Florida Law Review

Volume 64 | Issue 5 Article 7

10-17-2012

The Invisibility of Jurisdictional Procedure and Its Consequences

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Recommended Citation

Justin R. Pidot, *The Invisibility of Jurisdictional Procedure and Its Consequences*, 64 Fla. L. Rev. 1405 (2012).
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ESSAYS

THE INVISIBILITY OF JURISDICTIONAL PROCEDURE AND ITS CONSEQUENCES

*Justin R. Pidot**

Abstract

Modern standing doctrine has been the subject of substantial scholarly inquiry. Critics charge that it allows judges to resolve cases based on their own ideologies, favoring corporations over individuals and those who harm over those harmed. The doctrine likewise disserves social justice, preventing adjudication of indisputably meritorious claims. Yet the focus on the substance of standing doctrine has obscured an equally significant impediment to justice created by the *procedures* that judges use to adjudicate questions of standing and subject matter jurisdiction generally. The unusual dimensions of jurisdictional procedure have largely escaped notice. This Essay interrogates the history and context of jurisdictional procedure, offers an explanation for its invisibility, and identifies the consequences of that neglect.

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INTRODUCTION

In liberal circles, it has become *de rigueur* to complain that modern standing doctrine allows judges to resolve cases based on their own ideologies.[1] As Dan Farber recently explained, "[t]he unpredictability and

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1. Authorities disagree as to whether ideology influences standing decisions. *Compare* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1760 (1998) (arguing that standing decisions correlate highly with ideology), *with* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004) (arguing that standing decisions are less political than often believed). Whatever the data show, the ideological valance of standing decisions has gained wide

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ideological nature of standing law seems inherent in the three-part test, whose terms seem to serve as a kind of Rorschach inkblot allowing each Justice to project her own worldview onto each case."[2] The substance of standing doctrine privileges the powerful, favoring corporations over individuals and those who harm over those harmed. The doctrine likewise disserves social justice, preventing adjudication of indisputably meritorious claims.

Yet the focus on the substance of standing doctrine has obscured an equally significant impediment to justice created by the *procedures* that judges use to adjudicate questions of standing and subject matter jurisdiction generally. Elsewhere, I have developed a detailed analysis of jurisdictional procedure.[3] Here, however, my goal is to identify the reasons that jurisdictional procedure as it relates to standing doctrine has largely escaped notice and to consider the consequences of that neglect.

To that end, Part I explores the contours of jurisdictional procedure and the profound implications for the fairness of proceedings. Longstanding authority makes clear that jurisdictional procedure is cut from different cloth than the ordinary adversarial process that takes place in federal courts. Judges—not parties—have the ultimate obligation to identify defects in a court's jurisdiction. And when appellate courts identify such problems, or find that the district court erred in its own consideration, they typically determine jurisdiction themselves based on whatever facts happen to be in the district court record, rather than remanding to allow the trial judge to apply the correct legal standard. This procedure has particular consequences for the adjudication of standing because it results in courts dismissing cases even where plaintiffs could prove standing if allowed to introduce additional evidence. The ability to exclude plaintiffs with potentially meritorious claims renders jurisdictional procedure vulnerable to judicial manipulation in service of ideologically-driven outcomes.

If jurisdictional procedure so significantly affects standing doctrine, then why has it received so little scholarly attention? Part II explores this question. Much of the considerable discussion of standing prevalent in the literature essentially responds to a substantive and exceedingly narrow vision of the doctrine articulated by Justice Antonin Scalia in his scholarship and jurisprudence. Although Scalia's vision largely has not taken root in the Supreme Court, the conversation about its merits persists,

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acceptance. *See, e.g.*, Dan Farber, *Standing on Hot Air:* American Electric Power *and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121, 122 (2011).

2. Farber, *supra* note 1, at 122. The three-part test to which Farber refers is easy to recite but difficult to apply. The U.S. Constitution requires that a plaintiff demonstrate injury, causation, and redressability to invoke federal judicial power. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).

3. *See* Justin R. Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1 (forthcoming Nov. 2012), working draft *available at* http://ssrn.com/abstract=1872623.

obscuring problems of procedure. Legal scholarship also focuses on substantive standing doctrine because it remains relevant to niche, but particularly salient, areas of the law such as climate-change litigation.[4] Yet lawsuits related to climate change occupy only a small corner of public law, and while they present important questions about substantive standing doctrine, we should not focus myopically on them to the exclusion of the more universal issues of jurisdictional procedure.

More generally, jurisdictional procedure remains largely invisible because sometime in the last century, it evolved from a creature of statute into a construct of the Constitution. This transformation passed largely unnoticed. As a result, the procedures courts use to decide questions of standing are assumed inevitable, and thus receive little scrutiny.

Part III argues that making jurisdictional procedure visible matters because jurisdictional procedure can and should evolve to achieve fairer results. A better jurisdictional procedure would ensure that jurisdiction is decided on an accurate view of the facts and would quell judicial temptation to use standing as a foil for ideology. Recommendations for comprehensive reform lie beyond the scope of this Essay, and I undertake that project in other work.[5] But simply getting jurisdictional procedure on the agenda is a critical step toward its improvement. This Essay's objective, therefore, is to make clear the importance of jurisdictional procedure and to highlight its urgent need for reform. Such reform also provides fruitful opportunities to accomplish the justice and fairness goals of those who advocate for liberalization of substantive standing doctrine.

I. JURISDICTIONAL PROCEDURE'S UNFAIRNESS

Standing serves as a trap for the unwary, resulting in parties losing potentially meritorious cases because they did not foresee the facts that courts ultimately decided were necessary to establish standing. The ambiguity and vagueness of current standing doctrine makes it particularly difficult for plaintiffs to make accurate predictions about which facts courts will require. Jurisdictional procedure permits and even facilitates this pervasive unfairness. The aspects of this procedure with which I am concerned flow from courts' obligation to assure themselves of jurisdiction. Accomplishing that obligation has two procedural facets. First, courts of all levels raise jurisdictional issues *sua sponte*. Second, in resolving those issues, appellate courts and the Supreme Court typically rely on whatever facts happen to be in the district court record, even if no concern over jurisdiction arose during that phase of the litigation. Each facet contributes

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4. *See, e.g.*, Farber, *supra* note 1, at 122; Benjamin Ewing & Douglas Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 387–400 (2011); Tyler Welti, Note, Massachusetts v. EPA*'s Regulatory Interest Theory: A Victory for the Climate, Not Public Law Plaintiffs*, 94 VA. L. REV. 1751, 1751–52 (2008).

5. *See* Pidot, *supra* note 3, working draft at 31–41.

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to the problems faced by plaintiffs.

The way that courts address jurisdiction differs significantly from the ordinary adversarial procedures that dominate federal courts.[6] We pride ourselves on our adversarial tradition[7] and the heart of an adversarial proceeding is "the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."[8] The duty of judges to consider jurisdiction independently charges them with performing legal investigation—the antithesis of adversarial proceedings. At the same time, courts do not investigate the facts relevant to jurisdiction, leaving that task to the parties (even if the parties do not know that a standing issue may arise). As a result, jurisdictional procedure is a strange hybrid—inquisitorial when it comes to law and adversarial when it comes to facts.

Courts also exercise unusual appellate procedures in considering jurisdictional issues. When matters other than jurisdiction are involved, courts of appeals typically remand if they determine that the district court

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6. Federal Rule of Civil Procedure 12 readily reveals the unique procedures courts use to address jurisdiction. Rule 12 governs responsive pleadings and identifies various defenses that a party may wish to present. The defenses are familiar: lack of personal jurisdiction, lack of subject-matter jurisdiction, failure to state a claim, improper venue, failure to join an indispensible party, and so forth. The rule then provides that "[a] motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed," or else the defense is waived. FED. R. CIV. P. 12(b), (h). With the exception of subject-matter jurisdiction, that is. Rule 12(h)(3) provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

7. *See, e.g.*, Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572–73 (1993) (Souter, J., concurring in part and concurring in the judgment) ("Sound judicial decision making requires both a vigorous prosecution and a vigorous defense of the issues in dispute." (quotation marks omitted)); Penson v. Ohio, 488 U.S. 75, 84 (1988) ("[T]ruth—as well as fairness—is best discovered by powerful statements on both sides of the question." (quotation marks omitted)); Polk Cnty. v. Dodson, 454 U.S. 312, 318 (1981) (explaining that the American legal system "assumes that adversarial testing will ultimately advance the public interest in truth and fairness"); Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error . . . ."); LON FULLER, *The Adversary System*, *in* TALKS ON AMERICAN LAW 40 (H. Berman ed., 1971) ("[A]dversary presentation [is] the only effective means of combating [the] human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 325 (1960) (expressing deep skepticism "for any decision which is placed in part on any basis dug up by the court itself, but which is therefore new to the parties to the case"); 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395, at 94 (2d ed. 1923) ("The opponent demands confrontation, not for the idle purpose of gazing upon the witness . . . but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining of immediate answer."); *cf.* United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (noting the rule that issues may not be raised for the first time on appeal "distinguishes our adversary system from the inquisitorial one").

8. McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991).

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applied the wrong legal standard to allow the trial judge to apply the correct law to the facts in the first instance. This practice sensibly accounts for the respective competencies of appellate and district courts. As the Supreme Court has explained, "trial judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record."[9] But appellate courts and the Supreme Court usually ignore the practice of remanding when it comes to issues of jurisdiction. Instead, they nearly always decide for themselves whether the plaintiffs have standing, applying the legal standard they have articulated to the evidence placed before the district court—even though the district court never considered standing.[10]

To illustrate these general principles, consider three examples of *procedures* (rather than substantive standing doctrine) leading to dismissal where intuition suggests that the plaintiff could have met the legal standard applied by the appellate court:

In *Heartwood, Inc. v. Agpaoa*,[11] an environmental organization sued the U.S. Forest Service alleging that a timber sale in the Daniel Boone National Forest violated the Endangered Species Act. The Sixth Circuit dismissed for lack of standing because the organization alleged only that its members visited the forest, not that they visited the precise corner of the forest slated for harvest.[12]

The environmental plaintiffs in *Heartwood* did not lose their case just because of the stringency of the substantive standard applied by the court. Instead, their loss was the direct result of the procedure the court used. The Sixth Circuit raised standing *sua sponte* when the factual record was closed and decided that the environmental plaintiffs lacked standing based on the existing record. Such a procedure exists in an uncomfortable no-man's-land between adversarialism and inquisitorialism. Had the court applied

9. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438 (1996); *see also* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 497 (1991) (courts of appeals "lack the factfinding and record-developing capabilities of a federal district court"). There are exceptions, of course. For example, "although inadequate findings and conclusions may be remanded to the district court for supplementation, 'we will not remand a case for more specific findings if doing so will consume precious time and judicial resources without serving any purpose.'" McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980) (quoting LaSalle Extension Univ. v. FTC, 627 F.2d 481, 485 (D.C. Cir. 1980) (per curiam)).

10. *See, e.g.*, Heartwood v. Agpaoa, 628 F.3d 261, 266 (6th Cir. 2010); Dias v. City & Cnty. of Denver, 567 F.3d 1169, 1176 (10th Cir. 2009); *see also* Gaslin v. Fassler, 377 F. App'x 579, 579 (8th Cir. 2010). While the majority of appellate decisions finding that lower courts have overlooked a jurisdictional issue or misapprehended the relevant law proceed to order the case dismissed, courts do on occasion, and without explanation, deviate from this rule. *See* Sierra Club v. Morton, 405 U.S. 727, 741 (1972); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 263 F. App'x 348, 356 (4th Cir. 2008); Pa. Prison Soc'y v. Cortes, 508 F.3d 156, 159 (3d Cir. 2007); *see also* Pidot, *supra* note 3, working draft at 36–40.

11. 628 F.3d 261 (6th Cir. 2010).

12. *Id.* at 268–69.

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ordinary adversarial norms, it would not have raised standing *sua sponte*. And if the Sixth Circuit had investigated the facts itself or remanded to the district court, it seems virtually certain that Heartwood would have been found to have a member—and it claimed many members living around the Daniel Boone National Forest—who visited the timber-sale area.[13]

United States v. Diekemper[14] provides a second example. Here, a husband and wife who had been married for thirty-five years pleaded guilty to fraudulently concealing assets at their dairy farm after they declared bankruptcy. The wife received two years of probation subject to the condition that she refrain from all contact with her husband.[15] The husband received a sentence of more than ten years and as part of his appeal of the sentence challenged the parole condition that would prevent his wife from visiting him in jail.[16] The court first held that it could not review the wife's probation condition because she had not appealed. But, then, in the alternative, the court held that the husband lacked Article III standing because "[w]ithout some affidavits from Mrs. Diekemper that absent her probation condition she would visit her husband, we have no way of knowing that she would in fact do so."[17] The court may well have been correct that the husband could not challenge the wife's probation condition, but jurisdictional procedure provided a convenient alternative means of disposing of the case based on the fact that after thirty-five years of marriage, the wife had not declared that she desired to visit her husband during his incarceration.

The case most often cited as a paragon of restrictive standing—*Lujan v. Defenders of Wildlife*—provides a third example. In that case, the Supreme Court held that Defenders of Wildlife lacked standing because it had not provided evidence that its members had sufficiently immediate and

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13. Because dismissals for lack of subject matter jurisdiction are without prejudice, plaintiffs like Heartwood may be able to file new suits alleging additional standing facts. But this can only occur if the statute of limitations has not yet run, meaning that the plaintiffs' ability to secure judicial relief depends on the amount of time the court takes in identifying and resolving a jurisdictional problem. In some circumstances, the doctrine of direct estoppel may preclude certain efforts at relitigation. *See* Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1215 (10th Cir. 2004); Dozier v. Ford Motor Co., 702 F.2d 1189, 1192 & n.4 (D.C. Cir. 1983). But direct estoppel will rarely be an obstacle because it does not apply "where a jurisdictional defect has been cured or loses its controlling force." Eaton v. Weaver Mfg. Co., 582 F.2d 1250, 1256 (10th Cir. 1978); *see also Dozier*, 702 F.2d at 1192 & n. 4; WRIGHT, MILLER & COOPER § 4437 at 180:

> In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for prematurity or failure to satisfy a precondition to suit. No more need be done than await maturity, satisfy the precondition, or switch to a different substantive theory that does not depend on the same precondition.

14. 604 F.3d 345, 350 (7th Cir. 2010).
15. *Id.* at 349.
16. *Id.* at 349–50.
17. *Id.* at 350.

concrete plans to visit areas on foreign soil inhabited by endangered species and threatened with destruction by projects funded by the United States federal government. In concurrence, Justice Anthony Kennedy suggested that Defenders could have proven standing if its members had "acquire[d] airline tickets to the project sites or announce[d] a date certain upon which they will return."[18]

The airline-ticket rule garnered significant attention and a bit of ridicule,[19] but application of that rule to the actual facts might well have allowed Defenders to pursue its claims. Defenders is a large organization, boasting nearly one million members.[20] Had the Supreme Court remanded to the district court, Defenders would likely have been able to identify a member with a plane ticket in hand. So again, jurisdictional procedure, in addition to substantive standing doctrine, is to blame for a case's premature termination.

Moreover, this procedure may appeal to ideologically-motivated judges—either on a conscious or unconscious level—as a way of avoiding the merits of cases.[21] Imagine a judge whose ideological commitments strongly disfavor a plaintiff who appears to have a meritorious legal claim. Standing can provide a relatively easy way of disposing of the case. The doctrine is vague and indeterminate. And if the court announces a new or modified rule of standing, the accepted practice is that it can dismiss the case without remand for further proceedings in which the plaintiff might be able to satisfy whatever standard the court has now announced.

II. JURISDICTIONAL PROCEDURE'S INVISIBILITY

So why do scholars concerned about access to courts focus on the substance of standing doctrine, rather than jurisdictional procedure? The answer is twofold: first, the substantive limitations on standing proposed by Justice Scalia have captured the attention of the academy, even if they have found only minor purchase in the courts; second, we view the metes and bounds of jurisdictional procedure as unchanging and unchangeable. In combination, these circumstances have led to a narrative of jurisdiction in which procedure is all but invisible.

18. Lujan v. Defenders of Wildlife, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring).

19. *See, e.g.*, *id.* at 591 (Blackmun, J., dissenting); Beth Brennan & Matt Clifford, *Standing, Ripeness, and Forest Plan Appeals*, 17 PUB. LAND & RESOURCES L. REV. 125, 140 (1996); Ann Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 950–51 & n. 114 (1998); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 226–27 (1992); Patricia M. Wald, Colloquia, *The Cinematic Supreme Court: 1991–92 Term*, 7 ADMIN. L.J. AM. U. 238, 241–42 (1993).

20. *See Mission and History*, DEFENDERS OF WILDLIFE, http://www.defenders.org/about_us/history /index.php (last visited July 29, 2012). The organization formed in 1947 and was over forty years old by the time *Defenders of Wildlife* was decided. *See id.*

21. *See* Pierce, *supra* note 1, at 1749.

Scholarship on standing largely consists of a debate between those supporting restrictive substantive requirements that often deny public-interest plaintiffs ready access to federal courts and those advocating for liberal rules that would generally grant a federal forum.[22]

Justice Scalia, champion of restrictive standing, first articulated his views in an article he published while a judge on the D.C. Circuit. He explained that "when an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing."[23] But others whom Congress has legislated to protect face a more difficult path to the courthouse:

> Unless the plaintiff can show some respect in which he is harmed *more* than the rest of us . . . he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for juridical intervention.[24]

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22. *See, e.g.*, ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 201, 211–15 (2010) (arguing that restrictive standing doctrine is "one of the most pernicious aspects of the conservative assault on the Constitution"); MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 282 (2000) (arguing in support of restrictive standing to prevent plaintiff manipulation of courts); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1681–84 (2004) (arguing that restrictive standing prevents judicial encroachment into executive functions); John D. Echeverria, *Standing and Mootness Decisions in the Wake of* Laidlaw, 10 WIDENER L. REV. 183, 185–86 (2003) (arguing that Justice Scalia's conservative vision of standing was repudiated by *Laidlaw*); Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 586–87 (2012) (arguing that cases brought by ideologically conservative plaintiffs may prod the Supreme Court to liberalize standing doctrine); Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1508 (2008) (suggesting an alternative to injury-in-fact in environmental litigation based on geographic relationships); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988) (arguing that courts use standing analysis to inappropriately restrict Congress); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 326–27 (2001) (arguing that the injury-in-fact analysis stacks the deck in favor of economically advantaged litigants); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 519–20 (1994) (arguing that restrictive standing doctrine is necessary to preserve judicial resources). Commentators have also undertaken substantial empirical analysis to determine the practical effect of standing doctrine. *See generally, e.g.*, Pierce, *supra* note 1; Staudt, *supra* note 1; Christopher Warshaw & Gregory E. Wannier, 5 HARV. L. & POL'Y REV. 289 (2011) (analyzing environmental standing cases to assess whether regulatory beneficiaries are disadvantaged by standing doctrine); *see also* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing*, 62 STAN. L. REV. 5981 (2010) (applying statistical analysis to theories about the origin of standing doctrine); Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 876 (2012).

23. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

24. *Id.* at 894–95.

When President Ronald Reagan elevated Scalia to the Supreme Court, there was much concern in liberal circles about his views on standing.[25] Then in 1990, Scalia authored the decision in *Defenders of Wildlife v. Lujan*, seeming to enshrine his views in law. He wrote:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed.[26]

Defenders of Wildlife initially appeared to have far-reaching effect. Commentators lamented that the decision served as the death knell of citizen suits, which Congress had incorporated as an essential means of enforcing environmental laws.[27] As Cass Sunstein explained, "the decision ranks among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated."[28] The decision, and particularly its philosophical bent, suggested that corporations (often the object of regulation) would find more hospitable reception in the halls of federal courts than individuals (often the beneficiaries of regulation).[29] It seemed that courts would consider the complaints of those responsible for harming others, but not the complaints of those harmed (especially when a regulated entity harmed many people at once).

But *Defenders of Wildlife* itself heralded the demise of Justice Scalia's approach. As already described, Justice Kennedy's concurrence suggested that the very plaintiffs before the court would have standing if they had previously purchased a ticket to visit the foreign areas they sought to

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25. *See, e.g.*, *Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 196, 211 (1986) (statement of Lawrence Gold, General Counsel, AFL-CIO); *id.* at 267 (statement of Audrey Feinberg, Consultant to the Supreme Court Watch Project of the Nation Institute); *id.* at 298 (statement of Robert Maddox, Executive Director, Americans United for Separation of Church and State).

26. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992).

27. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g) (2006) (citizen suit provision); Clean Water Act, 33 U.S.C. § 1365 (2006) (citizen suit provisions); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2006) (citizen suit provision); Clean Air Act, 42 U.S.C. § 7604 (2006) (citizen suit provision).

28. *See* Sunstein, *supra* note 19, at 163, 165.

29. *See* Nichol, *supra* note 22, at 316–18.

preserve.[30] Kennedy explained that the airline-ticket rule may "seem trivial" but that it served an important purpose because the Court could not "assume that the affiants will be using the sites on a regular basis."[31] Requiring plaintiffs to purchase plane tickets *is* trivial, and even absurd. But such a rule thoroughly undermines Scalia's goal of substantially limiting the court access of regulatory beneficiaries. Under an airline-ticket rule, anyone can litigate on behalf of the public as long as they first make travel plans (or prove their interest in the matter in question in some equally inconsequential fashion).

Justice Kennedy's more lenient vision of standing has carried the day, and, under current doctrine, regulatory beneficiaries generally can access courts. That outcome became apparent in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, where the Court held that people have standing if they modify their behavior in response to a defendant's actions.[32] After *Laidlaw*, standing doctrine imposed few substantive limitations and largely devolved into today's complicated and sometimes ill-defined procedural trap for unwary plaintiffs.[33]

The scholarly debate has not kept up with these changes. Even after *Laidlaw*, analysis of standing continued to focus on its substantive content, not its procedural rules.[34] One explanation is the sheer audacity of Scalia's vision of transforming the terms "case" and "controversy" in Article III into a constitutional prohibition on courts providing relief to those individuals suffering harm at the hands of those violating environmental and other public-interest laws. Such bold claims tend to capture attention.[35] Relatedly, substantive standing law remains important in a few high-profile niches. For example, the Supreme Court has yet to decide whether injuries

30. *Defenders of Wildlife*, 504 U.S. at 579 (Kennedy, J., concurring).

31. *Id.*

32. 528 U.S. 167, 181–83 (2000); *see also* Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENVTL. L. & POL'Y F. 119, 121 (2001).

33. There are limited circumstances where standing doctrine substantively constrains plaintiffs. For example, the U.S. Court of Appeals for the District of Columbia Circuit has held that a plaintiff lacks standing to challenge government action that threatens her with only a slightly increased risk of injury. *See* Pub. Citizen v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1291–98 (D.C. Cir. 2007), *subsequent determination*, 513 F.3d 234, 240–41 (D.C. Cir. 2008). This rule effectively prevents anyone from challenging regulations that impose wide-spread, low-magnitude risks. *See* Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 403–05 (2009).

34. For example, according to a search of Westlaw's JLR database, Scalia's article has been cited in over 450 articles appearing in law reviews and journals, including more than 250 since *Laidlaw* was decided and thirty since the beginning of 2010.

35. *See, e.g.*, Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1480 & n.232 (1988) (suggesting that standing decisions are the modern equivalent of the *Lochner* era "when constitutional provisions were similarly interpreted so as to frustrate regulatory initiatives in deference to private-law understandings of the legal system").

related to climate change provide private plaintiffs with standing.[36] This context is important. As the most visible environmental issue of today, questions related to climate change have understandably received considerable attention.[37] Similarly, important aspects of the substantive rules that govern taxpayer standing in the Establishment Clause context remain in flux.[38] Finally, there is continuing concern that Scalia's view of standing may have a renaissance, particularly in light of the appointments of Chief Justice John Roberts and Justice Samuel Alito.[39]

The continuing robust discussion of substantive standing doctrine casts a long shadow, a shadow that has obscured jurisdictional procedure. But this is only half the story. Jurisdictional procedure also remains invisible because of its relative constancy and the unexamined assumption that it is constitutionally compelled.[40]

The rule the Supreme Court followed in 1934 remains true today: "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."[41] This rule remains virtually unquestioned.[42] The Court implies that its approach to

36. *See* Am. Elect. Power v. Connecticut, 131 S. Ct. 2527, 2535 (2011).

37. *See generally* Todd Barnet, Massachusetts v. Environmental Protection Agency*: Checks and Balances in Disarray*, 17 PENN ST. ENVTL. L. REV. 329 (2009) (explaining how checks and balances can frustrate environmental regulation); Farber, *supra* note 1 (criticizing ideological standing analysis in environmental regulation cases); Saby Ghoshray, Massachusetts v. EPA*: Is the Promise of Regulation Much Ado About Nothing? Deconstructing States Special Solicitude Against an Evolving Jurisprudence*, 15 WIDENER L. REV. 447 (2010) (downplaying *Massachusetts*'s importance to environmental regulation).

38. *See, e.g.*, Az. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011) (denying standing to taxpayers challenging state tax credit); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 614–15 (2007) (denying standing to taxpayers challenging executive office of Faith-Based and Community Initiatives); *see also* Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom from Religion Foundation, Inc. *and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 115–20 (2008) (arguing that *Hein* complicated standing for Establishment Clause plaintiffs); Craig A. Stern, *Another Sign from* Hein*: Does the Generalized Grievance Fail a Constitutional or Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1170–74 (2008) (discussing constitutional status of the generalized grievance exception in light of *Hein*).

39. *See* CHEMERINSKY, *supra* note 22, at 213.

40. There have been tweaks at the margins. For example, appellate procedure related to jurisdiction continues to develop for petitions for review filed directly in the courts of appeals. *See generally* Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957 (2010). And the Supreme Court only recently suggested that questions of standing must be decided on the district court record, rather than on affidavits submitted directly to a court of appeals. *See* Summers v. Earth Island Inst., 555 U.S. 488, 495 (2009).

41. Mitchell v. Maurer, 293 U.S. 237, 244 (1934).

42. A report by the American Law Institute in the 1960s recommending that courts treat jurisdictional issues as waivable brought brief attention to jurisdictional procedure. *See* THE AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 368–69, 373–74 (1969); *see also* Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 525–26 (1967) (citing AM. LAW INST.,

jurisdiction is self-evidently correct as a matter of constitutional law: "Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III."[43]

The academy has followed suit. Numerous articles critique courts' *sua sponte* consideration of issues, but those critiques come with an important caveat: of course courts consider questions of jurisdiction *sua sponte*.[44]

Courts did not always view the Constitution as mandating independent inquiry into jurisdiction. Federal courts have always treated jurisdiction differently than other issues.[45] But early courts derived their procedures from a common law conception of the inherent nature of judicial authority, not from Article III.[46] In those days, the courts' duty—and even ability—to raise jurisdictional issues *sua sponte* was decidedly more limited than it is today. Courts did assure themselves that a plaintiff properly invoked jurisdiction, but this was done only in reference to the complaint. If the complaint pled jurisdiction by asserting, for example, that the parties were

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STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Proposed Final Draft No. 1, Apr. 19, 1965)). The Institute considered the issue at a time when standing doctrine was in its infancy, and the report suggests that its prescriptions may not apply to cases involving constitutional issues. *See id.*

43. Judice v. Vail, 430 U.S. 327, 331 (1977); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93 (1998).

44. *See* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 307–08 (2002) ("[I]f one accepts the premise that writ of error review remains the best model, appellate courts should be permitted to raise nonjurisdictional matters sua sponte only in the most exceptional cases, to remedy the gravest injustices."); Neal Devins, *Asking the Right Questions: How Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 252 (2000) ("[A] central tenet of our adversarial system is that (save for jurisdictional issues) the parties to a case—not the judges deciding the case—raise the legal arguments."); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 249 n.12 (2002) ("Because of the constitutional limitations on their jurisdiction, federal courts are obligated to examine whether they have subject matter jurisdiction in a case.").

45. *See, e.g.*, Jackson v. Ashton, 33 U.S. (8. Pet.) 148, 148 (1834) (dismissing a case *sua sponte* for lack of jurisdiction because "[t]he bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case"); Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 126 (1804) ("The Courts of the U.S. have not jurisdiction unless the record shews [sic] that the parties are citizens of different states, or that one is an alien . . . ."); Turner v. Bank of Am., 4 U.S. (4 Dall.) 8, 8 (1799) ("Silence, inadvertence of consent cannot give jurisdiction, where the law denies it.").

46. *See* Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379 (1884). The Supreme Court provided no citations for its earliest articulation of jurisdictional procedure. *See, e.g.*, *Capron*, 6 U.S. (2 Cranch) at 126; *Turner*, 4 U.S. (4 Dall.) at 8. But notably, state courts had adopted similar views of their role in assessing jurisdiction, so it would be surprising if the Supreme Court thought itself to be articulating constitutional law. The earliest federal cases discussing the courts' roles in policing jurisdiction relied on the decisions of state courts, further illustrating that jurisdictional procedure was not viewed as constitutional. *See* Respublica v. Cobbett, 3 Dall. 467, 476 (Pa. 1798); Kirkbride v. Durden, 1 Dall. 288, 289 (Pa. 1788).

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fully diverse, then the court possessed jurisdiction, even if those allegations were unsubstantiated or later proven false.[47] And defendants had a tightly circumscribed ability to challenge the complaint. To dispute facts in a complaint necessary for jurisdiction, the defendant needed to file a plea for abatement in lieu of an answer.[48] If the court rejected the plea, the defendant was deemed to concede liability on the merits.[49]

The Judiciary Act of 1875 changed that practice, requiring courts to consider at any time whether cases before them "really and substantially involve a dispute or controversy properly within the[ir] jurisdiction."[50] Thereafter, courts took it upon themselves to sniff out potential jurisdictional defects based on "the facts as they really exist,"[51] causing jurisdictional procedure to drift further from the adversarial norms that animate our legal system. Over time, this statutory duty morphed into a constitutional duty, with the Court seeming to suggest that jurisdictional procedure has remained constant since the beginning of the Republic. So, for example, in *Wachovia Bank v. Schmidt*, the Court restates the modern rule of jurisdictional procedure but relies on a case applying the original, limited rule that courts have an obligation merely to consider whether the allegations properly invoked jurisdiction.[52]

Courts and scholars today accept current modes of jurisdictional procedure as an article of faith. As a result, little attention has been paid to *how* precisely courts decide questions of standing, and whether—as I believe—unfairness arises from that process.

III. JURISDICTIONAL PROCEDURE'S REFORM

If jurisdictional procedure shapes access to the courts, what is to be done? Courts currently use a procedure that deviates from the ordinary course of business in our adversarial legal system—a procedure that authorizes the sandbagging of plaintiffs late in the game and long after they have lost the opportunity to provide evidence of standing. We currently act

47. *See* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1839–40 (2007).

48. *See* Steigleder v. McQuesten, 198 U.S. 141, 142 (1905) ("[U]nder the judiciary act of 1789 an issue as to the fact of citizenship could only be made by plea in abatement when the pleadings properly averred citizenship . . . .").

49. *See* Collins, *supra* note 47, at 41.

50. The Judiciary Act of 1875 § 5.

51. Wetmore v. Rymer, 169 U.S. 115, 120 (1898).

52. 546 U.S. 303, 316 (2006) (citing Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)). While *Mansfield* was decided after the 1875 Judiciary Act, the case was filed in 1874 and the Supreme Court followed the pre-1875 practice of considering only the allegations in the petition for removal to determine that the case was improperly removed to federal court. In other words, *Mansfield* applied only the common-law rule that courts must consider the sufficiency of allegations, not the modern rule that courts must assure themselves of jurisdiction based on the facts in the record.

as though parties should know better and volunteer evidence before the district court to satisfy any conceivable standard that the court of appeals or Supreme Court might later apply. But when academics and judges struggle to derive clear, determinate rules from the maze of case law addressing standing, it hardly seems fair to expect plaintiffs to answer possible standing objections unprompted.

If current jurisdictional procedure is a problem—as this Essay contends—we could infuse it with familiar adversarial norms, requiring defendants to raise subject matter jurisdiction defenses just as they must raise other defenses. When defendants raise jurisdiction in the district court, plaintiffs will have an opportunity to meet the challenge at a time when the evidentiary record remains open.

Attempting to reform jurisdictional procedure in this way would make standing decisions fairer. But the attempt would face considerable obstacles. Our modern procedures grew out of the Judiciary Act of 1875 and were once statutory in character. But the courts now view the obligation to consider jurisdiction as constitutional, making reform of this sort difficult.

I also believe that recasting jurisdictional procedure as an adversarial process would be a mistake. Federal courts have assumed an increasingly important position in our separation of powers in the centuries since the framing of the Constitution. Judicial review has broadened, and judicial supremacy now reins.[53] Today, federal courts exercise unparalleled authority to police the other branches of the federal government. And, because they have the final say about the meaning of the Constitution and federal statutes, federal courts largely operate beyond the kinds of external checks and balances that the Constitution places on the President and Congress.[54] Jurisdictional procedure fills this gap, creating an important internal constraint on judicial authority.

If jurisdictional procedure cannot become adversarial, then what? One straightforward and sensible possibility is for courts of appeals to remand,

53. Judicial review and judicial supremacy were not always a given under our Constitution. For a detailed and insightful history of each doctrine, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

54. The Constitution does vest Congress with the power to impeach federal judges. *See* U.S. CONST. art. II, § 4. But the impeachment power only permits removal of judges for illegal or improper personal conduct, not because of their judicial decisions. *See generally* Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUDIES IN AM. POL. DEV. 55 (1995). Congress and the President arguably have other means of checking the judiciary by adjusting the number of justices on the Court, stripping the courts of jurisdiction, or reducing judicial budgets. *See* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 963–64 (2002). But courts have authority to pass on the constitutionality of any of these mechanisms, meaning that they require judicial assent to serve as a limitation on judicial authority. *See* Pidot, *supra* note 3, working draft at 8–16.

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rather than deciding jurisdictional questions themselves. If questions of standing return to trial judges, then parties could supplement the record to try to meet the legal standard identified on appeal. This would address some of the fairness concerns created by the current model of standing as a procedural trap. Requiring remand would also reduce the appeal that standing may have to ideologically-motivated appellate judges. If a judge can only remand the case, it seems less enticing to apply malleable standing standards to disadvantage disfavored plaintiffs. After all, if the plaintiffs can provide evidence sufficient to overcome whatever standing rule the court of appeals articulates, the case will proceed.

More radical options exist too. Courts have already claimed ownership of jurisdictional issues by insisting that they must consider them *sua sponte*. We could improve jurisdictional procedure by requiring courts to also take ownership for the investigation of jurisdictional facts.[55] This would facilitate remand, since district courts are natural receptacles for such a duty. It would also serve the important function of ensuring that courts not only decline to act in excess of their jurisdiction, but also act where jurisdiction is proper.[56]

CONCLUSION

Substantive standing doctrine has received much scholarly attention. Many commentators have argued that the modern doctrine bears little relationship to the constitutional provision it purports to vindicate.[57] And scholars have suggested alternatives. For example, the courts could abandon the injury-in-fact test,[58] could presume plaintiffs have standing unless "particular dangers of overreaching outweigh predispositions towards jurisdiction,"[59] or could adopt an alternative approach (at least for some cases) requiring plaintiffs to show only an "appropriate personal connection" to "specific geographic areas."[60] Such changes, their advocates hope, would depoliticize standing decisions and result in more predictable, more fair outcomes.

But the substance of standing doctrine has consequences for relatively few types of cases. On the other hand, the *procedures* by which courts decide questions of standing have much broader effect. Those procedures,

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55. See Pidot, *supra* note 3, for a detailed account of the benefits of this more radical revision of jurisdictional procedure.

56. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (noting that courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given to them").

57. *See, e.g.*, Sunstein, *supra* note 19, at 166; *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224–25 (1988).

58. *See* Sunstein, *supra* note 19, at 167.

59. Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 340 (2002).

60. Dan Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1505 (2008).

Published by UF Law Scholarship Repository, 2012

Florida Law Review, Vol. 64, Iss. 5 [2012], Art. 7

unfortunately, have received little attention, even though they have profound consequences. This Essay thus calls attention to jurisdictional procedure and suggests that it is ripe for reform. Such reform would retain the essence of modern practice, vindicate the separation of powers principles that animate standing and other jurisdictional doctrines, and achieve fairness and judicial neutrality.

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