to exercise jurisdiction over a "Case" regardless of whether the plaintiff has an injury-in-fact.

A second category of critique is that the standing doctrine is divorced from historical practice. The most prominent jurist to criticize the current standing analysis on this ground is Justice Thomas.[72] In his dissent in *Transunion,* Justice Thomas discusses evidence demonstrating that at the Founding whether a matter counted as an Article III case or controversy depended on whether an individual was asserting "his or her own rights."[73] If a person was asserting his private rights, the matter counted as a case or controversy regardless of whether the party had suffered an injury-in-fact.[74] By contrast, if a person was trying to vindicate communal rights—that is, public rights—he needed to show an individual injury with actual damages.[75] Thus, Justice Thomas concluded, where Congress creates a right of action to vindicate private rights, an injury-in-fact analysis is unnecessary. Accordingly, Justice Thomas argues that the Court's focus on injury-in-fact in private rights cases like *TransUnion* is inconsistent with Founding era historical practice and tradition.[76]

The historical criticism is not limited to Justice Thomas. In a legal realist critique, Professor Cass Sunstein has also argued that the standing doctrine is inconsistent with the history of Article III. According to Sunstein, the modern standing doctrine came from what "amounted to a largely revisionist reading of [A]rticle III" when certain jurists "favorably disposed toward the New Deal reformation developed doctrines of standing . . . largely to insulate agency decisions from judicial intervention" because they favored "the rise of regulation."[77] Like Justice Thomas, Sunstein contends that the best interpretation of Article III's "Case" or "Controversy"

72. *Id.*
73. *Id. a*t 2216.
74. *Id. a*t 2216 –18.
75. *Id. a*t 2217.
76. *Id.* at 2216–18.
77. Cass R. Sunstein, *Standing and the Privatization of Public Law,* 88 COLUM. L. REV. 1432, 1436–38 (1988).

language "would recognize that Congress has the authority to define legal rights and obligations, and that it may therefore, by statute, create an injury in fact where, as far as the legal system was concerned, there had been no injury before."[78]

I agree with Justice Thomas and Professor Sunstein that historical practice did not require plaintiffs to show an injury-in-fact. However, unlike Justice Thomas, it seems to me that historical practice demonstrates that an injury-in-fact analysis was not required even in public rights cases.[79] As explained above, so long as the plaintiff had a cause of action, there was a "Case" sufficient to confer the federal courts with jurisdiction. Whether or not it is *wise* to allow private litigants to vindicate communal rights is a question best left for Congress's decision when crafting new causes of action.[80] For reasons further explained below, the due process standing theory proposed here is consistent with historical practice because it allows litigants to sue even without an injury-in-fact.

Third, the Supreme Court has said that the injury-in-fact requirement protects the separation of powers,[81] but the injury-in-fact requirement is applied even in cases that have no bearing on the separation of powers. In *TransUnion* the Court held that plaintiffs may not sue based on congressionally created private

78. *Id.* at 1479.

79. *See* Winter, *supra* note 66, at 1396 (describing established legal proceedings recognized at the Founding, such as relator actions, that did not require a personal interest or injury-in-fact).

80. Some scholars have suggested that private litigants should not be able to sue to vindicate public rights because they are not politically accountable. *See e.g.*, Tara Grove, *Standing as an Article II Nondelegation Doctrine,* 11 U. PA. J. CONST. L. 781, 781–82 (2009). Be that as it may, it's irrelevant whether private litigants are not politically accountable because the Constitution protects people *from the government, not from other private parties. See* Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 619 (1991) ("With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities . . . One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law."); Stephen Jaggi, *State Action Doctrine,* OXFORD CONST. L. (Oct. 2017), https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e473 [https://perma.cc/QB22-YCSV?type=standard].

81. United States v. Texas, 143 S. Ct. 1964, 1969 (2023).

rights if the plaintiffs have not suffered an injury-in-fact similar to one recognized at common law.[82] But, as explained by Eleventh Circuit Judge Adalberto Jordan, cases "involving the alleged invasion of a congressionally created private right by a private party against another private party, do not implicate structural or institutional concerns."[83] When a private plaintiff sues a private defendant based on a congressionally created right, if the plaintiff wins, the judgment does not affect the branches of government in any way. In deciding such cases, the court does not interfere with the actions of the executive branch or invalidate an act of Congress and thus, requiring that the parties have standing does nothing to protect the separation of powers because the court is not doing *anything* with respect to the other branches of government. Thus, as Judge Jordan says, private party cases like *TransUnion* "are exactly the type of cases suited for initial congressional judgment and ensuing judicial resolution."[84]

I agree that the Court's decision to refuse jurisdiction whenever it does not believe a plaintiff's injury is sufficiently serious does not protect the separation of powers. Article III does not explicitly address the separation of powers because the separation of powers is a structural limitation. The Constitution contains vesting clauses delineating the powers of the respective branches of government. If adjudicating a case trenches on either the legislative power or the executive power, it would be the Vesting Clauses of Articles I and II, respectively, that check the Court's role, not § 2 of Article III.[85] So long as courts have jurisdiction, they have an unflagging obligation to exercise it[86] and refusing to do so undermines the separation of

82. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2219 (2021) (Thomas, J., dissenting).

83. Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 958 (11th Cir. 2020) (Jordan, J., dissenting).

84. *Id.*

85. *See e.g.,* Laufer v. Arpan LLC, 29 F.4th 1268, 1290 (11th Cir. 2022) (Newsom, J., concurring) (positing that Article II may limit plaintiffs' ability to litigate where doing so encroaches on the executive power).

86. *TransUnion,* 141 S. Ct. at 2216 (Thomas, J., dissenting) ("When a federal court has jurisdiction over a case or controversy, it has a 'virtually unflagging obligation' to exercise it." (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S.

powers by removing the judiciary's role as a check on the other branches. [87] By contrast, tying standing to the Due Process Clauses—as proposed herein—clarifies the standing doctrine's role as the protection of future litigants from the effects of inadequate adversarialism and allows the courts to play their proper part in the separation of powers.

Fourth, the standing doctrine suffers from a workability/inconsistent application problem. In *Sierra v. City of Hallandale Beach* Judge Newsom points out how,

> Despite nearly universal consensus about standing doctrine's elements and sub-elements, applying the rules has proven far more difficult than reciting them. Consider just the "concrete[ness]" component of the injury-in-fact requirement. Since *Spokeo* was decided, courts considering the same statute have found that seemingly slight factual differences distinguish the qualifyingly "concrete" from the disqualifyingly "abstract."[88]

800, 817 (1976))); Cohens v. Virginia, 19 U.S. 264, 404 (1821) (Marshall, C.J.) (The Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

87. The role of the judiciary is to check the other branches by exercising their jurisdiction. *See* THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961) (explaining that the Constitution's "great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition."); Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach,* 81 CORNELL L. REV. 393, 396 (1996) (describing how legal giants like "Erwin Chemerinsky and Martin Redish" have explained that the Court's concept of justiciability actually "undermines separation of powers by restricting or barring the exercise of judicial review—the principal control against unconstitutional action by the political branches."); Erwin Chemerinsky, *In Defense of Judicial Supremacy,* 58 WM. & MARY L. REV. 1459, 1461 (2017) ("The Constitution exists to limit government, and the limits are meaningful only if someone or something enforces them. Enforcement often will not happen without the judiciary."); *but see* Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (stating that it would violate the separation of powers for the courts to act as "virtually continuing monitors of the wisdom and soundness of Executive action" (quotation omitted)).

88. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) ("We have held, for instance, that receiving an unwanted phone call in violation of the Telephone Consumer Protection Act is a concrete injury, but receiving an unwanted text message in violation of the Act is not.").

Likewise, in an article written prior to his elevation to the bench, Ninth Circuit Judge William Fletcher explained that the "high level of generality" in the Court's standing analysis causes "wildly vacillating results."[89] According to Judge Fletcher, the results of the injury-in-fact analysis necessarily vacillate because there is no "non-normative way" to assess whether a plaintiff is injured.[90] Rather, any assessment of injury-in-fact turns on "impose[d] standards of injury derived from some external normative source."[91] Thus, he argues that in a legal system, injury can only be defined by reference to particular legal rights, and that, therefore, "standing should simply be a question on the merits of [the] plaintiff's claim."[92] In other words, whether a person is injured or not ultimately depends on whether his legal rights have been violated—a merits question. But because the Court insists on injury-in-fact as the touchstone of the standing analysis, it must therefore sift which types of injuries it thinks are sufficiently "concrete." Accordingly, Judge Jordan has argued that standing has essentially become "a policy question" that has "drifted from its beginnings and from constitutional first principles" because courts get to make case-by-case decisions about which injuries they think are important enough to let parties sue about.[93]

It's evident that the current doctrine is hard to apply consistently. While the due process standing theory proposed here cannot completely eradicate the inconsistent results arising from judicial

89. Fletcher, *supra* note 1, at 223.

90. *Id.* at 231.

91. *Id.* at 231. As explained above, the Court has more recently looked to injuries bearing a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts" as the external normative source that Judge Fletcher points to. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

92. Fletcher, *supra* note 1, at 223; *see also* Sunstein, *Standing After Lujan, supra* note 2, at 166 (agreeing with Judge Fletcher that relevant question for standing is "whether the law—governing statutes, the Constitution, or federal common law—has conferred on the plaintiffs a cause of action").

93. Muransky, v. Godiva Chocolatier, Inc., 979 F.3d 917, 957–58 (11th Cir. 2020) (Jordan, J., dissenting); *see also* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2224 (2021) (Thomas, J., dissenting) ("Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that a person is harmed when . . . ?").

discretion, I believe that clarifying the source of the standing doctrine as the Due Process Clauses can help develop clearer guidelines for assessing standing.[94] Accordingly, Part V.D. below discusses ways that a due process-based standing theory could be applied consistently.

In addition to the above listed critiques, I believe that the current standing doctrine suffers another fundamental flaw: the Court's standing analysis does not advance the standing doctrine's Court-articulated purposes. The Court has explained that "the gist" of standing doctrine is ensuring the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[95] Yet, a plaintiff can satisfy the standing doctrine without truly being adverse to the defendant. Imagine a plaintiff with a de minimis injury or who only seeks nominal damages.[96] In such a case, the plaintiff may have little incentive to litigate vigorously and the defendant may have little incentive to defend. Consequently, the parties' efforts may not "sharpen the issues" as the Court desires. As discussed further below, because the current standing doctrine does not adequately ensure adversarialism, it may fail to provide the process required by the Due Process Clauses. If the Court truly wishes to ensure that the issues presented to it are sharpened by the adverseness of the parties, it needs a new method of assessing standing. This article proposes a new method in Part V.D. below.

Despite these criticisms—which have largely discredited the foundational premises of current standing doctrine—the doctrine has proven durable and the Court has continued to insist that standing is required by Article III of the Constitution.[97]

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94. I discuss this further in Part V.D.

95. Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Massachusetts v. EPA, 549 U.S. 497, 517 (2007).

96. *See e.g.,* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) (finding standing where the plaintiff only requested nominal damages and not compensatory damages).

97. *See e.g., TransUnion,* 141 S. Ct. 2190 at 2203 (2021).

II. THE DUE PROCESS CLAUSES REQUIRE ADEQUATE REPRESENTATION

Because this article argues that standing is required by the Due Process Clauses, it's important to understand what due process entails. Thus, this Part discusses how courts afford litigants with due process using the preclusion context as an example.

The Constitution's two Due Process Clauses guarantee that neither the federal government nor the states will deprive a person of "life, liberty, or property, without due process of law."[98] In particular, the Supreme Court has explained that before a person is deprived of life, liberty, or property by a court, he or she must be afforded "notice and an opportunity to be heard."[99] That means, as

98. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

99. Missouri v. Jenkins, 495 U.S. 33, 66 (1990) (Kennedy, J., concurring); *see also* Richards v. Jefferson County, 517 U.S. 793, 797 n.4 (1996).

The hearing requirement is consistent with the way due process was understood by the Founders. Several influential common law sources the Founders were familiar with exemplify that appearance in court with an opportunity to answer was part of, or tantamount to, due process. *See* Liberty of Subject 1354, 28 Edw. 3 c.3 (Eng.) ("That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, *without being brought in Answer by due Process of the Law*." (emphasis added)); Observance of due Process of Law 1368, 42 Edw. 3 c.3 (Eng.) ("It is assented and accorded, for the good Governance of the Commons, that no Man be *put to answer without Presentment before Justices,* or Matter of Record, or by due Process and Writ original, according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error." (emphasis added)); 2 WILLIAM BLACKSTONE, COMMENTARIES *278–79 ("The next step for carrying on the suit, after suing out the original, is called the process; being the means of compelling the defendant *to appear in court*." (emphasis added)); 1 WILLIAM BLACKSTONE, COMMENTARIES *133–34 ("And it is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land; and again, by statute 28 Edw. III. c. 3, that no man shall be put to death, *without being brought to answer by due process of law*." (emphasis added)); THE GENERAL LAWS AND LIBERTIES OF NEW PLYMOUTH COLONY (June 1671), in THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH: TOGETHER WITH THE CHARTER OF THE COUNCIL AT PLYMOUTH 241, 241 (Bos., Dutton & Wentworth 1836) ("[N]o person in this Government shall be endamaged in respect of Life, Limb, Liberty, Good name or Estate . . . but by virtue or equity of some express Law of the General Court of this Colony . . . or the good and equitable Laws of our Nation suitable for us, *being brought to Answer by due process thereof*." (emphasis added)); CHARTER OF LIBERTIES AND PRIVILEGES [CONSTITUTION] (1683) (N.Y.), reproduced in 1

relevant here, that a person must have either had her day in court, or else must have been adequately represented by someone else in court, for a court's judgment to be binding on them.[100]

CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 95 (1906) ("That Noe man of what Estate or Condi[ti]on soever shall be putt out of his Lands or Tenements, nor taken, nor imprisoned, nor dis[in]herited, nor banished nor any way[s] d[e]stroyed without being brought to Answe[r] by due Course of Law."); *see also* ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 16–24 (2020) (explaining that as understood at the Founding, due process entailed following certain mandated procedures, in many instances including the right to appear before the Court). Sources from shortly after the ratification confirm the importance of a hearing. *See, e,g.*, Hecker v. Jarret, 3 Binn. 404 (1811) ("It is contrary to the first principles of justice, to deprive a man of his rights without a hearing, or an opportunity of a hearing.").

In an article by Max Crema and Lawrence Solum, arguing that the Fifth Amendment's Due Process Clause was originally understood to be narrow in scope, the authors state that early statutes protecting due process were "primarily concerned with protecting individuals from being judged in absentia without first being 'brought to answer' in the appropriate or 'due' manner." Max Crema & Lawrence Solum, *The Original Meaning of Due Process of Law in the Fifth Amendment*, 108 VA. L. REV. 447, 499 (2022).

100. *See* Taylor v. Sturgell, 553 U.S. 880, 884 (2008) ("'It is a principle of general application in Anglo- American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' . . . Several exceptions, recognized in this Court's decisions, temper this basic rule. In a class action, for example, a person not named as a party may be bound by a judgment on the merits of the action, *if she was adequately represented* by a party who actively participated in the litigation." (quoting Hansberry v. Lee, 311 U. S. 32, 40 (1940)) (emphasis added)).

The Founders were also familiar with the concept of adequate representation, although more frequently in contexts outside of the courtroom. For instance, Blackstone relates that the reason laws were binding was "because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives." I WILLIAM BLACKSTONE, COMMENTARIES *178. Similarly, Blackstone explained that acts of the English parliament did not generally extend to Ireland "because they do not send representatives to our parliament." *Id.* at *100. By contrast, "The town of Berwick upon Tweed" though "no part of the Kingdom of England, nor subject to the common law" was "subject to all acts of parliament, being represented by burgesses therein." *Id.* at *97.

A careful reading of the *Commentaries* demonstrates that adequate representation was also important in court. For instance, Blackstone explained that if a man became non compos—*i.e.*, insane and unable to care for his property—the lord chancellor could commit the non compos person to the care of another person with an aligned interest:

> The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king,

The Supreme Court has explained what does and does not count as adequate representation in several cases. For instance, in *Taylor v. Sturgell,* the Court held that a "virtually represented" non-party could not be bound by a judgment through res judicata (the doctrine barring parties from re-litigating cases that have been previously litigated). [101] The Court used the phrase "virtual representation" to mean a situation in which a non-party was "represented" by a previous party only through their shared interest in the outcome. [102] *Sturgell* involved a litigant's request under the Freedom of Information Act for copies of technical documents related to a vintage airplane.[103] The Federal Aviation Administration refused to provide those documents so the litigant sued to obtain them.[104] The FAA asserted that res judicata barred the plaintiff's suit because of a previous suit in which a different plaintiff sought the same documents and lost. [105] The FAA contended that the previous litigant who lost had "virtually

> the custody of idiots and lunatics is intrusted, upon petition or information, grants a commission in nature of the writ de idiota inquirendo, to enquire into the party's state of mind; and if he be found non compos, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee. However, to prevent sinister practices, the next heir is never permitted to be this committee of the person; because it is his interest that the party should die. But, it hath been said, there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy[t]. The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition; accountable however to the court of chancery, and to the non compos himself, if he recovers; or otherwise, to his administrators.

Id. at *294–95. Similarly, given the unfortunate legal status of married women at the time, "A woman indeed may be attorney for her husband; for that implies no separation from, but is rather a representation of, her lord." *Id.* at *430. As such, the focus of representation at the Founding was ensuring that the representative's interests were aligned with the interests of the represented party.

101. *See Sturgell,* 553 U.S. at 880–90.

102. *Id.* at 888.

103. *Id.* at 880–90.

104. *Id.*

105. *Id.* at 885–90.

represented" the current litigant. The Court rejected that argument holding that a non-present party may only be bound in six specific situations—none of which include "virtual representation."[106] That said, a party *may* be bound where they have been "*adequately represented* by someone with the same interests who was a party to the suit."[107]

In contrast to the insufficient representation in *Sturgell*, class action procedures are one common example of a situation where the Court has found adequate representation to satisfy due process.[108] Class actions allow "[o]ne or more members of a class" to "sue or be sued as representative parties on behalf of all members" if the requirements of Federal Rule of Civil Procedure 23 are satisfied.[109] That is to say, when the requirements of Rule 23 are satisfied, the class action procedure allows courts to apply preclusion to class members who have not had their day in court because those absent class members were adequately represented by the class representatives. As relevant here, two of Rule 23's requirements are that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" and "the representative parties will fairly and adequately protect the interests of the class."[110] Those requirements make sure that the class representatives' interests are aligned with the interests of the rest of the class and that the class representatives will do a good job litigating on behalf of the other class members. Thus, the Court has permitted class actions because the process that they afford absent class members adequately protects the interests of those members

106. *Id.* at 894–95.

107. *Id.* (emphasis added).

108. *See id.* at 894–95; Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ §23.02 (2020) (citing General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982)); Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994) ("The requirements of Rule 23(a) are meant to assure both that class action treatment is . . . fair to the absentees under the particular circumstances.").

109. FED. R. CIV. P. 23(a).

110. FED. R. CIV. P. 23(a)(3)–(4).

and, consequently, the class action mechanism does not violate the Due Process Clause.[111]

In short, due process forbids a court from binding a person to the effects of a court's judgment where that person has not previously had her "day in court" or otherwise been "adequately represented" in court.[112]

Separately, because this article discusses standing from a first-principles standpoint, it would be incomplete without a discussion of the original meaning of the Fifth Amendment's Due Process Clause. The goal of this article is not a thoroughgoing exploration of the original meaning of the Due Process Clause but, fortunately, others have undertaken that task. A recent article authored by Max Crema and Professor Lawrence Solum argues that, as originally understood, the Fifth Amendment's Due Process Clause "requires that deprivations of life, liberty, or property must be preceded by process of law in [a] narrow and technical legal sense."[113] Specifically, that a court must proceed through formal processes—for example, personal service of process or some legally valid alternative such as service by publication—before depriving the litigant of certain rights. That has not been the traditional understanding of the Due Process Clause, but, if their originalist research is right, it begs the question, does precedent deprive litigants of "life, liberty, or property" without that mandated formal service of process? To answer, we'll need to understand the role of precedent: the subject of the next section.

III. STARE DECISIS IS A FUNDAMENTAL LEGAL PRINCIPLE THAT CAN BIND FUTURE LITIGANTS

Stare decisis, or the application of binding precedent, can effectively bind litigants without the due process safeguards found in the preclusion context. This is so because courts must often apply the decisions in previously decided cases—binding precedent—to

111. *See* Hansberry v. Lee, 311 U.S. 32, 43 (1940).

112. Taylor v. Sturgell, 553 U.S. 880, 894–95 (2008).

113. Crema & Solum, *supra* note 99, at 451.

the case presently before them even where the court believes that the precedent is legally incorrect.[114] Thus, even though the litigant currently before the court has not had a chance to make his or her best arguments (i.e., had her day in court), the court may rule against them based on a previous unrelated case in which they were not a party nor adequately represented.

Over time, our legal system developed a particular understanding and usage of stare decisis. The concept of legal precedent traces back at least to the sixteenth century.[115] Although precedent is not explicitly mentioned in the Constitution, the Founders were aware of the concept and considered it an integral part of the judicial process.[116] That said, precedent was not used at the Founding in precisely the same way it's used today. Prior to the early 1800s, precedent served as a method of deriving general principles of law rather than as a dispositive process. It was only when official case reporters became systematic and reliable—thus allowing attorneys and judges to find relevant case law—that courts began adopting strict rules of stare decisis.[117] Stare decisis is

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114. Phillip M. Kannan, *The Precedential Force of Panel Law,* 76 MARQ. L. REV. 755, 755–56 (1993).

115. *See* DANIEL H. CHAMBERLAIN, THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT 5 (1885); *See also* LAURENCE GOLDSTEIN, PRECEDENT IN LAW 9 (1987) ("The notion of precedent plays an important role in the jurisprudence of every Western legal system, and *a pivotal role in systems rotten in the common law tradition.*" (emphasis added)); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 32 (2008) (tracing English court's reliance on precedent to the thirteenth century).

116. *See* THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology,* 76 N.Y.U. L. REV. 570, 579–80 (2001). Professor Fallon also argues that stare decisis is a constitutional doctrine. *Id.* at 588; *see also* Michael C. Dorf, *Dicta and Article III,* 142 U. PA. L. REV. 1997, 1997 (1994) ("[T]he precept that like cases should be treated alike [is] rooted both in the rule of law and in Article III's invocation of the 'judicial Power'.").

117. *See* JOSEPH L. GERKEN, THE INVENTION OF LEGAL RESEARCH 67–80 (2016). The knowledge of Supreme Court precedents in the early years of the republic "depended in large part upon dissemination of its opinions by an unofficial system of private enterprise reporting whose hallmarks were delay, omission and inaccuracy, and

the "[d]octrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same."[118]

Through the years, stare decisis and precedent have taken on a fundamental role in the judicial process.[119] Although a litigant can theoretically argue that a court's unfavorable precedent is wrong, in practice the result in a litigant's case is essentially predetermined if precedent exists on a dispositive issue in her case because of vertical stare decisis and the prior panel precedent rule.[120] Vertical stare decisis requires lower courts to follow the holdings of a higher court.[121] And the prior panel precedent rule (sometimes called horizontal stare decisis) requires circuit court panels to adhere to the precedent set by an earlier panel of that circuit—even if the current panel disagrees with the earlier panel.[122] Every circuit has adopted a form of that rule.[123] Thus, the application of vertical and horizontal stare decisis binds parties by depriving them of the

unmanageable expense." *See* Craig Joyce, Wheaton v. Peters: *The Untold Story of the Early Reporters,* 1985 Y.B. 35, 36 (1985).

118. *Stare Decisis,* BLACK'S LAW DICTIONARY ABRIDGED (5th ed. 1983); *see also Stare Decisis,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.").

119. *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 20 (1921); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States,* 12 NEV. L. J. 787, 796 (2012) (explaining how the "law-of-the-circuit" or prior-panel-precedent rule began to solidify in the 1960s and 70s).

120. CARDOZO, *supra* note 119, at 21 (explaining that when a judge fashions a judgment for the litigants before her, she also "fashion['s] it for others," and that "[t]he sentence of today will make the right and wrong of tomorrow."); Mead, *supra* note 119, at 788 ("No matter how sympathetic the party or how clever the lawyer, most litigation is resolved by stare decisis, where the decisions of the past control the future.").

121. *Precedent,* BLACK'S LAW DICTIONARY (11th ed. 2019).

122. *See* Kannan, *supra* note 114, at 755–56.

123. *Id.* ("[A]ll thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound by prior panel decisions in the same circuit.").

ability to effectively argue their cases in court when the results of their cases are pre-determined by precedent.[124]

To be sure, there are situations where the circuit can overrule a prior panel's holding; a circuit's en banc panel is free to overrule prior precedent and, additionally, "[m]ost circuits allow a later panel to overturn an earlier decision if it was rejected by an intervening decision of a higher authority," that is, the Supreme Court.[125] But it is notably difficult to secure either en banc review or a writ of certiorari from the Supreme Court.[126] And, if no en banc review is granted, the law of the circuit remains whatever the earlier panel declared it to be. Therefore, even if a litigant can, *theoretically,* convince an en banc court to decide her case contrary to circuit precedent or convince the Supreme Court to overrule precedent, *in practice,* litigants' cases are decided by pre-existing precedent.[127]

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124. As Justice Barrett has explained, "the preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality" because it "deprives a litigant of the right to a hearing on the merits of her claims." Barrett, *supra* note 10, at 1012.

125. Mead, *supra* note 119, at 797–98; *see also* Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals,* 82 FORDHAM L. REV. 2001, 2001 (2014) ("Hearing cases en banc allows the full circuit court to overturn a decision reached by a three-judge panel.").

126. *See* Sadinsky, *supra* note 125, at 2004–05.

127. Barrett, *supra* note 10, at 1014 ("The federal courts, particularly the courts of appeals, generally have taken an *inflexible* approach to stare decisis. Once precedent is set, a court rarely revisits it, even in the face of compelling arguments that the precedent is wrong."); Smith v. Bayer Corp., 564 U.S. 299, 317 (2011) ("[O]ur legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs."); Taylor v. Sturgell, 553 U.S. 880, 903 (2008) (responding to the FAA's concern's about repetitive litigation, the Court asserted that "stare decisis will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when *stare decisis* is not dispositive, 'the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others.'"). Taken together, case law and circuit rules show that Professor Tushnet *underestimates* the binding effect of precedent. *See e.g.,* Tushnet, *supra* note 11, at 1722 ("Brilmayer's strong theory of precedent ignores the reality that a court today cannot commit a court tomorrow to a decision."). Contrary to Tushnet's assertion that precedent can't bind potential future litigants, real world evidence as well as court practice shows that it does.

Thus, as Professor Trammel explains, while "preclusion usually does not apply to nonparties, who have not yet benefited from their own 'day in court,' . . . precedent works the other way around. Binding precedent applies to litigants in a future case, even those who never had an opportunity to participate in the precedent-creating lawsuit."[128]

* * *

When assessing whether a government practice—here, application of the standing doctrine to the precedent context—affords a person due process, it's useful to have a step-by-step framework. One helpful framework, laid out by Professor Erwin Chemerinsky, explains that "[a]ll procedural due process questions can be broken down into three sub-issues."[129] Those sub-issues include (1) whether there was a "deprivation," (2) whether that deprivation was of "life, liberty, or property," and (3) whether the government's process in depriving the individual was "inadequate."[130] Applying Professor Chemerinsky's three-step approach,[131] we can see that the rigid application of precedent may violate the Due Process Clause. First, when an argument is foreclosed because of precedent (and a litigant consequently loses her case), the government—here the courts—has caused a deprivation. And second, depending on the type of case, that deprivation is of the litigant's life, liberty, or property interests: the litigant is unable to marshal new arguments to protect her rights and as a result her rights are taken away.[132] Thus, third, we must assess whether the government's process—here, the court's process—is adequate.[133] In terms of assessing what process is adequate, prominent-jurist Judge Henry J. Friendly explained that

128. Trammel, *supra* note 14, at 565; Barrett, *supra* note 10, at 1012–13.

129. Erwin Chemerinsky, *Procedural Due Process Claims,* 16 TOURO L. REV. 871, 871 (2000).

130. *Id.*

131. *Id.*

132. Barrett, *supra* note 10, at 1055 (explaining that life, liberty, or property are at stake in every litigation).

133. Chemerinsky, *supra* note 129, at 888.

"[t]he required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it."[134] Thus, it is important to keep in mind that, when assessing whether standing provides adequate process (discussed further below), we must consider the importance of the private interest being protected.

IV. THE ARGUMENT FOR STANDING AS DUE PROCESS

Having established (1) that due process prohibits courts from binding a party when that party has not had her day in court,[135] and (2) that judicial precedent can effectively bind parties without the safeguards found in the preclusion context,[136] I propose that the standing doctrine can serve—or already does serve, even if the Supreme Court has not made it explicit—as that due process safeguard, thereby ensuring that the application of precedent is consistent with due process.

A "party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned and (2) either the party understood herself to be acting in a representative capacity or *the original court took care to protect the interests of the nonparty*."[137] For purposes of applying binding precedent to litigants before the court, the standing doctrine does the same thing; it ensures adequate representation in the precedential case—or at least it could be used that way. When a court ensures that a party has standing, they look

134. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1278 (1975).

135. *See supra* Part II.

136. *See supra* Part III; *see also* Barrett, *supra* note 10, at 1012; Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597, 612 (2010) (explaining that stare decisis may be inconsistent with due process).

137. Taylor v. Sturgell, 553 U.S. 880, 900 (2008) (citation omitted) (emphasis added); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *295 ("The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition").

to see whether the injury that the plaintiff is suing based on is "concrete."[138] In theory, a plaintiff with a concrete injury will truly be adverse to the defendant. By ensuring that the litigants before it are sufficiently adverse, the court attempts to "t[ake] care to protect the interests" of nonparties who may be affected by its precedent in the future.[139]

Consequently, rather than the injury-in-fact and concreteness requirements somehow deriving from Article III, it makes more sense that standing serves to ensure the interests of the litigants presently before the court are aligned with the interest of future litigants—a due-process safeguard.

The implication is that if courts make sure that the parties in front of them have a real stake in prevailing, the adversarial process will work as it's supposed to and the result will be fair to any later litigants who will be bound by the precedent. The Court's requirement that plaintiffs have an actual injury and are seeking a remedy for that injury ensures that litigants will do all that they can to prevail. Likewise, a defendant who knows that a plaintiff is seeking a real remedy for a real injury is likely to do whatever it can to avoid liability. Accordingly, both parties try their best to win—the plaintiff to redress her injury and the defendant to avoid liability. By contrast, litigants without concrete injuries may not do their utmost to protect their rights and will therefore fail to adequately represent later parties who are actually injured—because their interests are not aligned. Real adverseness between the parties is critical in our system because it ensures that the court hears the most compelling argument on each side of the case and is

138. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

139. Courts have an independent duty to assess their jurisdiction, but anyone, even the plaintiff or a nonparty, may contest standing. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (court is required to address standing even if neither side raises it); Gray v. City of Valley Park, Mo., 567 F.3d 976, 982 (8th Cir. 2009) (plaintiff may raise a standing issue); Stallworth v. Bryant, 936 F.3d 224, 230 (5th Cir. 2019) ("[E]ven nonparty witnesses refusing to comply with a discovery order may challenge standing."); United States v. Windsor, 570 U.S. 744, 755 (2013) (amicus curiae argued lack of standing). Thus, a nonparty who notices that a litigant lacks standing, and therefore will not adequately represent potential future litigants, may be able to raise that issue with the court.

thereby likely to reach the legally correct result.[140] Although courts can conduct their own legal research, "[u]nder the party presentation principle, American courts function in an 'adversarial system of adjudication' whereby 'we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'"[141] We do so because, "our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error."[142]

But the premise that adverseness will beget the best result rests on the assumption that the judicial process will, in fact, be adverse. If parties are not truly adverse, they may not present the most compelling argument for their side and, worse, may collude to manipulate the court into creating precedent they prefer for policy reasons.[143] That bad precedent then affects all potential future litigants in situations with similar facts. Standing protects against that eventuality by ensuring that earlier litigants are truly adverse and doing everything possible to prevail.

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140. Perhaps in a European or Latin American court system where the judge acts as an inquisitor rather than as a neutral arbiter, it would not be necessary to ensure that the parties were sufficiently adverse. In that kind of system, the judge has the latitude to seek out the right answer themselves. But in the American system, judges must generally rely on the parties to raise the appropriate issues before the court. *See* United States v. Campbell, 26 F.4th 860, 893 (11th Cir. 2022) (Newsom & Jordan, JJ., dissenting).

141. *Id.* at 872 (Newsom & Jordan, JJ., dissenting) (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)).

142. Mackey v. Montrym, 443 U.S. 1, 13 (1979).

143. "The presence of an improper representative on either side of the lawsuit may have consequences that far transcend the interests of the participants." Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 25 (1979). It has been said that "some of the most famous constitutional decisions have come in what now seem to have been collusive cases." CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS, 56 (4th ed. 1983) (citing Fletcher v. Peck, 10 U.S. 87 (1810), and Dred Scott v. Sandford, 60 U.S. 393 (1857)). Notably, *Peck* and *Dred Scott* were both decided before the development of modern standing doctrine—and, thus, the anti-collusion protection that doctrine provides.

Standing's function in ensuring adverseness and clear presentation of the issues may help explain why the Court only requires one of the plaintiffs in a case to have standing. *See* Massachusetts v. EPA, 549 U.S. 497, 518 (2007). So long as one of the plaintiffs is adverse to the defendant and doing a good job of presenting the issues (thereby adequately representing potential future litigants), it does not matter if other litigants aren't doing as good a job—the Court will still hear the arguments on either side.

In short, standing protects potential future litigants by ensuring that they are well-represented in court by current litigants and that, as much as possible, the Court comes to the correct legal result.[144] It does so in two ways: (1) it ensures that issues are presented clearly and arguments made persuasively so that the court gets the law right; and (2) it prevents parties from colluding or otherwise manipulating the court into making bad law. As to whether the process afforded by standing doctrine is "adequate,"[145] given that precedent is ultimately slightly less binding than preclusion, the adequate representation safeguard provided by standing seems sufficient in relation to the importance of the right to present arguments to the court.[146]

A. Cases Where Courts Have Used Standing to Protect Due Process

When looking at the way the Supreme Court and lower courts have described the standing doctrine, it is apparent that courts have

144. *See* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 542 (1986) ("[W]e have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts."). Standing also helps resolve tension inherent in the dual role of the federal courts. On the one hand, it is the court's role to adjudicate individual cases as the parties litigate them, but, on the other hand, many have argued that courts have a role in making sure that the law is interpreted correctly and vindicating "constitutional or statutory policies." *Campbell*, 26 F.4th at 897 (Newsom & Jordan, JJ., dissenting) (describing the views of "public law" commentators like Owen Fiss); *see also* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 460 (2009) (explaining that the adversarial system and standing both "ensure that courts decide only those issues that are briefed and argued by stakeholders with an incentive to adequately represent their interests to the court, which in turn will produce better judicial decisions."). Frost explains that "because federal judges operate within a common law system in which the precedent in one case establishes the law for all who follow, it is particularly important that they make accurate statements about the meaning of law." *Id.* at 453.

145. Chemerinsky, *supra* note 129, at 871.

146. Friendly, *supra* note 134 (explaining that the "required degree of procedural safeguards varies directly with the importance of the private interest affected"). The exact contours of due process are situationally dependent. For instance, FED. R. CIV. P. 23(b)(2) "does not require that class members be given notice and opt-out rights" because "notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause." Wal-Mart v. Dukes, 564 U.S. 338, 363 (2011).

already used standing to ensure that the litigants before them are in a position to adequately represent the interests of future litigants. Courts have been explicit that standing ensures that the best arguments are before the court[147] and that standing avoids the prospect of litigants using the courts to achieve preferred policy goals in a way that could harm future parties.[148] Stated differently, courts try to filter out litigants that will not do a good job representing future parties.

Starting with ensuring the clarity and potency of legal arguments. The Court has explained that standing is about making sure that the parties' arguments are clear and well-reasoned. Take *Baker v. Carr* as an example. *Baker* involved a Fourteenth Amendment challenge to Tennessee's decision not to redistrict voting districts following demographic changes.[149] Assessing whether the plaintiffs had standing to challenge Tennessee's failure to redistrict, the court used the hypophora, "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete *adverseness which sharpens the presentation of issues* upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."[150] Thus, in identifying the very essence or "main point" of standing,[151] the Court pointed to "sharpness" in "the presentation of issues."

The Court re-emphasized the importance of clarity to the standing analysis in *Flast v. Cohen.* There, the Court focused on whether the question underpinning the litigation "will be framed with the necessary specificity . . . and that the litigation will be

147. *See* Baker v. Carr, 369 U.S. 186, 204 (1962); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 542 (1986).

148. *See D*iamond v. Charles, 476 U.S. 54, 62 (1986); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150. 154 (1970) (citation omitted and emphasis added); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980) ("The imperatives of a dispute capable of judicial resolution are *sharply presented issues* in a concrete factual setting and *self-interested parties vigorously advocating opposing positions.*" (emphasis added)).

149. *Baker,* 369 U.S. at 187.

150. *Id.* at 204 (emphasis added).

151. *Gist,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("1: the ground or foundation of a legal action without which it would not be sustainable 2: the main point or material part (as of a question or debate): the pith of a matter: ESSENCE.").

pursued with the necessary vigor."[152] If the issues are "pressed before the Court with . . . clear concreteness" and "precisely framed," the Court can home in on discrete issues for decision.[153] And if those issues are litigated vigorously, the Court will—at least in theory—hear the best arguments on each side of the case. The *Flast* Court distinguished the plaintiff before it from the plaintiff in *Mellon* based on the fact that the plaintiff before it had pointed to a specific constitutional violation.[154] Because the plaintiff in *Flast* complained of the violation of a specific constitutional provision, he presented the Court with a clear issue and gave the Court "confiden[ce]that the questions will be framed with the necessary specificity" such that the Court could properly adjudicate the dispute.[155]

Several years later, in *Secretary of the State of Maryland v. Joseph H. Munson Co.*, the Court once again emphasized that ensuring clarity is the purpose of standing.[156] There, the Court was asked to determine whether a Maryland statute violated a plaintiff's First and Fourteenth Amendment rights.[157] After Maryland conceded that the plaintiff had an injury sufficient to confer constitutional standing, the state nonetheless argued that prudential considerations cautioned against granting the plaintiff standing.[158] Explaining the purpose of prudential standing requirements, the Court stated that "[t]he [standing] limitation 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy, and it assures the court that the issues before it will be concrete and sharply presented."[159] Because the plaintiff had a real stake in the case, had clearly presented the issues, and was acting as an "[]adequate

152. Flast v. Cohen, 392 U.S. 83, 106 (1968).
153. *Id.* at 96–97.
154. *Id.*
155. *Id.*
156. 467 U.S. 947, 955 (1984).
157. *Id.* at 952.
158. *Id.* at 955–56, 958.
159. *Id.* at 955 (citation omitted).

advocate" of third-party rights, the Court held that he had standing.[160] Although it referred to these as reasons for prudential standing, the Court cited *Baker,* a jurisdictional standing case.[161] Thus, the Court was either expressing that jurisdictional and prudential standing requirements serve the same purpose—ensuring that the issues are presented clearly—or confusing prudential and jurisdictional requirements. Whatever the case, the articulated purpose of standing was to avoid deciding cases where the issues were "cloudy" and not "sharply presented."[162]

Similar to *Munson,* in *Gladstone Realtors v. Village of Bellwood,* the Court stated that "the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants *best suited to assert a particular claim.*"[163] The Court's desire to find the best litigant to assert a particular claim before "deciding questions of broad social import"—that is, creating precedent—further emphasizes that standing is about getting the best arguments in front of the Court.

Moreover, discussing standing to challenge a statute on behalf of another, the Court has said that "[s]tanding doctrine embraces . . . the general prohibition on a litigant raising another person's legal

160. *Id.* at 958.

161. *Id.* at 955 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). In later cases the Court has reiterated that "concrete adverseness which *sharpens the presentation of issues"* is a jurisdictional standing requirement—not a prudential one. *See* Camreta v. Greene, 563 U.S. 692, 701 (2011) (emphasis added) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 (1983)). "[T]he concern that the controversy be *concrete and sharply presented* is fully satisfied by ascertaining that the [defendant's action] causes direct, specific, and concrete injury to the parties who petition for our review, and that the requisites of a case or controversy are also met." U.S. Dep't of Lab. v. Triplett, 494 U.S. 715, 731 (1990) (Marshall, J., concurring) (emphasis added) (quoting ASARCO v. Kadish, 490 U.S. 605, 623–624 (1989)) (internal quotation marks omitted).

162. *Munson*, 467 U.S. at 955 (quoting United States v. Raines, 362 U.S. 17, 22 (1960)). Relatedly, although not in the standing context, the Supreme Court has advised lower courts to "refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent" when "deciding an effectively raised claim according to a truncated body of law." Kamen v. Kemper Fin. Servs., 500 U.S. 90, 100 n.5 (1991).

163. 441 U.S. 91, 99–100 (1979) (emphasis added).

rights."[164] The reason for this is because the Court assumes "that the party with the right has the appropriate incentive" and that they will sue "with the *necessary zeal and appropriate presentation*."[165] Yet, cases where the court has allowed third-party standing also show how the Court uses standing as an adequate-representation tool. *Munson's* discussion of "*jus tertii*" standing demonstrates that standing serves to ensure that the parties present the issues clearly. *Jus tertii* standing is the right of a party to bring suit on another's behalf in specific situations.[166] One of those situations is "where practical obstacles prevent a party from asserting rights on behalf of itself" and "the third party can reasonably be expected properly to *frame the issues and present them with the necessary adversarial zeal*."[167] The Court's focus on the third party's ability to present the issues exemplifies the concern over clarity. This can also be seen in *Sullivan v. Little Hunting Park,* where the Court held that Sullivan, a white man who assigned his membership in a discriminatory private club to a Black man, could raise the rights of the Black assignee, when he sought an injunction against his expulsion from the club.[168] The Court held that even though Sullivan's injury was the result of his attempt to vindicate the rights of minorities, he still had standing because he was "'the only effective adversary' of the unlawful restrictive covenant."[169] The implication, then, is that the Court allowed Sullivan to sue because Sullivan had the best ability to clearly place the relevant issues before a court.

The above cases show that when assessing standing the underlying interest the Court is concerned about is whether the

164. Allen v. Wright, 468 U.S. 737, 751 (1984). Although the requirement that plaintiffs must assert their own interests has been characterized as prudential, *see, e.g.* Kowalski v. Tesmer, 543 U.S. 125, 128–29 (2004), the Court has raised some doubts about that characterization, *see* Lexmark Int'l v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014).

165. Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) (emphasis added) (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)).

166. *Munson Co.*, 467 U.S. at 956.

167. *Id.* (emphasis added).

168. 396 U.S. 229, 237 (1969); *see also* Ziglar v. Abbasi, 582 U.S. 120, 132 (2017) (limiting the holding of *Sullivan* in the realm of *Bivens* actions).

169. Sullivan, 396 U.S. at 237 (quoting Barrows v. Jackson, 346 U.S. 249, 259 (1953).

litigants appearing before it are sufficiently interested such that they will present the best arguments and theories and help the Court come to the correct determination of the law—thereby ensuring that the public and potential future litigants receive the benefit of that correct decision.

Next, avoiding manipulation. One of the primary reasons for justiciability doctrines is to prevent parties from "colluding to invoke federal jurisdiction, not to resolve a genuine dispute but to secure a judicial ruling on a subject of interest to one or more of the litigants."[170] Because courts must rely on the parties to frame the issues, parties may try to frame their issues or choose to litigate factually favorable cases in such a way that manipulates the ensuing precedent.[171] That's a problem because courts exist to adjudicate disputes, not to set social policy, and allowing parties to manipulate precedent disadvantages future litigants.[172] Thus, courts use standing as a filter to prevent precedent manipulation and protect future litigants.

Going back to *Flast.* When it held that the plaintiff had standing despite his status as a taxpayer, the Court justified its decision in part on the fact "that the issues will be contested with the *necessary adverseness* . . . to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution."[173] Or in other words, the litigation would ensure the "clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests."[174]

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170. FALLON, JR., ET AL., *supra* note 2, at 81.

171. *See* Barrett, *supra* note 10, at 1025–26 (describing how repeat player litigants try to manipulate precedent in their favor); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 9–15 (2000) (providing empirical evidence that repeat player litigants try to manipulate precedent in their favor).

172. Diamond v. Charles, 476 U.S. 54, 62 (1986). The Seventh Circuit has explained: "The main contemporary reason for having rules of standing . . . is to prevent kibitzers, bureaucrats, publicity seekers, and 'cause' mongers from wresting control of litigation *from the people directly affected*." Ill. Dep't of Trans. v. Hinson, 122 F.3d 370, 373 (7th Cir. 1997) (emphasis added) (citations omitted).

173. Flast v. Cohen, 392 U.S. 83, 106 (1968) (emphasis added).

174. *Id.* at 101 (quoting United States v. Fruehauf, 365 U.S. 146, 157 (1961)) (internal quotation marks omitted).

The adverseness of the parties was critical because "the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.'"[175] That's why "inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power."[176] When parties are adverse they, definitionally, are not colluding to manipulate precedent. By contrast, if parties are not adverse, they may collude and facilitate precedent that not only affects future litigants' ability to prevail but also incidentally affects the actions of non-litigants who change behavior in conformity with precedent.

The focus on adverseness was reiterated in *Sierra Club v. Morton.* In *Sierra Club,* the plaintiff sought to enjoin the development of a ski resort for environmental reasons but the Court held that the plaintiff lacked standing because the plaintiff failed to allege that any of its members used the area where the resort was to be built.[177] The Court observed that "the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context.'" [178] Although the Court acknowledged that the plaintiff was *likely* adverse to the defendant in this case, it refused to make an exception from the rule requiring a plaintiff to show an individualized injury to itself as evidence of adverseness.[179] It reasoned that without requiring a plaintiff to show a real stake in the litigation, any interested party could file suit to "vindicate their own value preferences through the judicial process," that is,

175. *Id.* at 101 (citations omitted) (first quoting Baker v. Carr 369 U.S. 186, 204 (1961); and then quoting Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937)).

176. *Flast,* 392 U.S. at 102.

177. Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

178. *Id.* at 732 (citations omitted) (first citing Baker v. Carr, 369 U.S. 186, 204 (1972); and then citing Flast v. Cohen, 392 U.S. 83, 101 (1968)).

179. *Sierra Club,* 405 U.S. at 735 n.8, 739.

precedent.[180] What mattered to the Court was that there be some way to assess whether the dispute "adjudicated will be presented in an adversary context."[181]

Later cases have continued to dwell on the effects of allowing litigants without a real stake to sue. Recognizing that its decisions have broad ripples beyond the parties to a specific case, the Court in *Diamond v. Charles* held that standing "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests'" because the courts' power "profoundly affect[s] the lives, liberty, and property of those to whom it extends."[182] Thus, the Court recognized that standing serves to ensure that whoever the litigant is, they are litigating effectively for all those not before the Court—not colluding to set precedent. The following phrase from *Data Processing* highlights the point: "Certainly he who is 'likely to be financially' injured, may be *a reliable private attorney general* to litigate the issues of the public interest in the present case."[183]

In *Valley Forge Christian College v. Americans United for Separation of Church & State,* the Court, explaining what it considered to be "implicit policies embodied in Article III," sought to ensure that litigants wouldn't manipulate precedent to set social policy.[184] The implicit policies include ensuring that "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action" and consequent "confidence that [the Court's] decision will not *pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.*"[185] It further noted that standing "reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order."[186] Hence, *Valley Forge*

180. *Id.* at 740.

181. *Id.* at 732.

182. Diamond v. Charles, 476 U.S. 54, 62 (1986).

183. 397 U.S. 150, 154 (1970) (citation omitted and emphasis added); *but see* Laufer v. Arpan LLC, 29 F.4th 1268, 1290 (2022) (Newsom, J., concurring) (Plaintiffs cannot constitutionally act as "private attorney[s] general." (quotation omitted)).

184. 454 U.S. 464, 472 (1982).

185. *Id.* at 472 (emphasis added).

186. *Id.* at 473.

shows how checking that the most relevant party is before the Court ensures that the precedent created by the Court will not be manipulated by interested parties without a real stake in the litigation. The Court's statements demonstrate that the Court is conscious of the practical effect of its precedent on the public and especially future litigants. Even though *Valley Forge* frames its reasoning in terms of Article III, its statements relate less to the Court's power than to the procedural effects of the Court's orders on the public and future litigants.

It is not traditionally considered a standing case, but *Lord v. Veazie*[187] is a particularly relevant example of the Court's concern with the adequacy of the litigants before it in ensuring that other parties are not improperly bound by precedent. In *Veazie,* the Court caught two parties colluding to try and convince the Court to answer a question of law that would "seriously affect[]" the rights of a third party.[188] Bear with me—the facts are complicated: Veazie had warranted his ownership of navigation rights in a particular river and conveyed those rights to Lord.[189] Lord sued Veazie so that the Court would have to rule on whether Veazie breached the warranty—and if it found that he hadn't, thereby set precedent establishing that Lord had rights in navigating the river.[190] Another party, Moor, submitted an affidavit to the Court claiming that he had a better claim to the river and that the "case was a feigned issue,[191] got up collusively between the said Lord and Veazie, for

187. 49 U.S. 251 (1850).

188. *Id.* at 255.

189. *Id.* at 252.

190. *Id.*

191. A "feigned issue" was a "proceeding in which the parties, by consent, ha[d] an issue tried by a jury without actually bringing a formal action" done when "a court either lacked jurisdiction or was unwilling to decide the issue." *Feigned issue,* BLACK'S LAW DICTIONARY (11th ed. 2019). I think it's more likely that Moore intended to accuse the parties of a feigned *action*—"[a]n action brought for an illegal purpose on a pretended right." *Feigned action,* BLACK'S LAW DICTIONARY (11th ed. 2019). Feigned issues were permitted in the early federal courts whereas feigned actions were not. *See* Stephen Sachs, *Feigned Issue in the Federal System* 1, 18–19 (Nov. 26, 2007) (unpublished manuscript) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032682 [https://perma.cc/LM4F-WQMC]).

the purpose of prejudicing his (Moor's) rights, and obtaining the judgment of this Court upon principles of law affecting a large amount of property, in which he and others were interested."[192] The Court found Moor's assertions credible and held that, because "there [wa]s no real conflict of interest between them; that the plaintiff and defendant have the same interest," the lower court's judgment on the issue should be vacated.[193] Thus, not referencing Article III, the Court held that non-adverse parties were not permitted to litigate a case in such a way as to disadvantage other litigants.[194] The underlying principle wasn't about the Court's constitutional jurisdiction to hear non-adversarial or feigned issues, but rather about protecting third parties from the collusion of other litigants and the Court's resulting statements on "principles of law."[195]

On occasion, the Court has gotten close to acknowledging that finding the right litigant to prosecute a case protects due-process rights. For instance, in *Singleton v. Wulff*, a case in which two physicians sued to protect the rights of their patients, the Court found that the physicians had standing because they adequately represented the rights of their patients.[196] Discussing why the Court often rejects third-party standing, the Court explained that

192. Lord v. Veazie, 49 U.S. (8 How.) 251, 252–53 (1850).

193. *Id.* at 255–56.

194. *Id.*

195. Another case about collusive suits that has been distinguished from standing, like Flast v. Cohen, 392 U.S. 83, 100 (1968) (distinguishing the standing requirement from the rule against friendly suits), but which, I contend, should be considered a standing case is United States v. Johnson, 319 U.S. 302 (1943). There the Court held that in "the absence of a genuine adversary issue between the parties," the "court may not safely proceed to judgment." *Id.* at 304. In *Johnson,* the Court determined that the defendant paid for the suit on behalf of the plaintiff and therefore vacated the judgment. *Id.* at 304. The concern in *Johnson* is the same as in other standing cases—the adverseness of the parties. *See, e.g.*, Geraghty, 445 U.S. at 403 ("The imperatives of a dispute capable of judicial resolution [is] . . . *self-interested parties vigorously advocating opposing positions.*" (emphasis added)). And it appears that the government at the time considered it to be a standing case as it cited the constitution's case or controversy requirement. *Johnson*, 319 U.S. at 303. Cases like *Veazie* and *Johnson* should be considered standing cases.

196. Singleton v. Wulff, 428 U.S. 106, 117 (1976).

"[t]he courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. *The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of stare decisis*."[197] But, explaining that the rule against third-party standing "should not be applied where its underlying justifications are absent," the Court stated that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter" and that in such instances standing should be afforded to the third party.[198] Thus, the Court implicitly acknowledged that the purpose of the rule was to protect potential future litigants not presently before the court.

Later, in *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*,[199] the Court came relatively close to conflating the role of precedent and preclusion. In the associational standing context, the Court wrote that assuring an association's "adversarial vigor in pursuing a claim for which" its members have "Article III standing exists" was the point of the associational standing test and that "it is difficult to see a constitutional necessity for anything more."[200] The Court explained that the requirement that "an association plaintiff be organized for a purpose germane to the subject of its member's claim raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary."[201] Then, while recognizing that preclusion and precedent are different, the Court maintained that an association must *adequately represent* its members' stake in the

197. *Id.* at 114 (emphasis added); Powers v. Ohio, 499 U.S. 400, 413–414 (1991) (same); *see also* Nasir v. Morgan, 350 F.3d 366, 376 (3d Cir. 2003) ("A 'close' relationship for third-party standing must allow the third-party plaintiff to operate 'fully, or very nearly, as effective a proponent,' of the potential plaintiff's rights as would the plaintiff himself.").

198. *Singleton,* 428 U.S. at 114-–15.

199. 517 U.S. 544 (1996).

200. *Id.* at 556.

201. *Id.* at 555–56.

litigation to have standing—even though those members would not usually be preclusively bound by the judgment against the association.[202] The Court explained that standing can only exist if the association was sufficiently adversarial to the opposing party and adequately representing its members. In that way, the Court ensured that the parties before it were sufficiently adverse and not colluding to manipulate precedent in a way that would harm other potential litigants.

The connection between adversarialism and standing also shows how standing is a due process issue, not a jurisdictional one. The Court has stated that one purpose of standing doctrine is to ensure the existence of a "Case" and to avoid the resolution of hypothetical controversies and the issuance of advisory opinions. [203] But requiring that suits be adversarial is not logically related to the goal of avoiding advisory opinions. Even two parties who are not truly adverse may have the legal relationship between them changed based on a court's ruling, and therefore the court's ruling would not be advisory.[204] If adverseness were required to avoid advisory

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202. *Id.* at 557 n.6 ("The germaneness of a suit to an association's purpose may, of course, satisfy a standing requirement without necessarily rendering the association's representation adequate to justify giving the association's suit preclusive effect as against an individual ostensibly represented. . . . In this case, of course, no one disputes the adequacy of the union . . . as an associational representative." (citations omitted)).

203. *See* Fletcher, *supra* note 1, at 247; Sierra Club v. Morton, 405 U.S. 727, 733 n.3 (1972).

204. Courts currently entertain certain cases and grant judgments where the parties agree or where only one party appears. *See Consent Decree,* BLACK'S LAW DICTIONARY (11th ed. 2019); WRIGHT, *supra* note 143, at 56 (giving guilty pleas, default judgments, and naturalization orders as examples); RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE, at vii (2007) ("Many antitrust cases . . . are concluded by agreements between the government and the defendant firms that specify the firms' future activities in detail; the agreements are then approved and adopted by the trial court (often with modifications) and thereby become legal decrees."); *Consent judgment,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("In effect, a consent judgment is merely a contract acknowledged in open court and ordered to be recorded, but it binds the parties as fully as other judgments."); *No contest,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("A criminal defendant's plea that, while not admitting guilt, the defendant will not dispute the charge."). In separate pieces, Professor Robert J. Pushaw, Jr. and Professor James Pfander argue that, as understood at the Founding, "Cases" included non-adversarial disputes. Both professors point to types of court

opinions, non-adversary court proceedings like consent decrees or guilty pleas would not be allowed. But they are. The only real reason for the Court to care about whether the parties are adverse is not to avoid advisory opinions, but rather to avoid opinions that will deprive future litigants of their ability to litigate without adequate process.[205]

Throughout US history, the courts have been an instrument by which interest groups seek to effect social change. Consider the historical, and growing role, of what is called "strategic" or "impact" litigation. Impact litigation is "the strategic process of selecting and pursuing legal actions to achieve far-reaching and lasting effects beyond the particular case involved."[206] Implicitly, then, the goal of this type of litigation is to affect parties not presently before the relevant court.[207] There is nothing necessarily wrong with impact litigation if the judicial process is working as it is supposed to. But what happens when courts do not ensure that parties are actually adverse and vigorously pursuing the litigation? Consider the following examples in Part IV.B., below.

B. The Current Doctrine's Failures in Protecting Due Process

There are a number of situations that arise under the current standing doctrine where the doctrine either makes exceptions to its usual requirements or somehow otherwise fails to ensure clarity and adversarialism. The potentially deleterious results in those

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proceedings that took place at the Founding without adversarial parties. *See* Pushaw, *supra* note 21, at 526; JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS 1–11, 19, 150, 181–82 (2021).

205. I later explain why non-adversary proceedings *are* permitted. *See infra* Part V.

206. AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW, IMPACT LITIGATION: AN INTRODUCTORY GUIDE 1 (2016), https://www.wcl.american.edu/impact/initiatives-programs/center/publications/documents/impact-litigation-an-introductory-guide/ [https://perma.cc/MV4Y-LNKK]

207. *Id.* ("[S]trategic litigation cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves."); Susan Wnukowska-Mtonga, *The Real Impact of Impact Litigation,* 31 FLA. J. INT'L L. 121, 121–22 (2019) (explaining that impact litigation "not only affects the rights holder" but other, future, litigants as well).

situations demonstrate why standing is so important to protect due process rights.

First, allowing litigants to bring First Amendment overbreadth cases even where their own First Amendment rights have not been infringed. As explained earlier, federal courts generally prohibit a party from bringing a suit or raising a defense asserting the rights of a third-party.[208] In other words, an individual usually needs to show that her own rights have been infringed to bring or defend a lawsuit. [209] But, "the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"[210] The Court allows the exception because of the great risk that a free-speech-infringing law "may cause others not before the court to refrain from constitutionally protected speech or expression."[211] Thus, the Court tries to protect the free speech rights of the entire community. But, in allowing plaintiffs without a real stake in the controversy to sue, the Court fails to make certain that those plaintiffs will do a good job litigating the case. Accordingly, First Amendment overbreadth litigation is an area that lacks the due process protection that I propose is usually afforded by the standing doctrine.

To show this, consider the following hypothetical. The curmudgeonly Claytown city council passes an ordinance prohibiting all live dancing performances. Then, knowing he will do a bad job, the city council pays Brian (who operates an obscene

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208. Warth v. Seldin, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

209. *Id.*

210. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

211. *Id.*

dancing establishment) to sue to challenge the unconstitutional regulation on overbreadth grounds. The city ordinance can constitutionally be applied to Brian's establishment because obscene speech may be regulated under the First Amendment.[212] Brian's rights have not been infringed so he would not usually have standing,[213] but this is an overbreadth challenge, so the court says that is no problem.[214] Brian hates interpretive dance performances (like the annual Claytown interpretive dance festival) and so, even though he sues to enjoin the regulation, he intentionally bungles the lawsuit. Due to Brian's intentionally incoherent briefing, and Claytown's lawyer's excellent advocacy, the court is persuaded that Claytown's regulation is not overbroad and holds that the regulation is constitutional. The very next day, Emile, a world-renowned interpretive dancer scheduled to perform at Claytown's interpretive dance festival, files a lawsuit challenging the same regulation. Emile argues cogently and persuasively that the regulation violates his First Amendment rights. The court is convinced that Emile is right but, because it is bound by its own precedent,[215] rules against him.

What this hypothetical shows us is that, by failing to ensure that Brian was actually adverse to the city council's ordinance, the court failed to protect Emile from the binding effects of its precedent. As explained above, Emile was not present during *Brian v. Claytown City Council,* but he is bound by the decision nonetheless. Had the court required that Brian have standing—that is, required a litigant actually adverse to the city council—the court would have realized that the council's regulation violated the First Amendment and

212. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68, 74–75, 77 (1981); Roth v. United States, 354 U.S. 476, 485 (1957).

213. *Warth*, 422 U.S. at 499.

214. *See Broadrick*, 413 U.S. 601, at 612.

215. *See e.g.,* United States v. Steele, 147 F. 3d 1316, 1318 (11th Cir. 1998) (en banc) ("a panel cannot overrule a prior one's holding even though convinced it was wrong."); *see also* Kannan, *supra* note 114, at 755–56; CARDOZO, *supra* note 119, at 151 (In situations where precedent has been established, judges "have nothing to do but stand by the errors of [their] brethren of the week before, whether [they] relish them or not.").

Emile would have won his later suit had the city tried to enforce its regulation against him.

The doctrine allowing an assignee to claim an injury-in-fact based on an assignor's injury can raise a similar issue.[216] Imagine a hypothetical where a manufacturer sells a defective product—say, an exploding blender—to a large group of consumers. The manufacturer could offer to pay one of the badly injured blender users to assign his claim to a third- party of the manufacturer's choosing. The injured blender consumer would likely take the payment if it was more than they would be able to recover at trial. Then, the third-party (also paid off by the blender manufacturer) could incompetently sue the manufacturer, lose, and set a precedent harmful to all the other consumers.

Similarly, current standing doctrine may fail to protect future litigants' due process rights in the associational standing context. As Donald Simone has pointed out, "[a]n association is not, in every sense, the sum of its members," and consequently, "the possibility arises that when a court grants an association standing the association will fail to represent membership interests adequately."[217] This is so because the decisions of "an association's leadership do not necessarily reflect the views of its constituency."[218] Accordingly, "in a suit alleging employment discrimination, a union may adequately represent the interests of members who are female or who are members of a racial minority, but inadequately represent the interests of male or nonminority members."[219] Likewise, "a union may fail to advocate the interests of its officers when it pursues litigation on behalf of rank and file members."[220] Accordingly, if courts do not check whether the association litigant is adequately adverse on behalf of all its

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216. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000); Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 286 (2008).

217. Donald F. Simone, Note, *Associational Standing &and Due Process: The Need for an Adequate Representation Scrutiny,* 61 B.U. L. REV. 174, 179 (1981).

218. *Id.*

219. *Id.* at 180.

220. *Id.* at 180–81.

members, standing cannot protect the interests of the potential future litigants whose interests were not represented.

Standing doctrine may also fail to protect future litigants when a litigant currently before the court who should have a serious incentive to advocate vigorously nonetheless chooses not to do so. Consider cases involving qualified immunity. In a stereotypical qualified immunity case, the plaintiff sues a government official, say, a police officer, for allegedly violating one of the plaintiff's constitutional rights.[221] However, the way in which the police officer allegedly violated the constitutional right was novel, and under current precedent, the police officer would be entitled to qualified immunity.[222] Because he is entitled to qualified immunity, the police officer may only half-heartedly litigate the constitutional violation and, instead, primarily rely on the defense of qualified immunity. Consequently, the Court might conclude that the police officer violated the plaintiff's constitutional right but that no relevant law existed at the time to show the police officer knew that his actions violated a right, and the police officer is let off the hook.[223] But then, when another police officer is alleged to have done the same thing, the Court assumes that the second police officer knew about the holding from the earlier case and therefore holds that officer liable. In that way, the second officer is held liable based on the precedent in a case to which the second officer was not a party. And, as the example shows, the second officer was not adequately represented in the creation of that precedent because the first officer was insulated from the adverse constitutional outcome by qualified immunity and consequently did not vigorously defend the constitutional issue.

Looking to a real case, the facts of *Hollingsworth v. Perry* shed light on how current doctrine does not always live up to its aspirations when a party who should, theoretically, have an incentive to

221. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 231 (2009).

222. *See* Safford Unified Sch. Dist. v. Redding, 557 U.S. 364, 377–78 (2009).

223. *See, e.g.*, Camreta v. Greene, 563 U.S. 692, 697–98 (2011) (describing a situation in which the Ninth Circuit held that government officials violated a Fourth Amendment right but that the officials were protected by qualified immunity).

vigorously litigate chooses not to.[224] In *Perry*, California had passed a ballot initiative called Proposition 8 amending the state constitution to "provide that '[o]nly marriage between a man and a woman is valid or recognized in California.'"[225] Plaintiffs—same-sex couples—sued, arguing that Proposition 8 violated the Federal Constitution.[226] At that point, the defendants, including "California's Governor, attorney general, and various other state and local officials responsible for enforcing California's marriage laws," decided not to defend the constitutionality of the amendment—despite, theoretically, being the parties with the most relevant interest in defending the state's laws.[227] So, the amendment's proponents—who did want to defend its constitutionality—tried to intervene in the suit.[228] The district court allowed the intervention but ruled that the amendment was unconstitutional.[229] The government decided not to appeal.[230] Eventually, the suit reached the Supreme Court and the Court was required to address whether the amendment's proponents had standing to challenge the district court's judgment.[231] The Court held that, because the proponents did not have a direct stake in the

224. Hollingsworth v. Perry, 570 U.S. 693 (2013).

225. *Id.* at 701.

226. *Id.*

227. *Id.*

228. *Id.* at 702. The intervention process was designed in part to rectify instances of inadequate representation. FED. R. CIV. P. 24 advisory committee's note to 1966 amendment ("The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate."). Amicus curiae briefs can similarly help courts interpret the law correctly when parties have failed to address an important point. *See* SUP. CT. R. 37 (2022) ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court."). Nevertheless, neither mechanism can completely resolve the due process issue created by stare decisis when the effected party was unaware or unable to intervene or file an amicus brief (*e.g.*, if the effected party was not yet alive, lacked resources to enter the litigation, or was simply unaware of the case).

229. *Perry*, 570 U.S. at 702.

230. *Id.*

231. *Id.* at 703–04. The Court has required litigants to satisfy the standing requirements "throughout the life of the lawsuit," including on appeal. *See* Wittman v. Personhuballah, 578 U.S. 539, 543 (2016).

case, they lacked standing.[232] Because the Court applied its standing rules in a formulaic manner, without bothering to check which party had a real interest in prevailing—and thus assuring adversarialism—the Court allowed precedent to come into existence without the benefit of the adversarial process.[233] It thus failed to protect the interests of potential litigants who would want to rely on the amendment.[234]

This can also happen when litigants with serious injuries are filtered out of the adjudicatory process and only litigants with minor injuries—plaintiffs who cannot recover high damages—remain in the precedent-creating adjudicatory process. It stands to reason that a plaintiff who has an injury worth a significant sum in damages is likely to litigate more vigorously to acquire that award. And such high-value plaintiffs are likely to be able to engage vigorous counsel on a contingency fee due to the high amount of damages. However, defendants may decide not to risk a large judgment and try to settle with those plaintiffs. By contrast, plaintiffs with small injuries, and consequently small damages, may not be able to acquire counsel who will expend the necessary resources on their cases, and the defendants in those cases may be more willing to risk a small judgment. Thus, the very plaintiffs who are most likely to vigorously litigate with effective counsel—thereby adequately representing future parties—may be filtered out of precedent-creating adjudication. Consequently, the parties left in the process may not be best suited to adequately represent future litigants.

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232. *Perry*, 570 U.S. at 715.

233. *See id.* at 720–21 (Kennedy, J., dissenting) (Explaining that only allowing the State to defend the amendment would put its defense in the hands of the very "elected public officials [who] had refused or declined to adopt" the amendment in the first place) (quoting Perry v. Brown, 52 Cal. 4th 1116, 1140 (Cal. 2011)).

234. Another example can be found in United States v. Windsor, 570 U.S. 744 (2013). There, the plaintiff sued the United States arguing that the Defense of Marriage Act violated the Fifth Amendment. *Id* at 751–52. The executive branch, who was the defendant, declined to defend the constitutionality of DOMA despite being the party with standing to do so, and consequently the amendment was declared unconstitutional. *Id* at 752–53. When the Court does not check for adverseness in its standing analysis, it fails to provide the protection that due process requires.

C. Inconsistencies in Current Article III Standing Doctrine

I have already described some of the criticisms of standing doctrine in part I.B., but I would like to briefly address some inconsistencies in the current doctrine that demonstrate that standing cannot really be about Article III jurisdiction. These inconsistencies would be resolved if we thought of standing as a due process requirement instead.

First, allowing standing in pre-enforcement actions is inconsistent with statements the Supreme Court has made about standing doctrine. By their very nature, pre-enforcement actions involve no injury-in-fact. Yet, the Court allows the case to go forward because of the *risk* of future injury.[235] If injury-in-fact were necessary for the exercise of Article III jurisdiction, the Court would not have been able to make an exception for pre-enforcement actions.[236] I contend that the real reasoning for allowing standing in pre-enforcement actions is that the risk of injury is enough to spur litigants on to fight their hardest to win and, thereby, present the most compelling arguments to the Court. If the standing requirement was really about ensuring a traditional type of justiciable injury, pre-enforcement actions would not make any sense. But, because standing is really about ensuring that litigants will vigorously represent future parties, allowing standing in pre-enforcement actions makes sense when the Court has proof that the litigants will do their best to do so.

The Court's precedent addressing defendant/appellant standing also demonstrates that the real crux of standing is adequate representation, not the existence of an injury in fact. Defendants do

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235. *See generally* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–65 (2014) (holding that litigants have standing to challenge a statute before the statute has been applied to them if the threatened enforcement is sufficiently imminent).

236. Jurisdictional requirements are not waivable and courts must always assure themselves of their own jurisdiction. *See* Henderson *ex rel*. Henderson v. Shinseki, 562 U.S. 428, 434 (2011); Gonzales v. Thaler, 565 U.S. 134, 141 (2012) ("Subject -matter jurisdiction can never be waived or forfeited."); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998).

not usually have injuries, plaintiffs do.[237] So, if standing were merely about the plaintiff having a requisite injury, it would make no sense to require that defendants "possess a 'direct stake in the outcome.'"[238] Yet, the Court has required that defendants have standing.[239] If we think about standing as ensuring that the parties are doing their best to prevail, then it makes good sense to require that the defendant has standing. If the defendant does not have a real stake in the litigation, then she will not necessarily do her best and fail to adequately represent future defendants. The requirement of defendant standing shows that what the Court really desires is adversarialism.

As explained in footnote 204, courts regularly exercise jurisdiction even where the parties are not adverse.[240] If standing were really an Article III jurisdictional requirement as the Supreme Court contends, the federal courts would not be able to order non-adversarial judgments like consent judgments, consent decrees, etc.[241] While it is true that processes like consent decrees and judgments are somewhat different than a usual case, their force and effect is still derived from the court's exercise of jurisdiction.[242] The fact that the parties to a consent decree or judgment have agreed to the court's jurisdiction makes no difference because "[p]arties may not, by agreement, confer subject-matter jurisdiction on a federal

237. Of course, defendants may have an injury and decide to counterclaim, but that is not necessary for the Court to find standing.

238. Hollingsworth v. Perry, 570 U.S. 693, 705 (2013) (citation omitted).

239. *See id.* at 705.

240. *See* Pushaw, *supra* note 21, at 526 (providing examples of non-adversarial adjudications like consent decrees, consent judgments, bankruptcy hearings, and naturalization orders). "Article III limits federal courts to cases or controversies, but this limitation does not explicitly require that plaintiffs have a particular stake in the outcome. A case or controversy might exist quite apart from whether there is an injury, legal or otherwise, to the complainant." Sunstein, *Standing and the Privatization of Public Law, supra* note 77, at 1474.

241. Flast v. Cohen, 392 U.S. 83, 101 (1968) (focusing on the importance of adverse parties in the standing analysis).

242. *See Jurisdiction,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("A court's power to decide a case *or issue a decree*." (emphasis added)). I explain why this is not a problem under the due process theory of standing in Part V.B. below.

court that would not otherwise have it."[243] Thus, standing—as the Court has articulated it—cannot be jurisdictional, or else those types of judgments would be without force.[244]

Additionally, the Court's focus on the "specificity" [245] and "sharp[ness]"[246] of the issues presented in standing cases does not seem relevant if the question of standing is jurisdictional. If standing were truly jurisdictional, as long as the plaintiff had an injury in fact recognized at common law, it wouldn't matter how specifically or sharply the issues were presented because the Court would have jurisdiction.[247] If, instead, as I propose, standing is about ensuring adequate representation, the sharpness of issues is critical because the clarity of the issues will affect how effectively the Court will be able to come to the correct determination for future litigants.

The Supreme Court's practice of appointing amicus curiae to defend the decision below also demonstrates the inconsistency of current standing doctrine because court-appointed amici often lack any injury-in-fact and yet are treated similarly to a party to the case. Take *Jones v. Hendrix* as an example.[248] There, the U.S. Office of the Solicitor General indicated that it would defend the Eighth Circuit's judgment below but not the Eighth Circuit's rationale. [249] Accordingly, the Court appointed Morgan Ratner as amicus curiae to argue in support of the Eighth Circuit's reasoning.[250] Ratner had no specific stake in the outcome of the litigation, yet orally argued the case, and the Supreme Court adopted the position she

243. *Consent jurisdiction,* BLACK'S LAW DICTIONARY (11th ed. 2019).

244. Jurisdictional requirements are not waivable, and courts must always assure themselves of their own jurisdiction. *See* Henderson v. Shinseki, 562 U.S. 428, 434 (2011).

245. *Flast,* 392 U.S. at 106.

246. *Id.* at 99

247. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (explaining that injury analysis focuses on "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts").

248. 143 S. Ct. 1857 (2023).

249. *Id.* at 1864.

250. *Id.*

advocated rather than the position of either party.[251] When appointing amicus curiae, the Court appears to implicitly recognize that injury-in-fact is not always necessary for adversarialism. By appointing an amicus curiae to argue a specific position, the Court ensures that position has been adequately represented before the Court issues a holding binding all future parties—a due process requirement.

Lastly, allowing non-injured parties to sue in the First Amendment overbreadth context is also inconsistent with the Court's statements about standing being jurisdictional. If standing were truly jurisdictional and an "irreducible constitutional minimum" as the Court has so vehemently asserted,[252] the Court wouldn't have been able to "alter[] its traditional rules of standing to permit—in the First Amendment area," parties without a stake in the litigation to sue.[253] Conversely, if standing is not jurisdictional but merely a due process issue, the Court could adjudicate those cases provided it ensures due process another way.

D. Preemptively Addressing Issues with the Due Process Theory

There are some natural rejoinders to the due process theory which I will attempt to address here.

First, one might ask, how can the application of stare decisis ever violate due process if it was applied at the Founding? There are two answers. One is that, as I explained in Part III, stare decisis wasn't always as rigid a command as it is today.[254] At the Founding, precedent was used more to establish legal principles than to determine the precise outcome of a case.[255] Strict stare decisis and the prior panel precedent rule only came about later.[256] Thus, stare decisis did not bind future litigants in the same way it does today.

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251. *Id.*

252. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

253. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

254. *See supra* Part III.

255. *See* GERKEN, *supra* note 117, at 67, 70.

256. *See id.*; Mead, *supra* note 119, at 795 (explaining that "[t]he adoption of a law-of-the-circuit rule is a relatively modern judicial phenomenon" (quotation omitted)).

Relatedly, the function of a judicial opinion has changed over time. During the Founding era, "[j]udicial opinions began as extemporaneous oral explanations rendered immediately at the close of proceedings" given for the benefit of the parties to the case.[257] But, as time went on:

> Modern judge[s] addresse[d] an opinion only incidentally to the parties and to the lawyers who argued the case. Especially for appellate judges, the primary audience is the readership of the published report. The main job is not explaining the outcomes to the immediate participants, but rather, generating precedents to guide future conduct and adjudication."[258]

Thus, the nature of the modern legal opinion affects future litigants in a way that earlier opinions and precedents did not.

A second answer is that even if the application of stare decisis at the Founding hadn't been considered a violation of due process, that may have been because the courts were already protecting potential future litigants by making sure the parties before them were adverse. In other words, courts were already employing a proto-standing doctrine.[259]

A second rejoinder. It would be natural to ask, what about the Court's focus on separation of powers when discussing standing?[260] Surely—some will say—standing doctrine serves to preserve the separation of powers principle in the Constitution? My answer is that Article III is not, by itself, precisely about the separation of powers—it says nothing about it. Rather, the separation of powers principle is found in the *structure* of the Constitution; each of the first three articles contains a vesting clause setting forth the powers

257. John H. Langbein, *Chancellor Kent and the History of Legal Literature,* 93 COLUM. L. REV. 547, 578 (1993).

258. *Id.* at 578 (emphasis added).

259. *See, e.g.*, Lord v. Veazie, 49 U.S. 251 (1850).

260. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 SUFFOLK U. L. REV. 881, 882 (1983).

of the respective branches of government.[261] To the extent that adjudicating a case might somehow encroach on either the legislative power or the executive power, it's the Vesting Clauses of Articles I and II respectively that are the relevant constitutional provisions for assessing the Court's conduct, not § 2 of Article III.[262] The case-or-controversy jurisdiction in Article III § 2 is not a limit on the courts' ability to hear cases so long as they are in fact, definitionally, cases. And the "straightforward" reading of the word "Case," as understood at the Founding, simply means a situation where "a plaintiff has a cause of action, whether arising from the common law, emanating from the Constitution, or conferred by statute."[263] Insofar as the plaintiff has a cause of action, a court's decision to adjudicate that dispute does not violate the separation of powers because the judicial power is quintessentially, the power to adjudicate.[264] Indeed, a court's decision not to

261. *See* U.S. CONST. art. I, II, & III; *Lujan,* 504 U.S. 559–60 ("[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

262. As an aside, to the extent that Court rulings can trench on the powers vested in the legislature and executive under Articles I and II, the only reason the Court is able to have any substantial impact is because of stare decisis. Without stare decisis, each case would affect only the individual litigant and the government could enforce its regulations against the public at large notwithstanding those regulations having been found unconstitutional vis-a-vis the specific litigants in each case. *See* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (explaining that when the court grants injunctive relief, "the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding"); Amanda Frost & Samuel Bray, *One for all: Are nationwide injunctions legal?,* 102 JUDICATURE 70, 72 (2018) ("[C]ommon law courts and equity courts—before the Founding, at the Founding, and for most of U.S. history— . . . g[a]ve remedies *only for a party to the case*." (emphasis added)). If the actions of the political branches were only affected with regard to a handful of litigants, it would not seriously undermine those branches' prerogatives. But stare decisis does exist and, consequently, when the government loses a case, it is effectively bound in all future cases and must change its conduct in relation to the entire public. To some extent, ensuring that litigants have standing minimizes the number of cases affecting the government's conduct at large, but that is only a side-effect of the doctrine, not its constitutional basis.

263. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1122 (2021) (Newsom, J., concurring).

264. *See Judicial Power,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("The authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what

adjudicate can be an abdication of the court's responsibility in checking the other branches of government and stopping them from governmental overreach.[265]

Furthermore, it seems to me that the Court has so often focused on the separation of powers when discussing standing only because so many standing cases involve challenges to government conduct.[266] But if we look at the application of standing doctrine in cases that do not involve the executive or legislative branches, we can see that it bears no inherent relationship to preserving the separation of powers.[267] Take *Spokeo*,[268] for example. Although the Court stated that standing "'serves to prevent the judicial process from being used to usurp the powers of the political branches,'"[269] the Court's *own* decision in that case obstructed the legislature's power: Congress had created a cause of action authorizing the plaintiff to sue, but the Court, finding that the plaintiff lacked an

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has been done or not done under it."); 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §101.02 (2020) ("'[P]rivate rights' model of adjudication . . . posits that the sole role of the federal judiciary is to adjudicate live disputes."); Emile J. Katz, *The "Judicial Power" and Contempt of Court: A Historical Analysis of the Contempt Power as Understood by the Founders,* 109 CAL. L. REV. 1913, 1952 (2021) ("Taken together, the papers of the Federalists, the Anti-Federalists, and the notes of the various state conventions demonstrate that the people who wrote and informed Article III believed that judicial power referred to power of adjudication.").

265. *See* THE FEDERALIST NO. 51 at 318–19 (James Madison) (Clinton Rossiter ed., 2003) (explaining that the Constitution's "great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition."); Chemerinsky, *In Defense of Judicial Supremacy, supra* note 87, at 1461 ("The Constitution exists to limit government, and the limits are meaningful only if someone or something enforces them. Enforcement often will not happen without the judiciary.")

266. *See, e.g.*, *Mellon*, 262 U.S. at 447 (challenging statute); Flast v. Cohen, 392 U.S. 83, 83 (1968) (challenging government's unconstitutional use of taxpayer funds); *Lujan*, 504 U.S. at 555 (challenging regulations issued by the Secretary of Interior).

267. *See* Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 958 (11th Cir. 2020) (Jordan, J., dissenting).

268. 136 S. Ct. 1540

269. *Id.* at 1547 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013)).

injury in fact, refused to allow the plaintiff to do so.[270] Consider the counterfactual. If the Court had allowed the plaintiff to sue, as Congress intended, it would not have had any effect whatsoever on the political branches. Imagine a hypothetical involving a common-law right. Suppose I saw someone steal my girlfriend's backpack and decided to sue that person for the tort of trespass to chattels. Obviously, I would lose on the merits because I do not have a claim, but before it even got to the merits of my suit, a court would hold that I lacked standing to bring the case because I had no injury in fact and can't sue on behalf of my girlfriend.[271] While it is obviously true that I lack standing, whether or not I can sue to enforce my girlfriend's property rights has nothing to do with the separation of powers. Rather, it has everything to do with the fact that I'm not the appropriate party to vindicate my girlfriend's property rights—she is. Standing is about making sure the best litigant is before the Court, not about the separation of powers.

V. IMPLICATIONS

There are several implications that arise from assessing standing as a due process requirement rather than as an Article III "Cases" or "Controversies" requirement.

A. The Jurisdictional Implication

Because standing is required by the Due Processes Clauses, not Article III, standing shouldn't be considered jurisdictional. That means that courts should be able to address the merits of a case even if the litigants in that case do not have standing. That is because the Due Process Clauses have nothing to do with the

270. *See also* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2221 (2021) (Thomas, J., dissenting) ("In the name of protecting the separation of powers . . . this Court has relieved the legislature of its power to create and define rights.").

271. *See* Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975))).

jurisdiction of the federal courts, only with what the courts may do consistent with due process.

So, one might ask, if courts can hear the merits of a case even without standing, what is the purpose of standing doctrine? The answer is that even if a court can hear the merits of the case, the Due Process Clauses place other limits on the court.

B. The Precedent Implication

Under my view, due process prohibits courts from giving precedential effect to cases where litigants lack standing—it does not prohibit courts from adjudicating those cases *ab initio*.[272] In other words, the court's ruling in a case where the court determined that the parties lacked standing could not be precedential in any future case even if a future case had the exact same facts. That outcome may sound surprising, but in many ways it is consistent with how the federal courts already function. At present, nearly all federal circuit courts of appeals maintain a rule stating that unpublished decisions of that circuit have no precedential value.[273] And the federal circuit courts have discretion to choose whether or not to issue a case for publication or not.[274] Given that courts of appeals already make the decision whether or not to publish—

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272. Another option, though perhaps hard to imagine, would be to get rid of the concept of binding precedent (including the prior panel precedent rule) entirely. That way, each litigant would have a fresh chance to make their arguments in court before being bound by a judgment. Indeed, some scholars have proposed the courts scrap the prior panel precedent rule as inconsistent with federal statutes anyway. Kannan, *supra* note 114, at 757 ("The interpanel rule is inconsistent with" statutes authorizing "appeals as of right.") *but see* FALLON, Jr., Et Al., *supra* note 2, at 588 (arguing that stare decisis has become part of the Judicial power); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 68 (2011) (arguing that stare decisis is permissible because of the Supremacy Clause). And then-professor Barret has argued that to avoid the due process problems inherent in binding precedent "[t]he courts of appeals should either eliminate the rule that prohibits one panel from overruling another, or change the en banc rules to add error correction as a basis for review." Barret, *supra* note 10, at 1061.

273. Henry J. Dickman, *Conflicts of Precedent*, 106 VA. L. REV. 1345 (2020); Kannan, *supra* note 114, at 756 & n.7.

274. Most circuits have explicit standards for when to publish, but some do not. *Compare* 4TH CIR. LOC. R. 36 *and* 5TH CIR. R. 47.5.1, *with* 2ND CIR. R. *and* 7TH CIR. R. 32.1.

whether or not to give a case precedential effect—it is not unreasonable to make standing part of that process.[275] For example, circuit courts sometimes avoid binding potential future litigants in qualified-immunity cases when they hold an officer liable in an unpublished opinion. Unpublished opinions are not clearly established law and therefore do not give notice to future officers. Thus, future officer-defendants are not bound by that precedent and cannot be held liable.[276] If we view standing as a due process requirement, courts could still adjudicate cases in which the parties lack standing but avoid the due process concerns by leaving the ensuing decision unpublished. And I believe this is why non-adversary court processes like consent decrees or guilty pleas are currently permissible: they are not generally precedential, so they do not affect any future party.[277]

It is not only the circuit courts that would have to determine standing. The Supreme Court would have to as well (and with even more care given how Supreme Court decisions affect the entire country and are even more difficult to change). But the Supreme Court already does something similar by assessing the likely *precedential effect* of cases when granting certiorari. Supreme Court Rule 10 sets out criteria for what types of cases the Court will hear.[278] For instance, Rule 10 states that the Court will primarily grant a writ of certiorari when the case raises an issue that has created a circuit split or a split between the penultimate courts of different states.[279] Evidently, then, the Court chooses cases based on

275. In 2004, decisions in 81% of cases before the federal courts of appeals were issued in unpublished form. *See* OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR, at 39 tbl. S-3 (2004), http://www.uscourts.gov/judbus2004/tables/s3.pdf. [https://perma.cc/654N-RCUV].

276. *See, e.g.*, Grissom v. Roberts, 902 F.3d 1162, 1167–69 (10th Cir. 2018).

277. Tracy Hester, *Consent Decrees as Emergent Environmental Law*, 85 MO. L. REV. 687, 692 (2020) (Consent decrees "rarely act as a possible source of guidance or statement of legal principles to inform future judicial decisions. Effectively, consent decrees are discounted almost entirely as a source of organically persuasive legal guidance or precedential authority.").

278. SUP. CT. R. 10.

279. *Id.*

how its precedent will unify the precedent of the states and circuit courts.

Insofar as Supreme Court precedent is sticky[280] and affects future litigants across the country,[281] the Supreme Court should be especially cautious of taking cases in which the parties are not sufficiently adverse or well-represented.

C. The Federalism Implication

Another implication is that standing requirements would extend to state courts. At present, the Constitution is thought to require only that litigants have standing when suing in *federal* courts.[282] That is because Article III of the Constitution—the article modern standing doctrine is (in my view incorrectly) tied to—is about the jurisdiction of the federal courts, not the state courts. But if, as this article contends, standing is required by due process, state courts will need to ensure standing as well because the Fourteenth Amendment's Due Process Clause applies to the states.[283]

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280. By sticky, I mean unlikely to change. The Supreme Court hears a small number of cases every year and, consequently, once it renders a decision on a topic, is unlikely to address that topic again in short order.

281. Supreme Court decisions are binding on all lower courts, and thus the magnitude of their consequence means that it is especially important to ensure that the issues in front of the Court are clear and unmanipulated. *See* U.S. CONST. art. III, § 2; *id.* art. VI, §2; 28 U.S.C. § 1254; FALLON, JR., ET AL., *supra* note 2; Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls." (cleaned up)); United States v. Katzin, 769 F.3d 163, 173 (3d Cir. 2014) ("[I]t is self-evident that Supreme Court decisions are binding precedent in every circuit."); United States v. Aguon, 851 F.2d 1158, 1173 (9th Cir. 1988) (en banc) (Reinhardt, J., concurring) ("When the Supreme Court has spoken, its pronouncements become the law of the land."), *overruled by* Evans v. United States, 504 U.S. 255 (1992).

282. *See* Virginia v. Hicks, 539 U.S. 113, 120 (2003).

283. U.S. CONST. amend XVI. *See* Crema & Solum, *supra* note 99. Indeed, one implication from Crema and Solum's article is that the Fourteenth Amendment may require greater process from the states than the Fifth Amendment requires of the Federal government. On the other hand, "the operative language of the Fifth and Fourteenth Amendments is materially identical, and it would be incongruous for the same words to generate markedly different doctrinal analyses." Herederos De Roberto Gomez

Ultimately, this should not be too large a change for state courts because most states already have a standing requirement based on their interpretations of their own constitutions.[284]

D. The Method-of-Assessment Implication

Perhaps the most important implication of reframing standing as a due process safeguard is that it raises the question whether an "injury in fact" should remain the standard for assessing a litigant's standing. While it is true that ensuring that the plaintiff has an injury is likely a good heuristic for how adverse the parties really are, there are other ways of making sure that the two sides in litigation are doing their best to prevail. And sometimes the injury in fact threshold does not adequately filter out non-interested parties. Consider a party with a small monetary injury—the sort of injury that is traditionally thought to confer standing[285]—yet who does not really care about the suit.[286] Or, look to the facts of *Perry*, where the party with the requisite injury—there, the State—simply chose not to defend the litigation.[287] On the other hand, a person might have only an "ideological" or "psychic" injury—perhaps not

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Cabrera, LLC v. Teck Res. Ltd., 43 F.4th 1303, 1308 (11th Cir. Aug. 12, 2022), *cert. denied,* 143 S. Ct. 736 (2023).

284. *See* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts,* KY. J. EQUINE, AGRIC., & NAT. RES. L. 349, 353 (2015–2016) ("An overwhelming majority of states apply some type of constitutional standing doctrine.").

285. *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret,* 107 NW. U. L. REV. 169, 178–79 (2012) ("[T]he Court has said that 'pocketbook' or 'wallet' injury always qualifies, but that mere 'ideological' or 'psychic' harm never does."). A "relatively small economic loss—even an identifiable trifle—is enough to confer standing." Massachusetts v. U.S. Dep't of Health & Hum. Servs., 923 F.3d 209, 222 (1st Cir. 2019) (citation omitted); Halbig v. Burwell, 758 F.3d 390, 396 (D.C. Cir. 2014) (same), *judgment vacated,* No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).

286. *See* Tushnet, *supra* note 11, at 1712 ("Hohfeldian plaintiffs . . . can be as unrepresentative as any other kind of plaintiff, and can induce the courts to adjudicate cases in ways that bind future courts and litigants to premature or abstract decisions."). "Neither empirical, psychological, nor anthropological evidence has ever been cited to support" the assumption that an injury-in-fact will provide the only incentive to "litigate an issue fully." 15 JAMES WM. MOORE ET AL., Moore's Federal Practice §101.40[1][a] (2020).

287. *See* Hollingsworth v. Perry, 570 U.S. 693, 702 (2013).

enough to count for traditional standing[288]—and yet feel so strongly about the case and advocate so vigorously that they would be a particularly good representative for future litigants.[289] There is nothing inherently constitutional or old about using "injury in fact" to determine whether a party has standing.[290] Given that a bare-minimum injury might not be sufficient to ensure that litigants are actually adverse or doing their utmost to prevail, it behooves the Court to create a new standard for assessing a litigant's standing.

I will admit that I do not have a perfect replacement for the injury-in-fact analysis to measure whether litigants will do their best to prevail. Even without a perfect determination, though, I think we can do better than the current standing doctrine—the method of which does not align with even its own stated goals. I do not purport to provide a definitive method here but hope to start a conversation about ways in which courts can better assess a party's ability to effectively prosecute her case such that she adequately represents future litigants. It may be difficult to create a workable standard for assessing how well a current litigant will represent future litigants, but the modern standing doctrine that is currently used is a bad heuristic and equally unworkable. So courts may as well try to come up with something better.

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288. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (mere harm to an ideological interest is an insufficient injury to confer standing); Valley Forge Christian Coll. v. Ams. United, for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982).

289. *See* Tushnet, *supra* note 11, at 1712 ("The sociology of litigation indicates that the public interest litigant, with an ongoing interest in the issue at stake, is often likely to be the most effective representative of the interests at stake."). Employing an assessment that does not require a "Hohfeldian" plaintiff can resolve one of Tushnet's criticisms of Brilmayer's representation theory.

290. *See* Fletcher, *supra* note 1, at 229 ("Properly understood, standing doctrine should not require that a plaintiff have suffered 'injury in fact.'"); Sunstein, *Standing After Lujan*, *supra* note 2, at 166 (explaining that "the view" that "Article III forbids Congress from granting standing to 'citizens' to bring suit" is "essentially an invention of federal judges, and recent ones at that" and, therefore, "should not be accepted by judges who are sincerely committed to the original understanding of the Constitution."); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1117 (11th Cir. 2021) (Newsom, J., concurring) (explaining that "'Injury in fact' is not a particularly old concept" and that the concept "made its first appearance in a Supreme Court opinion about 50 years ago—and thus about 180 years after the ratification of Article III.").

One way that we might try to discern standards for assessing standing is by looking at how courts ensure adequate representation in the preclusion context. For instance, in class actions, Federal Rule of Civil Procedure 23 contains several requirements that class representatives, and their counsel, must satisfy in order to represent the class.[291]

Respecting whether the representative in a particular case is adequate, Rule 23 requires that courts assess whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class" and whether "the representative parties will fairly and adequately protect the interests of the class."[292] With regard to counsel, the assessing court "must consider [among other things] . . . the work counsel has done in identifying or investigating potential claims in the action; . . . counsel's experience in handling [past cases]; . . . counsel's knowledge of the applicable law; and . . . the resources that counsel will commit to representing the class."[293]

Both standards can be used analogically to assess whether a litigant has standing and, thus, whether her case may be considered for precedential treatment. For instance, analogizing to Rule 23(a)(3), the court can determine whether the facts of the plaintiff's case are similar to facts likely to arise in the future. This would help ensure good law because it prevents general precedent being made based on an unusual or difficult set of facts. There is a reason why the common law-school adage, "bad facts make bad law"[294] or "hard cases make bad law" exists.[295] Requiring that the facts of a case be generally similar to facts in cases involving similar claims would help prevent strategic litigators from picking and choosing cases based on how favorable the facts are in a given case and

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291. *See* FED. R. CIV. P. 23.

292. FED R. CIV. P. 23(a)(3)–(4).

293. FED. R. CIV. P. 23(g).

294. *See, e.g.,* Eugene H. Soar, *McKinney v. Richitelli: Abandoning Parents and Presumptive Penalties,* 26 N.C. CENT. L. J. 155, 155 (2003-2004) ("The tired adage 'bad facts make bad law' is given new life in a recent decision by the North Carolina Supreme Court").

295. Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation,* 51 J. LEGAL STUD. 133, 133(2021) (finding that "[w]hen a case raises concerns that are not reflected in doctrine, the court might distort the law to avoid a hardship").

thereby shaping the law in a way that prejudices the usual case. As described above, the Court has explained that one purpose of standing is to ensure that the facts in a particular case are representative of future cases.[296]

Rule 23(g)'s counsel requirements would be even easier to apply analogically to the precedent context. A court need only look at how competent the attorney has been in the past or how well they seem to understand the particular area of law to assess whether the representative has chosen an attorney who will best represent them to prevail against the opposing party.

Aside from analogizing to Rule 23, it would be helpful for courts to ask, "do the litigants in this case actually *care* about the issue involved here?" Although it did so using the framework of the traditional standing analysis, this inquiry is essentially what the D.C. Circuit did in *American Society for Prevention of Cruelty v. Feld. Entertainment, Inc.*[297] *Feld* involved a plaintiff who sued to stop a circus from violating the Endangered Species Act by exploiting elephants.[298] After a bench trial, the district court held that the plaintiff's "allegations, if proven, would [have been] sufficient to establish Article III standing," but because it found that the plaintiff was "'essentially a paid plaintiff and fact witness' whose trial testimony, and particularly his claim that he had developed an attachment to the elephants, lacked credibility," it denied the plaintiff standing.[299] It found the following facts when determining that the plaintiff did not have a real stake in the outcome of the case:

> [The plaintiff] complained publicly about the elephants' mistreatment only after he was paid by activists to do so, . . . had referred to one of the elephants as a 'bitch' and "killer elephant" who "hated" him; that he struggled to recall the names of the

296. *See* Valley Forge Christian Coll. v. Ams. United, for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (explaining that one of the purposes of standing is to ensure "confidence that [the Court's] decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court").

297. 659 F.3d 13 (D.C. Cir. 2011).

298. *Id.* at 17.

299. *Id.* at 18.

> elephants in two separate depositions; that he had failed to take advantage of multiple opportunities to visit the elephants outside of the circus; and that he was unable to identify the individual elephants on videotape, including one who had the "distinctive and unusual (for an Asian elephant) characteristic of a swayed back."[300]

Thus, the district court essentially made a factual inquiry into whether the plaintiff indeed cared about the suit, found that he did not, denied standing, and the circuit court then affirmed its judgment.[301] The inquiry conducted in *Feld* can serve as an example for how courts may be able to assess how much a litigant cares about the outcome of her case, irrespective of whether she has an injury-in-fact. A factual inquiry to check whether the litigants actually care enough about prevailing would not drastically change the process of assessing standing because courts must already sometimes conduct evidentiary hearings to resolve factual disputes that bear on standing.[302]

E. The Consolidating Constitutional and Prudential Standing Implication

Lastly, thinking of standing as a due process requirement rather than a jurisdictional requirement would erase the fuzzy[303] division between jurisdictional standing requirements and prudential standing requirements. Like jurisdictional standing requirements, the prudential requirements are about ensuring that the best arguments are before the Court.[304] Thus, they serve the same purpose, and all standing requirements could be consolidated into

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300. *Id.* at 20.

301. *Id.* at 20–22.

302. *See* Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Munoz-Mendoza v. Pierce, 711 F.2d 421, 425 (1st Cir. 1983); Disability Support All. v. Heartwood Enters., LLC, 885 F.3d 543, 547 (8th Cir. 2018); Bischoff v. Osceola Cnty., Fla., 222 F.3d 874, 881 (11th Cir. 2000).

303. The Court has not always been clear about whether certain requirements are prudential/policy-driven or constitutional. 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §101.04 (2020) ("Additional uncertainty exists in the doctrine of justiciability because the doctrine has become a blend of constitutional requirements and policy considerations." (citation omitted)).

304. Sec'y of State of Md. v. Munson Co., 467 U.S. 947, 955 (1984).

one analysis meant to determine whether the parties are adequately adjudicating their case, and protecting potential future litigants, so that the case can be considered precedential.[305]

CONCLUSION

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government—including state and federal courts—from depriving persons of life, liberty, or property without due process of law. The effect of stare decisis can function to deprive future litigants of life, liberty, and property, and, thus, courts must ensure that when they publish a precedential ruling, they do so in a way that is consistent with due process. The way courts protect future litigants consistent with due process is by ensuring that the litigants presently before the court in a precedential case adequately represent future litigants. And the way that courts ensure adequate representation is by checking whether the litigants before them—both plaintiffs and defendants—are sufficiently adverse and competent to present the court with the best arguments on either side of the case. That is the gist of standing. Thus, standing is required by the Fifth and Fourteenth Amendments' Due Process Clauses.

305. Because the standing requirements—both what has been termed "prudential" and what has been termed "jurisdictional"—are required by the Due Process Clauses, Congress could not waive any of the requirements, *see* Warth v. Seldin, 422 U.S. 490, 509–510 (1975), without providing a different method of ensuring due process.